WORLD TRADE ORGANIZATION

WT/DS316/AB/RW

15 May 2018

(18-2882)

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

AB-2016-6

Report of the Appellate Body

BCI redacted, as marked **[BCI]**

Table of Contents

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
A350XWB Business Case Presentation	"Presentation to the EADS Board", **[BCI]** and "A350XWB Business Case: Assumptions, Sensitivities and Limitations, Presentation to EADS BoD – status", 2 November 2006
A350XWB Chief Engineering Rebuttal	Statement by Gordon McConnell, Michel Lacabanne, Chantal Fualdes, François Cerbelaud and Burkhard Domke, A350XWB Chief Engineering, 13 December 2012 (Panel Exhibit EU-128 (BCI/HSBI))
A350XWB Chief Engineering Statement	Airbus, A350XWB Chief Engineering and Future Projects Office, "A350XWB Chief Engineering Statement", 3 July 2012 (Panel Exhibit EU-18 (BCI/HSBI))
A350XWB Production Statement	A350XWB Production Statement by Philippe Launay, 14 January 2013 (Panel Exhibit EU-129 (BCI/HSBI))
Aérospatiale	French aerospace manufacturer, Aérospatiale Société Nationale Industrielle
BAE Systems	British Aerospace Systems
Bair Declaration	Declaration of Michael Bair: Products and Competition in the LCA Industry (16 August 2012) (Panel Exhibit USA-339 (BCI))
BCI	business confidential information
Compliance Communication	Communication from the European Union dated 1 December 2011, WT/DS316/17
DARE	Develop And Ramp-up Excellence
Deutsche Airbus	German aerospace manufacturer, Deutsche Airbus GmbH
Dorman Report	Gary J. Dorman, NERA, *The Effect of Launch Aid on the Economics of Commercial Airline Programs*, 6 November 2006 (Original Panel Exhibit US-70 (BCI))
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EADS	European Aeronautic Defence and Space Company N.V.
EBIT	earnings before interest and taxes
GATT 1994	General Agreement on Tariffs and Trade 1994
HSBI	highly sensitive business information
IRR	internal rate of return
Jordan Reply	Dr James Jordan, NERA Economic Consulting, "Reply to Professor Whitelaw's Response to Jordan Report", 20 May 2013 (Panel Exhibit USA-505 (BCI/HSBI))
Jordan Report	Dr James Jordan, NERA Economic Consulting, "Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks", 18 October 2012 (Panel Exhibit USA-475 (BCI/HSBI))
JRP	Jordan Risk Premium
LA/MSF	"launch aid" or "member State financing"
LCA	large civil aircraft
Mourey Statement	Christophe Mourey, Senior Vice President Contracts, Airbus, "Statement on Current Competitive Conditions in the LCA Industry", 4 July 2012 (Panel Exhibit EU-8 (BCI))

Abbreviation	Description
MTN	medium-term note
original panel	panel in the original proceedings
original panel report / Original Panel Report	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R
Panel	The Panel in these Article 21.5 compliance proceedings
Panel Report	Panel Report, *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*, WT/DS316/RW
PwC Amortization Report	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 (Panel ExhibitEU-5 (BCI/HSBI))
R&D	research and development
R&TD	research and technological development
ROCE	return on capital employed
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Schneider Declaration	Declaration of Larry Schneider, Senior Vice President of Product Development, Boeing Commercial Aircraft, "The Relevance of Prior Commercial Experience to Existing Model Improvements and New Aircraft Developments", 17 October 2012 (Panel Exhibit USA-354 (BCI))
SSNIP	Small but Significant Non-Transitory Increase in Prices
Supplemental Mourey Statement	Christophe Mourey, Senior Vice President, Contracts, Airbus, "Supplemental statement on current competitive conditions in the LCA industry", 12 December 2012 (Panel Exhibit EU-124 (BCI/HSBI))
UK Appraisal	a written assessment by the UK Government of the merits of Airbus' request for A350XWB LA/MSF
United States' compliance panel request	Request for the Establishment of a Panel by the United States pursuant to Article 21.5 of the DSU, WT/DS316/23
USDOC	United States Department of Commerce
VLA	very large aircraft
Whitelaw Response to Jordan	Professor Robert Whitelaw, "Response to Dr Jordan's report on the benefits of MSF", 13 December 2012 (Panel Exhibit EU-121 (BCI/HSBI))
Williams Statement	Statement by Tom Williams, Executive Vice President, Programmes, Airbus SAS, 17 May 2013 (Panel Exhibit EU-354 (BCI))
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WRP	Whitelaw Risk Premium
WTO	World Trade Organization
YTM	yield to maturity

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, p. 4299
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
Canada – Continued Suspension	Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Chile – Price Band System (Article 21.5 – Argentina)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
China – Rare Earths	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
China – Rare Earths	Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, DSR 2014:IV, p. 1127
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243

Short Title	Full Case Title and Citation
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
EC – Commercial Vessels	Panel Report, *European Communities – Measures Affecting Trade in Commercial Vessels*, WT/DS301/R, adopted 20 June 2005, DSR 2005:XV, p. 7713
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p. 685
EC and certain member States – Large Civil Aircraft (Article 21.5 – US)	Panel Report, *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*, WT/DS316/RW and Add.1, circulated to WTO Members 22 September 2016
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
Japan – Apples	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3

Short Title	Full Case Title and Citation
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
Peru – Agricultural Products	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Continued Suspension	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, p. 3507
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – COOL (Article 21.5 – Canada and Mexico)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015
US – Cotton Yarn	Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R, adopted 5 November 2001, as modified by Appellate Body Report WT/DS192/AB/R, DSR 2001:XII, p. 6067
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
US – Countervailing and Anti-Dumping Measures (China)	Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R, DSR 2014:VIII, p. 3175
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
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
US – FSC (Article 21.5 – EC II)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697

Short Title	Full Case Title and Citation
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 21.5 of the DSU by the European Union*, WT/DS353/RW and Add.1, circulated to WTO Members 9 June 2017
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007, DSR 2007:IX, p. 3523
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
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 – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Tax Incentives	Appellate Body Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/AB/R and Add.1, adopted 22 September 2017
US – Tax Incentives	Panel Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/R and Add.1, adopted 22 September 2017, as modified by Appellate Body Report WT/DS487/AB/R
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	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 (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 – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
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

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

European Union, *Appellant/Appellee*
United States, *Other Appellant/Appellee*

Australia, *Third Participant*
Brazil, *Third Participant*
Canada, *Third Participant*
China, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*

AB-2016-6

Appellate Body Division:

Ramírez-Hernández, Presiding Member
Bhatia, Member
Van den Bossche, Member

1 INTRODUCTION

1.1. The European Union and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report, *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*[1] (Panel Report). The Panel was established on 13 April 2012 pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to consider a complaint by the United States[2] regarding the alleged failure on the part of the European Union[3] and certain of its member States to implement the recommendations and rulings of the Dispute Settlement Body (DSB) in the original proceedings in *EC and certain member States – Large Civil Aircraft*.[4]

1.1 Original proceedings

1.2. In the original proceedings in this dispute, the United States claimed that the European Communities and certain of its member States – namely, France, Germany, Spain, and the United Kingdom – had caused, through the use of specific subsidies, adverse effects to the United States' interests in the form of serious prejudice under Articles 5(c) and 6.3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[5] Each of those measures related to the design and development by Airbus of large civil aircraft (LCA), which is the product at issue throughout this dispute.[6]

[1] WT/DS316/RW, 22 September 2016.
[2] Request for the Establishment of a Panel by the United States pursuant to Article 21.5 of the DSU, WT/DS316/23 (United States' compliance panel request).
[3] The European Union replaced and succeeded the European Communities as of 1 December 2009. Accordingly, we only refer to the European Communities in this Report in relation to events that took place during the original panel proceedings. In all other circumstances, we refer to the European Union.
[4] The recommendations and rulings of the DSB resulted from the adoption on 1 June 2011, by the DSB, of the Appellate Body report, WT/DS316/AB/R, and the panel report, WT/DS316/R, in *EC and certain member States – Large Civil Aircraft*. In this Report, we refer to the panel that considered the original complaint brought by the United States as the "original panel" and to its report as the "original panel report" or "Original Panel Report".
[5] Original Panel Report, paras. 2.5 and 3.1-3.3.
[6] The product at issue is the same in both the original and the compliance proceedings. The original panel and the Panel have distinguished LCA from smaller (regional) aircraft or military aircraft, and defined LCA as follows:

> {L}arge (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

1.3. The original panel, established on 20 July 2005, found that the following specific subsidies, related to the production and development of LCA, were inconsistent with Articles 5(c) and 6.3(a), (b), and (c) of the SCM Agreement: (i) "launch aid" or "member State financing" (LA/MSF) for the A300, A310, A320, A330, A330-200, A340, A340-500/600, and A380 models of Airbus LCA[7]; (ii) French and German government "equity infusions" provided in connection with the corporate restructuring of French and German aerospace manufacturers, Aérospatiale Société Nationale Industrielle (Aérospatiale) and Deutsche Airbus GmbH (Deutsche Airbus)[8]; (iii) certain infrastructure and infrastructure-related measures provided by German and Spanish authorities to Airbus in the form of, *inter alia*, regional development grants[9]; and (iv) certain research and technological development (R&TD) funding provided to Airbus for LCA-related R&TD projects in which Airbus participated.[10]

1.4. In addition, the original panel found that the United States had established that the German, Spanish, and UK LA/MSF for the A380 constituted prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 thereto of the SCM Agreement.[11]

1.5. On appeal, the Appellate Body reversed the original panel's finding that the German, Spanish, and UK A380 LA/MSF contracts constituted prohibited export subsidies under Article 3.1(a) of the SCM Agreement; however, it was unable to complete the legal analysis with regard to Article 3.1(a) due to insufficient factual findings or undisputed facts on the panel record.[12] The Appellate Body also reversed or modified several other aspects of the original panel findings[13], and completed the legal analysis where it had sufficient factual findings or undisputed facts on the record to do so. With regard to issues of subsidization and adverse effects, the Appellate Body completed the legal analysis and ultimately concluded that: (i) the use of the challenged LA/MSF measures had caused adverse effects to the United States' interests; and (ii) the equity infusions and infrastructure measures (but not the R&TD subsidies) that were found by the original panel to constitute specific subsidies "complemented and supplemented" the effects of the LA/MSF measures.[14]

1.6. The Appellate Body upheld the original panel's recommendation pursuant to Article 7.8 of the SCM Agreement, and recommended that the DSB request the European Union to bring its measures that were found to be inconsistent with the SCM Agreement into conformity with its obligations under that Agreement.[15]

1.7. On 1 June 2011, the DSB adopted the Appellate Body report and the original panel report, as modified by the Appellate Body report.[16]

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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"). (Panel Report, para. 1.32. See also Original Panel Report, para. 2.1)

[7] Panel Report, para. 1.2 (referring to Original Panel Report, paras. 7.290(a)(i)-(vii), 7.482-7.496, and 8.1(a)(i)).

[8] Panel Report, para. 1.2 (referring to Original Panel Report, paras. 7.1245-7.1249, 7.1302, 7.1323-7.1326, 7.1380-7.1384, 7.1414, and 8.1(c) and (d)).

[9] Panel Report, para. 1.2 (referring to Original Panel Report, 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)).

[10] Panel Report, para. 1.2 (referring to Original Panel Report, paras. 7.1427-7.1456, 7.1459-1480, 7.1608, and 8.1(e)).

[11] Panel Report, para. 1.3 (referring to Original Panel Report, paras. 7.689 and 8.1(a)(ii)).

[12] Panel Report, para. 1.7 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1414(j) and 1415(b)).

[13] Panel Report, para. 1.7 (referring to 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)).

[14] Panel Report, para. 1.7 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1414(e)(iv), (g), (l), (m), (p), (q), and (r)). See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1414(s).

[15] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1416 and 1418.

[16] Minutes of the DSB Meeting held on 1 June 2011, WT/DSB/M/297.

1.2 Compliance proceedings

1.2.1 Panel proceedings

1.8. Subsequent to the adoption of the original panel report and the Appellate Body report, the European Union informed the DSB on 1 December 2011 in a Compliance Communication that it had "taken appropriate steps" to bring its measures into conformity with its World Trade Organization (WTO) obligations, thereby ensuring "full implementation of the DSB's recommendations and rulings".[17] The European Union referred to, *inter alia*: "(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 ha{d} … 'come to an end' and {were} no longer capable of causing adverse effects".[18] The European Union provided further details regarding the steps it had taken and the intervening market events it considered to have enabled it to achieve compliance, in a two-page document comprising 36 numbered paragraphs, attached to its Compliance Communication.[19]

1.9. On 9 December 2011, the United States requested to hold consultations with the European Union and the four member States, alleging that the European Union had failed to comply with the recommendations and rulings of the DSB.[20] On 30 March 2012, the United States requested for the establishment of a panel pursuant to Article 21.5 of the DSU with standard terms of reference.[21] The Panel was established by the DSB on 13 April 2012.[22]

1.10. Before the Panel, the United States argued that the relevant subsidies found to have caused adverse effects in the original proceedings continue to cause adverse effects and that, by agreeing to provide Airbus with LA/MSF for the A350XWB family of aircraft[23], the four member States have "continued and even expanded" the subsidization of Airbus' LCA activities, thereby causing "additional adverse effects" within the meaning of Articles 5(c) and 6.3 of the SCM Agreement.[24] On this basis, the United States submitted that the European Union and the four member States have failed to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" within the meaning of Article 7.8 of the SCM Agreement. The United States also claimed that the A350XWB and A380 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.

1.11. The Panel circulated its Report to Members of the WTO on 22 September 2016. The factual aspects of the Panel proceedings are summarized in detail at paragraphs 1.17 through 1.32 of the Panel Report.

1.12. The Panel made the following findings in its Report:

a. Only two out of the 36 "alleged compliance 'steps'" notified by the European Union in its Compliance Communication (steps 28 and 29) constitute "actions" concerning the degree of ongoing subsidization of Airbus LCA. The 34 remaining "steps" constitute "*assertion of*

[17] Communication from the European Union dated 1 December 2011, WT/DS316/17 (Compliance Communication), para. 5.
[18] Panel Report, para. 6.6 (quoting Compliance Communication, para. 4).
[19] Panel Report, para. 6.6 (quoting Compliance Communication, para. 4). The 36 "steps" identified by the European Union are described and explained in more detail at paragraphs 6.8-6.42 of the Panel Report.
[20] WT/DS316/19 and Corr. 1.
[21] WT/DS316/23.
[22] Panel Report, para. 1.13.
[23] For a detailed description of the A350XWB LA/MSF measures, see Panel Report, paras. 6.225-6.267. The A350XWB LA/MSF measures are not covered by the DSB's recommendations and rulings. Before the original panel, the United States had challenged the alleged provision of LA/MSF for the original A350 model, but the original panel considered that, as at July 2005, the examined evidence suggested that there were no clear commitments from the four member State governments to provide LA/MSF for the A350 on back-loaded, success-dependent, and below-market interest rate repayment terms. (Original Panel Report, para. 7.314)
[24] Panel Report, para. 6.3 (quoting United States' first written submission to the Panel, para. 1).

facts or the *presentation of arguments* for the purpose of supporting the European Union's theory of compliance".[25]

b. The French, German, Spanish, and UK A350XWB LA/MSF measures, as well as 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, and the United States' claims of "threat of displacement and impedance" of imports under Article 6.3(a) of the SCM Agreement fall within the scope of these compliance proceedings. 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 these compliance proceedings.[26]

c. The United States 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.[27]

d. The United States failed to demonstrate that the French, German, Spanish, and UK A350XWB LA/MSF subsidies are prohibited export and/or import substitution subsidies within the meaning of Articles 3.1 and 3.2 of the SCM Agreement, and 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.[28]

e. With regard to Article 7.8 of the SCM Agreement, the European Union demonstrated that the *ex ante* "lives" of (i) the French, German, and Spanish LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, and A330/A340; (ii) the UK LA/MSF subsidies for the A320 and A330/A340; and (iii) the capital contribution subsidies "expired" before 1 June 2011. 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 **[BCI]** and **[BCI]**. The *ex ante* "lives" of five of the regional development grant subsidies will not "expire" until sometime between 2054 and 2058, while the other two "expired" around 2014.[29]

f. The European Union failed to demonstrate that "the alleged partial privatization of Aérospatiale in 1999, the transactions leading to the creation of {European Aeronautic Defence and Space Company N.V. (EADS)} in 2000, and {British Aerospace Systems' (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".[30]

g. The relevant subsidies identified in subparagraph e above have "expired" because "the total period of time over which their 'projected value' was expected to 'materialize' has transpired in the absence of any 'intervening event'".[31]

h. With regard to Article 7.8 of the SCM Agreement, the fact that the *ex ante* "lives" of certain subsidies "*passively* 'expired'" before the end of the implementation period does not amount to "withdrawal" of those subsidies for the purpose of Article 7.8.

[25] Panel Report, para. 7.1.a.i-ii. (emphasis original)
[26] Panel Report, para. 7.1.b.i-iv.
[27] Panel Report, para. 7.1.c.i.
[28] Panel Report, para. 7.1.c.ii-iii.
[29] The Panel found that the fact that one or more of the subsidies challenged in these compliance proceedings may have ceased to exist prior to 1 June 2011 does not *ipso facto* mean that the European Union and the four member States do not have a compliance obligation under the terms of Article 7.8 of the SCM Agreement in relation to these subsidies. The Panel further rejected the European Union's arguments on "extraction" of subsidies, which had been rejected by the original panel and the Appellate Body in the original proceedings. (Panel Report, para. 7.1.d.i-v)
[30] Panel Report, para. 7.1.d.vi.
[31] Panel Report, para. 7.1.d.vii.

The European Union therefore "failed to comply with the obligation to 'withdraw the subsidy' for the purpose of Article 7.8".[32]

i. The European Union failed to establish that the United States' claims under Article 6.3(b) and (c) of the SCM Agreement should be rejected on the ground that the United States' "like" product is not "unsubsidized" within the meaning of Articles 6.4 and 6.5 of the SCM Agreement.[33]

j. The United States brought its adverse effects claims with respect to "appropriately defined product markets for LCA", namely, the global markets for: (i) single-aisle LCA; (ii) twin-aisle LCA; and (iii) very large aircraft (VLA).[34]

k. 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 … 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".[35] With the exception of the A300 and A310 LA/MSF subsidies, the "*direct* and *indirect* effects of the aggregated LA/MSF subsidies" are a "'genuine and substantial' cause of the current market presence of the A350XWB family … 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".[36]

l. With regard to Articles 6.3 and 5(c) of the SCM Agreement, the "product" effects of LA/MSF subsidies, as identified in subparagraph k above, are a "'genuine and substantial' cause of displacement and/or impedance" of imports of a "like" product of the United States into the markets for single-aisle LCA, twin-aisle LCA, and VLA in the European Union, within the meaning of Article 6.3(a), constituting serious prejudice under Article 5(c). These "product" effects are also a "'genuine and substantial' cause of displacement and/or impedance of exports" from the markets for (i) single-aisle LCA in Australia, China, and India; (ii) twin-aisle LCA in China, Korea, and Singapore; and (iii) VLA in Australia, China, Korea, Singapore, and the United Arab Emirates, within the meaning of Article 6.3(b), constituting serious prejudice under Article 5(c). Further, these "product" effects are a "genuine and substantial" cause of significant lost sales in the global markets for single-aisle LCA, twin-aisle LCA, and VLA, within the meaning of Article 6.3(c), constituting serious prejudice within the meaning of Article 5(c).[37]

m. The effects of the aggregated non-LA/MSF subsidies (i.e. 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)". The United States failed to demonstrate that the Spanish regional development grants used for Airbus' military aircraft activities benefit Airbus' LCA activities, and thus failed to establish that these subsidies "complement and supplement" the "product" effects of the LA/MSF subsidies.[38]

1.13. Having found that the challenged subsidies have caused present serious prejudice to the United States' interests within the meaning of Article 5(c) of the SCM Agreement, the Panel made no findings with respect to the United States' conditional claim that the challenged subsidies threaten to cause serious prejudice to its interests.[39]

[32] Panel Report, para. 7.1.d.viii-ix. (emphasis original)
[33] Panel Report, para. 7.1.d.x.
[34] Panel Report, para. 7.1.d.xi.
[35] Panel Report, para. 7.1.d.xii. (emphasis original)
[36] Panel Report, para. 7.1.d.xiii. (emphasis original)
[37] Panel Report, para. 7.1.d.xiv-xvi.
[38] Panel Report, para. 7.1.d.xvii-xviii.
[39] Panel Report, para. 7.1.d.xix.

1.2.2 Appellate proceedings and procedural issues

1.14. On 13 October 2016, the European Union notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal[40] pursuant to Rule 20 of the Working Procedures for Appellate Review[41] (Working Procedures).

1.15. Also on 13 October 2016, the Chair of the Appellate Body received a joint letter from the participants, the European Union and the United States, requesting the Division hearing this appeal to adopt additional procedures to protect business confidential information (BCI) and highly sensitive business information (HSBI) in these appellate proceedings. In their letter, the European Union and the United States argued, *inter alia*, that disclosure of certain sensitive information on the Panel record would be severely prejudicial to the LCA manufacturers concerned and possibly to their customers and suppliers. The participants suggested that the additional procedures adopted by the Appellate Body in the appeal in *US – Large Civil Aircraft (2nd complaint)* (DS353), with certain modifications, form the basis for any procedural ruling on confidentiality in these appellate proceedings.

1.16. On the same day, the Chair of the Appellate Body sent a letter to the participants and third parties indicating that the Division hearing this appeal had decided, pursuant to Rule 16(1) of the Working Procedures, to suspend the deadlines for the filing of written submissions and other documents in this appeal. The third parties were invited to comment in writing on the participants' joint request by 19 October 2016. Comments were received from Australia, Brazil, and Canada. While none of the third parties objected to the adoption of additional procedures for the protection of BCI and HSBI, Canada suggested that the additional procedures provide for a designated reading room at the embassy and/or other diplomatic mission of the European Union and the United States in each of the third participants' capitals.[42] On 24 October 2016, Australia, the European Union, and the United States each commented on Canada's proposal. Australia supported Canada's request. The European Union and the United States opposed it, noting that it would require a total of 12 designated reading rooms in the third participants' respective capitals, in addition to the designated reading room on the WTO premises, and emphasized that this would impose a significant burden on the participants. The United States also considered that there would be little benefit to third participants, because the only difference under the proposed adjustment would be to shift the burden of reviewing BCI from Geneva-based officials to capital-based officials.

1.17. Taking into account the arguments made by the participants and the third parties' comments, the Chair of the Appellate Body, on behalf of the Division hearing this appeal, issued a Procedural Ruling on 25 October 2016[43] adopting additional procedures to protect the confidentiality of BCI and HSBI in these appellate proceedings. The Division did not adopt the adjustment proposed by Canada, noting the burden it would involve and that the interests of third participants mainly concerned the correct legal interpretation of relevant provisions of the covered agreements, rather than factual questions.[44] The Division also noted that third participants' rights would be taken into account in these appellate proceedings, including in setting the Working Schedule for this appeal.

1.18. Pursuant to the Procedural Ruling of 25 October 2016, the participants communicated their lists of BCI- and HSBI-Approved Persons on 27 October 2016. On 31 October 2016, the United States "provisionally" objected to the inclusion of one of the European Union's BCI- and HSBI-Approved Persons, and requested further information on this individual. On 2 and

[40] WT/DS316/29.
[41] WT/AB/WP/6, 16 August 2010.
[42] Australia and Brazil did not object to the joint request by the participants, but requested that the Appellate Body ensure that the rights of third participants are taken into account in setting the working schedule for this appeal.
[43] The Procedural Ruling of 25 October 2016 and Additional Procedures to Protect Sensitive Information are contained in Annex D-1 of the Addendum to this Report, WT/DS316/AB/RW/Add.1. The composition of the Division was communicated to the participants and third parties on 14 November 2016.
[44] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling and Additional Procedures to Protect Sensitive Information, para. 11.

18 November 2016 respectively, the European Union provided additional information on the individual concerned, and confirmed that he had been retained by an outside advisor who is subject to an enforceable code of professional ethics and assumes responsibility for compliance with the additional BCI/HSBI procedures adopted by the Appellate Body in these proceedings. The Division issued a Procedural Ruling on 21 November 2016, recalling that, pursuant to the Procedural Ruling of 25 October 2016, it would reject a request for designation of an outside advisor as a BCI- or HSBI-Approved Person only upon a showing of compelling reasons. In the circumstances of this case, the Division considered it appropriate for the European Union to keep the individual concerned on its BCI- and HSBI-Approved Persons list.

1.19. On 1 November 2016, the Division provided the participants and third parties with a Working Schedule for Appeal, setting out the dates for the filing of the appellant's submission and an eventual Notice of Other Appeal and other appellant's submission. On 3 November 2016, the European Union filed an appellant's submission pursuant to Rule 21 of the Working Procedures.

1.20. On 10 November 2016, the United States notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal and other appellant's submission[45] pursuant to Rule 23 of the Working Procedures. The United States requested an extension until Friday, 11 November 2016, and subsequently until Monday, 14 November 2016, to file the HSBI appendix to its submission, which was being transferred to Geneva by means of an expedited international courier service. In accepting the United States' request, the Division noted that the European Union did not object to the late filing of the appendix, and that the late filing did not adversely affect the Appellate Body's consideration of this appeal. The Division nevertheless emphasized the importance of adhering to the time-limits for filing documents in the interests of fairness and the orderly conduct of the appellate proceedings.

1.21. On 14 November 2016, the Division received a letter from the European Union requesting that certain text in the United States' other appellant's submission be designated as BCI. The United States responded in writing on 16 November 2016, indicating that it did not object to the BCI designations proposed by the European Union in paragraphs 36, 52, 64, and 69 of its other appellant's submission, but objected to the proposed BCI designations in paragraphs 35, 37, 41, 43, 45, 47, 49, 51, 53, 55, and 60 because the information at issue could already be derived from information on the Panel record that was not designated as BCI or HSBI. The Division reviewed the changes proposed, taking into account the risks associated with the disclosure of the relevant information and the rights and duties established in the DSU and the other covered agreements. In a Procedural Ruling dated 21 November 2016, the Division decided to proceed on the basis of the BCI designations proposed by the European Union and requested the United States to submit revised copies of the BCI and non-BCI versions of its other appellant's submission by 23 November 2016.

1.22. On 22 November 2016, the Division provided the participants and third parties with a revised Working Schedule for Appeal, setting out the dates for the filing of the appellees' and third participants' submissions. The Division added that the dates for the oral hearing would be communicated to them in due course.

1.23. On 5 December 2016, the Appellate Body received a letter from the European Union referring to this ongoing appeal, and to the then anticipated appeals in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* (DS353) and *US – Tax Incentives* (DS487). Referring to Rules 16(1) and 16(2) of the Working Procedures and Article 9 of the DSU, the European Union requested that the schedules for these three appeals be harmonized to the greatest extent possible and that the hearings be sufficiently proximate in time, so that a particular matter would not be effectively disposed of in one appeal before the related matter is heard in one of the other appeals. The Chair of the Appellate Body invited the United States and the third parties to submit comments on the European Union's request by 9 December 2016. The United States argued that the European Union's request was not supported by the DSU or the Working Procedures and would result in delays in the proceedings. The United States stated that it remained open to proposals to set deadlines for written submissions and dates for oral hearings in a way that would allow the

[45] WT/DS316/30.

participants and third participants in each dispute to advocate effectively their positions on appeal and for the Appellate Body to consider fully the issues raised.[46] The participants and third parties were invited to submit additional comments by 16 December 2016. The European Union reiterated its request that any oral hearings in these appeals be sufficiently proximate in time, but noted that it was content to leave it to the Appellate Body to determine what that would mean in practice.[47] By letter dated 22 December 2016, the Appellate Body indicated that it would bear in mind the European Union's request, as well as the comments received, during the appellate proceedings in these three disputes.[48]

1.24. On 19 December 2016, the United States sent a letter referring to the Working Schedule drawn up by the Division informing that it would have significant difficulties participating in the oral hearing if it were to be scheduled during the weeks of 6 and 13 March 2017 due to the unavailability of key members of its delegation during those periods. On the same day, the European Union sent a letter informing the Division that, for the same reason as that given by the United States, the European Union would have difficulties participating in the oral hearing if it were scheduled between 9 and 22 February 2017. Both participants requested the Division to be cognizant of this constraint when setting the dates for the oral hearing in these proceedings.

1.25. By letter dated 21 December 2016, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.[49] The Chair indicated that this was due to a number of factors, including the number and complexity of the issues raised in these compliance proceedings, the substantial workload of the Appellate Body, the overlap in the composition of the Divisions hearing several concurrent appeals, and the shortage of staff in the Appellate Body Secretariat. On 4 May 2018, the Chair of the Appellate Body informed the Chair of the DSB that the Appellate Body Report in these proceedings would be circulated no later than 15 May 2018.[50]

1.26. On 6 January 2017, the Appellate Body received a communication from the European Union requesting that the Division modify the deadline for the filing of the appellees' submissions from 13 January to 20 January 2017. The Division invited the United States and the third parties to comment on the European Union's request by 10 January 2017. Written comments were received from the United States, Australia, and Canada. The United States opposed the request for an extension. While Australia and Canada did not object to the extension, they requested that the Division also extend the deadline for the filing of the third participants' submissions if it were to decide to grant the European Union's request. Taking into account the length of the United States' other appellant's submission and the extended Working Schedule adopted for these appellate proceedings, the Division took the view that declining the extension would not result in manifest unfairness and thus rejected the European Union's request.

1.27. On 13 January 2017, the European Union and the United States each filed an appellee's submission.[51] On 31 January 2017, Brazil, Canada, China, and Japan each filed a third participant's submission.[52] On the same day, Australia notified its intention to appear at the oral hearing as a third participant.[53] On 26 April 2017, Korea also notified its intention to appear at the oral hearing as a third participant.[54]

[46] Comments were also received from Canada, China, and Japan.
[47] Comments were also received from the United States and Australia.
[48] See also Appellate Body Report, *US – Tax Incentives*, para. 1.5.
[49] WT/DS316/31.
[50] WT/DS316/32.
[51] Pursuant to Rules 22 and 23(4) of the Working Procedures.
[52] Pursuant to Rule 24(1) of the Working Procedures.
[53] Australia notified in writing that it would not be filing a third participant's submission. For purposes of this appeal, we have interpreted Australia's action to be a notification expressing its intention to attend the oral hearing pursuant to Rule 24(2) of the Working Procedures.
[54] Korea submitted its delegation list for the oral hearing. For purposes of this appeal, we have interpreted Korea's action to be a notification expressing its intention to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures.

1.28. By letter dated 26 January 2017, the participants and third participants were informed that the first session of the oral hearing would take place from 2 to 5 May 2017.[55] By letter dated 4 April 2017, the Division invited the participants to indicate by 11 April 2017 whether they wished to request the sessions of the oral hearing in this appeal to be open to public observation, and if so, to propose specific modalities in this respect. The Division also invited the third participants to provide comments by 13 April 2017 on any request or proposal made by the participants.

1.29. On 11 April 2017, the participants requested in a joint letter that the oral hearing in this appeal be opened to public observation, subject to proposed additional procedures for the protection of BCI and HSBI similar to those in *US – Large Civil Aircraft (2nd complaint)*. Regarding the segments of the oral hearing that would be open to public observation, the participants suggested that the opening and closing statements of the participants and third participants (that agreed to public observation) be videotaped, reviewed by the participants for any inadvertent inclusion of BCI/HSBI, and transmitted to the public at a later date.[56] On 13 April 2017, Canada and China submitted comments on the participants' joint request. Canada supported the joint proposal. While recognizing the need for the protection of BCI/HSBI in these proceedings, China queried whether a complete exclusion of third participants' non-BCI-Approved Persons from segments of the oral hearing dedicated to questions and answers was required. Instead, China suggested that sessions dedicated to legal interpretative issues be open to all third participants and that they be kept separate from sessions requiring reference to BCI/HSBI.

1.30. On 19 April 2017, the Division issued a Procedural Ruling[57] authorizing the participants' request to open the sessions dedicated to the delivery of opening and closing statements to public observation, subject to additional procedures for the conduct of all sessions of the oral hearing. Regarding China's request, the Division considered that it would be difficult to accommodate given the amount of BCI/HSBI involved in this dispute. The Division also recalled in this regard that third participants were allowed to designate up to eight individuals as BCI-Approved Persons, and considered this sufficient to allow the third participants to be meaningfully represented at the oral hearing.

1.31. By letter dated 16 May 2017, the Division informed the participants and third participants that the second session of the hearing would be held from 26 to 29 September 2017. By letter dated 22 June 2017, the Division notified to the participants and third participants that the second session of the oral hearing would have to take place one week earlier than initially planned. The Division indicated that this was because no meeting room would be available at the WTO due to the WTO Public Forum. On the same day, the United States objected to this scheduling change due to, *inter alia*, conflict with religious holidays and emphasized that, from its perspective, the WTO's organization of a public forum could not supersede the WTO's timely administration of its dispute settlement system, a core function of the organization. The United States suggested that the second session of the oral hearing take place on the initially scheduled week in an alternative venue if no meeting room could be made available at the WTO. The United States stated that, alternatively, it could participate in a session scheduled for the week of 2 October 2017, if absolutely necessary. By letter dated 26 June 2017, the European Union also stated its preference for the second session of the oral hearing to take place on the initially planned dates in premises outside the WTO if necessary, due to, *inter alia*, the professional and personal commitments of members of the European Union's delegation. The European Union further indicated that it would have a strong preference not to reschedule the second session for the week of 2 October 2017, and instead suggested moving it to the week of 9 October 2017, should it be impossible to maintain the dates initially planned.

1.32. On 7 July 2017, the Division invited the third participants to comment on the arguments and proposals of the European Union and the United States. No comments were received from the

[55] The first session of the oral hearing was held from 2 to 5 May 2017 as scheduled and covered the following topics: (i) the Mühlenberger Loch and Bremen Airport measures; (ii) import substitution subsidies; (iii) withdrawal of subsidies/removal of adverse effects; (iv) the European Union's and the United States' conditional appeals regarding the expiry of pre-A350XWB LA/MSF; and (v) benefit.

[56] The participants requested that any potential disagreement as to whether BCI/HSBI was inadvertently included in the oral statements be resolved by the Division.

[57] The Procedural Ruling of 19 April 2017 and Additional Procedures on the Conduct of the Oral Hearing are contained in Annex D-2 of the Addendum to this Report, WT/DS316/AB/RW/Add.1.

third participants. Following confirmation by the WTO Administration that there would be no room available to the Appellate Body during the week of the WTO Public Forum, and taking into account the participants' preference for the initially planned dates, the Division explored alternative venues and made arrangements for the second session of the oral hearing to take place on the initially planned dates, 26-29 September 2017, at the World Meteorological Organization.

1.33. The participants and third participants did not refer to BCI or HSBI in their opening or closing statements in either session of the oral hearing.[58] Pursuant to the Procedural Ruling of 19 April 2017, public observation of the first session of the oral hearing was limited to the opening statements of the participants and the third participants (with the exception of China). This was done by means of a delayed transmission of a video recording of such statements, after the participants had been given an opportunity to review the recording to confirm that no BCI or HSBI had been inadvertently uttered.[59] Due to the fact that the second session of the hearing took place outside the WTO premises, public observation took place via delayed audio playback of the recording of the opening and closing statements.[60]

1.34. During the two sessions of the oral hearing, the participants and third participants responded to questions posed by Members of the Division hearing the appeal. At the second session, the Division distributed written questions to the participants and third participants related to the United States' request for completion of the legal analysis with respect to displacement or impedance.[61] The Division received written responses during the session and the participants were given the opportunity to comment orally on the other participant's written responses during the final day of the hearing.

1.35. On 30 June 2017 and 24 November 2017, respectively, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had notified the Chair of the DSB of the Appellate Body's decision to authorize Appellate Body Members Mr Ricardo Ramírez-Hernández and Mr Peter Van den Bossche to complete the disposition of this appeal, even though their respective second terms of office were due to expire before the completion of these appellate proceedings.

1.36. On 25 April 2018, pursuant to paragraph 18(xiii) of the Procedural Ruling of 25 October 2016, the Division provided a confidential advance copy of the Appellate Body Report intended for circulation to WTO Members to the participants, inviting them to indicate, by 2 May 2018, whether any BCI or HSBI was inadvertently included in the report, and to request removal of such information. The Division also provided the participants with an opportunity to respond to each other's comments by 4 May 2018. The United States indicated, on 2 May 2018, that it had not found any BCI or HSBI outside of the text encompassed in square brackets in the Appellate Body report intended for circulation, and the European Union indicated that it had identified four instances in which confidential information had been inadvertently included. On 8 May 2018, the Division informed the European Union and the United States that it had redacted the information concerned from the Appellate Body report to be circulated to Members.

[58] There were no closing statements at the first session of the oral hearing. Korea did not make an opening statement at either of the sessions, and Australia did not make an opening statement at the second session. In addition, only the European Union, the United States, Canada, and Japan made closing statements at the end of the second session.

[59] China was not included in the video recording, having objected to opening its statements to public observation.

[60] China was not included in the audio recording, having objected to opening its statements to public observation.

[61] The second session was held from 26 to 29 September 2017 as scheduled and covered the topics not covered in the first session, namely: (i) product market; (ii) non-subsidized like product; (iii) causation; (iv) displacement/impedance and lost sales; and (v) completion of the legal analysis.

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.[62] The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to this Report, WT/DS316/AB/RW/Add.1.

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of those third participants that filed a written submission are reflected in the executive summaries of their written submissions provided to the Appellate Body[63], which are contained in Annex C of the Addendum to this Report, WT/DS316/AB/RW/Add.1.

4 ISSUES RAISED ON APPEAL

4.1. The following issues are raised in this appeal[64]:

a. whether the Panel erred by declining to make a finding as to whether the European Union had "withdrawn" the Bremen airport and Mühlenberger Loch measures within the meaning of Article 7.8 of the SCM Agreement;

b. whether the Panel erred in finding that the United States had failed to establish that the French, German, Spanish, and UK LA/MSF subsidies for Airbus' A350XWB constituted prohibited import substitution subsidies, within the meaning of Article 3.1(b) of the SCM Agreement (raised by the United States);

c. whether the Panel erred in determining the "corporate borrowing rate" component of the market benchmark for the A350XWB LA/MSF measures; and, in particular:

   i. whether the Panel erred in its application of Article 1.1(b) of the SCM Agreement or acted inconsistently with Article 11 of the DSU by failing to determine the "corporate borrowing rate" component of the market benchmark on the basis of the yield of the EADS bond *on the day of conclusion* of each A350XWB LA/MSF contract; and

   ii. in the event the Appellate Body finds that the Panel did not err in the manner described above, whether the Panel erred in its application of Article 1.1(b) of the SCM Agreement or acted inconsistently with Article 11 of the DSU by including in its calculation of the "corporate borrowing rate" the average yield of the EADS bond over the six months prior to the conclusion of the A350XWB LA/MSF contracts;

d. whether the Panel erred in using the risk premium applied to the A380 LA/MSF measures in the original proceedings as the project-specific risk premium to determine whether the A350XWB LA/MSF measures confer a benefit; and in particular:

   i. whether the Panel erred under Article 1.1(b) of the SCM Agreement or acted inconsistently with Article 11 of the DSU by allegedly failing to establish a risk premium that best reflects the risks associated with the A350XWB project;

   ii. whether the Panel acted inconsistently with Article 11 of the DSU in its assessment of the differences in the risk profiles of the A380 and the A350XWB projects; and

[62] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

[63] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

[64] Unless indicated otherwise, the following issues are raised by the European Union.

iii. whether the Panel erred under Article 1.1(b) of the SCM Agreement or acted inconsistently with Article 11 of the DSU by adopting a single project risk premium for each of the French, German, Spanish, and UK A350XWB LA/MSF measures;

e. whether the Panel erred in its interpretation of Article 7.8 of the SCM Agreement in finding that this provision requires an implementing Member, found in original proceedings to have granted or maintained subsidies that cause adverse effects, to "remove the adverse effects" of the subsidies *irrespective of whether those subsidies continue to exist* in the implementation period;

f. in the event the Appellate Body reverses the Panel's interpretation of Article 7.8 of the SCM Agreement:

i. whether the Panel erred in its interpretation of Article 1.1(b) of the SCM Agreement in finding that the *ex ante* "lives" of the French, German, and Spanish LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, and A330/A340, and the UK LA/MSF subsidies for the A320 and A330/A340 expired prior to 1 December 2011 (raised by the United States); and

ii. if the Appellate Body finds that the expiry of a subsidy *after* the end of the implementation period constitutes "withdrawal" within the meaning of Article 7.8 of the SCM Agreement, whether the Panel erred in finding that the LA/MSF subsidies for the A330-200 and the A340-500/600 expired after 1 December 2011 (raised by the United States);

g. in the event that the Appellate Body reverses the Panel's interpretation of Article 7.8 of the SCM Agreement and attempts to complete the legal analysis on the basis of a correct interpretation, whether the Panel erred in its interpretation of Article 7.8 (in conjunction with Article 1 of the SCM Agreement) in finding that the European Union has not demonstrated that the "lives" of the French LA/MSF subsidies for the A310-300 and A330-200, the French and Spanish LA/MSF subsidies for the A300B/B2/B4 and A300-600, and the French, Spanish, and UK LA/MSF subsidies for the A320 and A330/A340 came to an end when Airbus completed repayment of the financial contribution;

h. whether, as a consequence of the Panel's interpretative error under Article 7.8 of the SCM Agreement, the Panel's findings regarding the adverse effects caused by the challenged subsidies must be reversed;

i. whether the Panel erred in rejecting the European Union's contention that the United States was required under Article 6.4 of the SCM Agreement, to demonstrate that its "like product" (Boeing LCA) was "non-subsidized" in order to make out its claims of serious prejudice under Article 6.3(b) of the SCM Agreement;

j. whether the Panel erred in its identification of the relevant product markets; and in particular:

i. whether the Panel erred in interpreting the term "market" in Article 6.3 of the SCM Agreement by finding that two products fall within the same product market as long as there is "some" competitive relationship between the products, and consequently failing to perform a "quantitative" analysis of the nature and degree of competition between the products to determine whether it was "significant";

ii. in the alternative, to the extent that the Appellate Body finds that the Panel did not err in its interpretation of the term "market", whether the Panel erred in its application of Articles 5(c), 6.3, and 7.8 of the SCM Agreement by not finding that all Airbus and Boeing LCA products form part of a "single" LCA market based on the existence of "some" competition between each model of Airbus and Boeing LCA; and

iii. whether the Panel acted inconsistently with Article 11 of the DSU by assessing the United States' adverse effects claims on the basis of the three-way market segmentation proposed by the United States, without also enquiring whether there existed "some" competition between aircraft that the United States had placed in separate product markets;

k. whether the Panel erred in its interpretation and application of Articles 5(c), 6.3, and 7.8 of the SCM Agreement in finding that "product effects" of the pre-A350XWB LA/MSF subsidies, that is, the effects of such subsidies on the ability of Airbus to launch and bring to market an Airbus LCA as and when it did, continue to be a "genuine and substantial" cause of the present-day market presence of the A320, A330, and A380 families of Airbus LCA;

l. whether the Panel found that the LA/MSF subsidies for the A380 resulted in "direct effects" on the launch and market presence of the A380 and, if so, whether the Panel acted inconsistently with Article 11 of the DSU in reaching that finding;

m. whether the Panel erred in finding that the "product effects" of the aggregated LA/MSF subsidies, with the exception of the LA/MSF subsidies for the A300 and A310, are a "genuine and substantial" cause of the current market presence of the A350XWB family of Airbus LCA; more specifically:

i. whether the Panel found that the LA/MSF subsidies for the A350XWB resulted in "direct effects" on the launch and market presence of the A350XWB and, if so, whether the Panel acted inconsistently with Article 11 of the DSU in reaching that finding; and

ii. whether the Panel erred in its application of Articles 5(c) and 7.8 of the SCM Agreement in finding that A380 LA/MSF subsidies had "indirect effects" on Airbus' ability to launch the A350XWB; and

n. whether the Panel erred in its interpretation and application of Articles 5(c), 6.3(a), 6.3(b), 6.3(c), and 7.8 of the SCM Agreement in finding that the United States established that the challenged LA/MSF subsidies are a genuine and substantial cause of "lost sales" and "displacement and/or impedance" of US LCA in the relevant product and geographic markets; more specifically:

i. whether the Panel erred in finding a causal link between the challenged subsidies and alleged "lost sales" and "displacement and/or impedance" by failing to take into account: (i) the "closeness of competition" between various LCA models; and (ii) non-attribution factors; and

ii. whether the Panel erred in finding "displacement and/or impedance" in the relevant product and geographic markets at issue by: (i) failing to distinguish between the concepts of "displacement" and "impedance" and making undifferentiated findings of "displacement and/or impedance"; and (ii) failing to engage with the relevant volume and market share data and to adopt a large enough number of data points to meaningfully investigate trends in the chosen reference period.

5 ANALYSIS OF THE APPELLATE BODY

5.1 Article 21.5 of the DSU – the Mühlenberger Loch and Bremen Airport measures

5.1. The European Union claims that, by declining to make a finding as to whether the European Union had achieved compliance with respect to the Mühlenberger Loch aircraft assembly site measure and the Bremen Airport runway extension measure, the Panel erred in its

interpretation and application of Article 21.5 of the DSU and also acted inconsistently with Article 11 of the DSU.[65]

5.2. Specifically, the European Union claims that the Panel erred in interpreting Article 21.5 of the DSU as limiting the right of an original respondent to have recourse to Article 21.5 to a scenario where the following three conditions are met: (i) the original respondent initiates Article 21.5 proceedings; (ii) the original complainant refuses to participate in such proceedings; and (iii) the original complainant has already suspended concessions vis-à-vis the original respondent in accordance with Article 22 of the DSU.[66] For the European Union, the Panel thus attached, without textual basis, such qualifications to the right of an original respondent to seek adjudication of a disagreement concerning the WTO-consistency of its measure taken to comply.[67] As to the Panel's application of Article 21.5, the European Union submits that the Panel erred in finding that a "disagreement" within the meaning of this provision did not exist between the parties with respect to the two measures at issue.[68] Finally, the European Union submits that, by refusing to make findings as to whether the European Union had achieved withdrawal, within the meaning of Article 7.8 of the SCM Agreement, in respect of the Mühlenberger Loch and Bremen Airport measures, the Panel incorrectly declined to exercise validly established jurisdiction, thereby acting inconsistently with Article 11 of the DSU.[69] Based on these alleged errors in the Panel's analysis, the European Union requests us to reverse the Panel's findings, complete the legal analysis, and find that the European Union has withdrawn the subsidies that had been found to flow from the two measures at issue.[70]

5.3. Before addressing the European Union's claims of error, we briefly recall the Panel's analysis concerning the Mühlenberger Loch and the Bremen Airport measures.

5.1.1 The Panel's findings

5.4. Regarding the Bremen Airport runway extension measure, the Panel noted that "{t}he United States' claims of non-compliance d{id} not include" claims with respect to this measure.[71] In respect of the Mühlenberger Loch aircraft assembly site measure, the Panel noted that the measure was initially within the scope of the United States' challenge to the European Union's alleged compliance. However, having reviewed the European Union's explanation in its first written submission to the Panel of the methodology it had used to adjust the rental for the Mühlenberger Loch site to a market rate, the United States subsequently decided not to pursue its claim with regard to this measure.[72] In footnote 1847 to paragraph 6.1102 of its Report, the Panel stated:

> 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 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.[73]

[65] European Union's appellant's submission, para. 226.
[66] European Union's appellant's submission, para. 244.
[67] European Union's appellant's submission, para. 244.
[68] European Union's appellant's submission, paras. 258-262.
[69] European Union's appellant's submission, paras. 270-271.
[70] European Union's appellant's submission, para. 272.
[71] Panel Report, para. 6.20 (referring to United States' first written submission to the Panel, paras. 5 and 35).
[72] Panel Report, paras. 5.75 and 6.22.
[73] See also Panel Report, fn 109 to para. 6.42.

5.5. Similarly, the Panel observed that the United States' claims of continued adverse effects "d{id} 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".[74]

5.6. During the interim review stage of the Panel proceedings[75], the European Union requested the Panel to find that the two measures taken to comply in respect of Mühlenberger Loch and Bremen Airport achieved "withdrawal" of the respective subsidies within the meaning of Article 7.8 of the SCM Agreement.[76] The European Union asserted that the right of an original respondent to have a compliance panel under Article 21.5 of the DSU assess the WTO-consistency of a measure taken to comply was explicitly recognized by the Appellate Body in *US – Continued Suspension / Canada – Continued Suspension*.[77] In response, the United States requested the Panel to reject the European Union's request and confirmed that, as stated in its second written submission to the Panel, it was not pursuing the claims with respect to the Mühlenberger Loch and Bremen Airport measures.[78]

5.7. Responding to the European Union's request for findings presented during the interim review stage, the Panel recalled that its task under Article 21.5 of the DSU was to make an objective assessment as to whether the European Union had complied with the recommendations and rulings of the DSB to the extent that there was a "*disagreement* as to the existence or consistency" of "measures taken to comply".[79] In this regard, the Panel noted that neither party contested the "existence" of the European Union's measures taken to comply, and found that there was no present disagreement between the parties regarding the conformity of the Mühlenberger Loch and Bremen Airport measures with the relevant disciplines of the SCM Agreement or whether those measures achieved compliance with the recommendations and rulings of the DSB.[80] For the Panel, in the absence of any such "disagreement", there was no question of WTO-consistency to determine in relation to those measures.[81]

5.8. The Panel then addressed the European Union's reliance on the Appellate Body reports in *US – Continued Suspension / Canada – Continued Suspension*. The Panel noted that, in those disputes, the Appellate Body had discussed the scenario where: (i) the original respondent initiates Article 21.5 proceedings; (ii) the original complainant refuses to participate in such proceedings; and (iii) the original complainant has already suspended concessions vis-à-vis the original respondent in accordance with Article 22 of the DSU.[82] The Panel understood the Appellate Body to have considered that, "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'".[83] The Panel considered the situation to be different in the present case, noting that the original complainant – i.e. the United States – (rather than the original respondent) had initiated these Article 21.5 proceedings, in which both parties participated, and that the suspension of

[74] Panel Report, fn 53 to para. 6.3.

[75] The second, and final, round of written submissions to the Panel was concluded on 15 January 2013. The Panel meeting with the parties in this dispute took place on 16-18 April 2013. The Panel issued its Interim Report to the parties on 11 December 2015. The parties submitted their comments on the Interim Report on 22 January 2016, and responded to each other's comments on 12 February 2016.

[76] Panel Report, para. 5.74.

[77] Panel Report, para. 5.74 (quoting Appellate Body Reports, *US – Continued Suspension / Canada – Continued Suspension*, para. 358).

[78] Panel Report, para. 5.75. The Panel noted that the United States neither sought a finding that the European Union had failed to comply with the recommendations and rulings of the DSB with respect to those measures, nor argued that those subsidies caused adverse effects after the end of the implementation period. (Ibid.)

[79] Panel Report, para. 5.76 (quoting Article 21.5 of the DSU (emphasis added by the Panel)).

[80] Panel Report, para. 5.76.

[81] Panel Report, para. 5.76.

[82] Panel Report, para. 5.77.

[83] Panel Report, para. 5.77 (quoting Appellate Body Reports, *US – Continued Suspension / Canada – Continued Suspension*, para. 358).

concessions had not been approved or implemented.[84] Furthermore, the Panel found no relevant "disagreement" or "associated exigency" to exist in these proceedings.[85]

5.9. For all these reasons, and "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", the Panel found that "there {was} 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."[86] Finally, referring to Article 22.2 of the DSU, the Panel noted that, under these circumstances, "the United States would not be entitled to request the suspension of concessions or other obligations under the covered agreements in relation {to} the Mühlenberger Loch and the Bremen Airport runway measures."[87]

5.1.2 Whether the Panel erred by declining to make a finding as to whether the European Union had "withdrawn" the Mühlenberger Loch and Bremen Airport measures

5.10. Article 21.5 of the DSU requires that "disputes" arising out of any "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings … shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel." The Appellate Body has emphasized the "compulsory" and "obligatory" nature of Article 21.5 proceedings for resolving disputes concerning the existence or WTO-consistency of measures taken to comply with the recommendations and rulings of the DSB.[88]

5.11. In *US – Continued Suspension / Canada – Continued Suspension*, the Appellate Body stated that a "disagreement" under Article 21.5 as to the consistency with the WTO agreements of a measure taken to comply "arises from the existence of conflicting views: the original complainant's view that such a measure is inconsistent with the WTO agreements or brings about only partial compliance, and the original respondent's view that a measure is consistent with the WTO agreements and brings about full compliance with the DSB's recommendations and rulings".[89] Article 21.5 does not indicate which party may initiate proceedings under this provision. Rather, the language of the provision is neutral on this matter and it is open to either party to refer the matter to a compliance panel to resolve a disagreement as to the existence or consistency with a covered agreement of measures taken to comply.[90] The text of Article 21.5, therefore, does not preclude an original respondent from initiating proceedings under this provision to obtain confirmation of the WTO-consistency of its implementing measures.[91]

5.12. Article 6.2 of the DSU is "generally applicable" to panel requests under Article 21.5.[92] Article 21.5, for its part, expressly links the measures taken to comply with the recommendations and rulings of the DSB.[93] In carrying out its adjudicatory function, the task of a panel under Article 21.5 is to decide "disputes" arising out of any "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings". By virtue of Article 11 of the DSU, which also governs proceedings under Article 21.5, the task of a compliance panel is to "examine fully", and in an objective manner, the issues raised by the parties.[94] Much like it is for the Article 21.5 panel – and not for the complainant or the

[84] Panel Report, para. 5.77.
[85] Panel Report, para. 5.77.
[86] Panel Report, para. 5.78.
[87] Panel Report, para. 5.78.
[88] Appellate Body Reports, *US – Continued Suspension / Canada – Continued Suspension*, para. 340. See also paras. 336 and 339.
[89] Appellate Body Reports, *US – Continued Suspension / Canada – Continued Suspension*, para. 347.
[90] Appellate Body Reports, *US – Continued Suspension / Canada – Continued Suspension*, para. 347.
[91] Appellate Body Reports, *US – Continued Suspension / Canada – Continued Suspension*, para. 347.
[92] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 59. The Appellate Body further explained that, "given that Article 21.5 deals with compliance proceedings, Article 6.2 needs to be interpreted in the light of Article 21.5. In other words, the requirements of Article 6.2, as they apply to an original panel request, need to be adapted to a panel request under Article 21.5". (Ibid.)
[93] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, paras. 61 and 93.
[94] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 151.

respondent − to determine whether a particular measure is one "taken to comply"[95], it is also for the Article 21.5 panel, and not for either party, to determine whether an objectively identifiable "disagreement" exists between the parties. Thus, a panel under Article 21.5 must carry out its objective assessment of the existence and WTO-consistency of measures taken to comply in light of the arguments and evidence placed before it by the parties and the relevant recommendations and rulings of the DSB.

5.13. With these considerations in mind, we begin by examining the European Union's claim that the Panel erred in its interpretation of Article 21.5 of the DSU by qualifying the right of an original respondent to seek adjudication of a disagreement regarding the WTO-consistency of a measure taken to comply to scenarios where each of the following three conditions is met: (i) the original respondent initiates Article 21.5 proceedings; (ii) the original complainant refuses to participate in such proceedings; and (iii) the original complainant has already suspended concessions vis-à-vis the original respondent in accordance with Article 22 of the DSU.[96]

5.14. Contrary to what the European Union suggests, we do not consider that the Panel dismissed the European Union's request for findings on the basis of an alleged failure to meet the three "conditions" discussed by the Appellate Body in *US − Continued Suspension / Canada − Continued Suspension*.[97] Instead, the Panel declined to rule on the WTO-consistency of the two measures at issue because it found that "there {was} no relevant disagreement between the parties' to resolve".[98] In doing so, the Panel distinguished between the issues arising in the present case and those in *US − Continued Suspension / Canada − Continued Suspension*.[99] We do not consider that the Panel's reasoning distinguishing the present case from the specific situation addressed by the Appellate Body in those disputes should be understood as qualifying the rights of parties to have recourse to compliance proceedings by interpreting Article 21.5 in the manner suggested by the European Union. As we have discussed above, under a proper interpretation of Article 21.5, it is open to either party to refer the matter to a compliance panel under this provision to resolve a disagreement as to the existence or consistency with a covered agreement of a measure taken to comply.[100]

5.15. The European Union further submits that the Panel erred in its application of Article 21.5 of the DSU in finding that there was no "disagreement" between the parties, within the meaning of this provision, with respect to the Mühlenberger Loch and Bremen Airport measures.[101] According to the European Union, a disagreement in respect of the two measures taken to comply existed, and continues to exist, between the parties in the present dispute.[102] First, the European Union refers to its Compliance Communication, identifying the measures it took to comply concerning the Mühlenberger Loch and Bremen Airport measures. Recalling that those measures were included in the United States' compliance panel request[103], the European Union submits that this is indicative

[95] Appellate Body Report, *EC − Bed Linen (Article 21.5 − India)*, para. 78.

[96] European Union's appellant's submission, para. 244.

[97] As the Panel rightly observed, the Appellate Body's discussion of the "hypothetical" scenario was premised on the existence of a "disagreement" between the parties, namely, whether the ongoing suspension of concessions continued to be justified under Article 22.8 of the DSU. (See Panel Report, para. 5.77)

[98] Panel Report, para. 5.75.

[99] In requesting the Panel to rule on the two measures at issue, the European Union relied on the Appellate Body's statement in *US − Continued Suspension / Canada − Continued Suspension* 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". (Panel Report, para. 5.74 (quoting Appellate Body Reports, *US − Continued Suspension / Canada − Continued Suspension*, para. 358)) This statement by the Appellate Body discussed the specific situation where an original respondent has initiated Article 21.5 proceedings against the original complainant, and the original complainant has refused to participate in the Article 21.5 proceedings initiated by the original respondent. The Appellate Body explained that, in such proceedings initiated by the original respondent, a "defending party {i.e. the original complainant} who refuses to participate in dispute settlement proceedings will lose the opportunity to defend its position and will risk a finding in favour of the complaining party {i.e. the original respondent} that has established a *prima facie* case". (Appellate Body Reports, *US − Continued Suspension / Canada − Continued Suspension*, para. 358) See also Panel Report, para. 5.77.

[100] Appellate Body Reports, *US − Continued Suspension / Canada − Continued Suspension*, para. 347.

[101] European Union's appellant's submission, para. 256.

[102] European Union's appellant's submission, para. 257.

[103] WT/DS316/23.

of a "disagreement" within the meaning of Article 21.5.[104] Second, the European Union submits that the parties' written submissions to the Panel also evidence "conflicting views" as to whether the two measures at issue achieved withdrawal of the respective subsidies.[105]

5.16. The United States responds that the Bremen Airport measure was not included in its compliance panel request as one of the measures on which the United States requested the Panel to rule.[106] Even assuming that the Bremen Airport measure was properly included in the United States' compliance panel request, we note that, in its first written submission to the Panel, the United States made it clear that it was "not challenging the EU's compliance with the DSB recommendations and rulings with regard to {the infrastructure-related subsidy for the Bremen Airport runway}"[107], nor "the EU's removal of the Bremen Airport runway subsidy."[108] At the oral hearing in these appellate proceedings, the United States confirmed its position that the European Union had taken action with regard to the subsidy arising out of the Bremen Airport measure in a way that ceased its adverse effects and that the European Union had therefore "withdrawn" that subsidy.[109] In light of its statements before the Panel, as confirmed by it on appeal, we understand the United States to have clarified that it is not challenging the European Union's compliance regarding the Bremen Airport measure and it is not making any claim in respect of that measure.

5.17. Turning to the Mühlenberger Loch measure, the United States does not dispute that this measure was expressly included in its compliance panel request as one of the measures on which it was seeking findings.[110] We note that, unlike the Bremen Airport measure, the United States initially pursued its claim with respect to the Mühlenberger Loch measure in its first written submission to the Panel.[111] Subsequently, however, the United States clarified that it was "not pursuing its claim with regard to {that} measure at {that} time[112] and stated that "the only subsidies that the EU ha{d} withdrawn {were} the discounted fee for the use of the Bremen runway and the below-market rental terms for the Mühlenberger Loch site."[113]

5.18. On appeal, in support of its position that the parties' "disagreement" with respect to the Mühlenberger Loch measure continued to exist during the course of the Panel proceedings, the European Union relies on the heading of a section of the United States' second written submission to the Panel, which reads as follows: "The modifications to the Mühlenberger Loch lease did not make the terms consistent with the market and, therefore, failed to withdraw the subsidy".[114] While the text of the heading, when considered in isolation, may suggest that the United States continued to take issue with the Mühlenberger Loch measure, we note that in the section following that heading the United States clarified that it was "not pursuing its claim with regard to {that} measure at {that} time".[115] We understand the United States therefore to have abandoned its claim in respect of the Mühlenberger Loch measure as of its second written submission to the Panel. We also note in this regard that the European Union acknowledged before the Panel that "{t}he United States agree{d} with respect to the measures involving take-off and landing fees at Bremen Airport and the lease agreement for the land in the Mühlenberger Loch in Hamburg."[116]

5.19. It was only during the interim review stage of the Panel proceedings that the European Union requested the Panel to make findings with respect to the Bremen Airport and Mühlenberger Loch measures. Asking the Panel to reject the European Union's request made

[104] European Union's appellant's submission, paras. 258-259. At the oral hearing, the European Union asserted that the United States' compliance panel request incorporated the entire Compliance Communication by the European Union.
[105] European Union's appellant's submission, para. 260.
[106] United States' appellee's submission, para. 177.
[107] United States' first written submission to the Panel, fn 13 to para. 5.
[108] United States' first written submission to the Panel, fn 64 to para. 35.
[109] United States' response to questioning at the oral hearing.
[110] See United States' compliance panel request, para. 5.
[111] United States' first written submission to the Panel, para. 97.
[112] United States' second written submission to the Panel, para. 265.
[113] United States' second written submission to the Panel, para. 52.
[114] European Union's appellant's submission, para. 260 (quoting United States' second written submission to the Panel, section IV.C.4).
[115] United States' second written submission to the Panel, para. 265.
[116] European Union's second written submission to the Panel, para. 72. (fn omitted)

during the interim review stage, the United States reaffirmed that it was not pursuing the claims with respect to those two measures.[117] The United States confirmed at the first session of the oral hearing in these appellate proceedings that it considered the European Union to have "withdrawn" the subsidy arising out of the Mühlenberger Loch measure in a way that ceased its adverse effects.[118]

5.20. As discussed above, a "disagreement" under Article 21.5 as to the consistency with the WTO agreements of a measure taken to comply "arises from the existence of conflicting views: the original complainant's view that such a measure is inconsistent with the WTO agreements or brings about only partial compliance, and the original respondent's view that a measure is consistent with the WTO agreements and brings about full compliance with the DSB's recommendations and rulings".[119] In accordance with Article 11 of the DSU, it is for the panel to determine whether an objectively identifiable "disagreement" within the meaning of Article 21.5 exists between the parties.

5.21. By including the Bremen Airport and Mühlenberger Loch measures in its Compliance Communication, the European Union took the view that those measures are consistent with the WTO agreements and brought the European Union into full compliance with the relevant recommendations and rulings by the DSB. It is our understanding, based on a collective reading of its representations before the Panel, that the United States did not take issue with or challenge this view held by the European Union.[120] Thus, in light of the United States' and European Union's statements before it, the Panel, in our view, rightly found that there was no "disagreement" for it to resolve within the meaning of Article 21.5 of the DSU.[121] With the United States having clarified that it did not take issue with the Bremen Airport and Mühlenberger Loch measures[122], the Panel was not, under the circumstances of the present case, required to rule on the merits of the claims of WTO-consistency and/or compliance in respect of the those two measures.

5.22. Finally, the European Union claims that the Panel acted inconsistently with Article 11 of the DSU by declining to assess whether the European Union had achieved withdrawal, within the meaning of Article 7.8 of the SCM Agreement, in respect of the Mühlenberger Loch and Bremen Airport measures.[123] The European Union submits that a panel acts inconsistently with Article 11 of the DSU if it declines to exercise validly established jurisdiction on the matter before it.[124] Recalling its position that the "disagreement" between the parties continued to exist throughout the Panel proceedings, the European Union asserts that the "matter" relating to the two measures at issue was properly before the Panel and should have been addressed by it.[125]

5.23. We agree with the European Union to the extent that it suggests that a panel acts inconsistently with Article 11 of the DSU if it declines to exercise validly established jurisdiction.[126] It does not, however, follow from this that, once jurisdiction has been established, a panel is required to rule on the substantive merits of each of the claims before it.[127] In the present case, we have not found fault in the Panel's conclusion that there was no "disagreement" between the parties with respect to the Bremen Airport and Mühlenberger Loch measures. In such circumstances, the Panel was not required to make findings on the existence and WTO-consistency

[117] Panel Report, para. 5.75.

[118] United States' response to questioning at the oral hearing.

[119] European Union's appellant's submission, para. 257 (quoting Appellate Body Reports, *US – Continued Suspension / Canada – Continued Suspension*, para. 347).

[120] Our understanding is confirmed by the United States' responses to questioning during the first session of the oral hearing in this appeal.

[121] Panel Report, para. 5.77.

[122] At the oral hearing in this appeal, the United States confirmed that it would not challenge the Bremen Airport and Mühlenberger Loch measures in new proceedings under Article 21.5 of the DSU given its view that the subsidies arising out of these measures did not cause adverse effects in the post-implementation period. (United States' response to questioning at the oral hearing)

[123] European Union's appellant's submission, para. 271.

[124] European Union's appellant's submission, para. 264 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 51).

[125] European Union's appellant's submission, para. 269.

[126] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 46 and 51.

[127] For example, a panel may validly decline to examine and rule on a particular claim for reasons of judicial economy provided it resolves the dispute at hand.

of those measures, and we therefore do not consider that the Panel erred under Article 11 of the DSU.

5.24. We further note that the Panel did not find that the European Union had acted in a WTO-inconsistent manner or failed to comply with its obligations under Article 7.8 of the SCM Agreement with respect to the Bremen Airport and Mühlenberger Loch measures. In these circumstances, we fail to see how the United States could request authorization to take countermeasures pursuant to Article 7.9 of the SCM Agreement and Article 22 of the DSU[128] with respect to any effects flowing from such measures. In this regard, we agree with the Panel that "the United States would not be entitled to request the suspension of concessions or other obligations under the covered agreements in relation {to} the Mühlenberger Loch and the Bremen Airport runway measures."[129]

5.25. For these reasons, we find that the Panel did not err by declining to make a finding as to whether the European Union had achieved compliance with respect to the Mühlenberger Loch aircraft assembly site measure and the Bremen Airport runway extension measure, and see no need to make further findings in respect of those measures.

5.2 Article 3.1(b) of the SCM Agreement

5.26. The United States seeks review of the Panel's finding that it failed to establish that the French, German, Spanish, and UK A350XWB LA/MSF contracts are inconsistent with Article 3.1(b) of the SCM Agreement because they grant subsidies contingent upon the use of domestic over imported goods. Should we find that the Panel erred in its interpretation of Article 3.1(b), then the United States requests that we reverse the Panel's finding, complete the legal analysis, and find that the French, German, Spanish, and UK A350XWB LA/MSF contracts grant subsidies contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b).[130]

5.27. We begin by summarizing the Panel's findings and the issues appealed before turning to consider the United States' appeal of the Panel's analysis.

5.2.1 The Panel's findings

5.28. The Panel began by setting out the factual background, including the two general types of evidence on which the United States based its argument under Article 3.1(b) of the SCM Agreement, namely: (i) the publicly available information regarding the existence of the Workshare Agreements; and (ii) the terms of each of the French, German, Spanish, and UK A350XWB LA/MSF contracts.[131] The Panel observed that subsidy payments in all four contracts depend on the recipient incurring expenses arising from A350XWB development and production activities, and that they require some, if not all, reimbursable expenses to arise from activities performed in the territory of the subsidy grantor. The Panel referred to this as the

[128] We note that, by virtue of Article 1.2 of the DSU, the DSU (including Article 21.5) applies "subject to such special or additional rules and procedures" as listed in Appendix 2 to the DSU. Articles 7.2 through 7.10 of the SCM Agreement are listed in Appendix 2 to the DSU. Article 7.10 states that, "{i}n the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist".

[129] Panel Report, para. 5.78. We also note the Panel's observation 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 Loch aircraft assembly site, both of which were found to cause adverse effects in the original proceeding." The Panel went on to state the European Union's position that "the terms of these subsidies were aligned to a market benchmark before the end of the implementation period". (Panel Report, fn 1847 to para. 6.1102) The Panel's observations make clear that it did not find the measures taken to comply at issue in these Article 21.5 proceedings to have WTO-inconsistent effects.

[130] United States' other appellant's submission, para. 23.

[131] Panel Report, paras. 6.754-6.773. Before the Panel, the United States argued that the relevant four member States granted A350XWB LA/MSF to Airbus in exchange for commitments to locate certain LCA production activities in the member States' territories and then use the LCA components made in such domestic production in downstream LCA production activities. The United States characterized this exchange of commitments as "Workshare Agreements". (Ibid., para. 6.780)

"Domestic A350XWB Development Contingency".[132] The Panel also detected three other types of contingencies in the terms of the **[BCI]** contracts.[133] While the Panel observed that none of the contracts explicitly required "the use of domestic over imported goods", it noted that they could nonetheless operate so as to require such use "whether alone or in combination".[134]

5.29. The Panel understood the United States to argue that both the publicly available information and the terms of the four A350XWB LA/MSF contracts demonstrate that "the A350XWB LA/MSF contracts are contingent {on} the use of domestic over imported goods."[135] However, the Panel found the publicly available information insufficient to support the proposition that the Workshare Agreements existed in a form distinct from the A350XWB LA/MSF contracts.[136] Turning to the terms of the four A350XWB LA/MSF contracts, the Panel began by noting that a degree of consistency is called for in the interpretation of Article III of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 3.1(b) of the SCM Agreement.[137] The Panel understood Article III:8(b) of the GATT 1994 to "suggest{} that the act of granting subsidies to firms so long 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" under Article 3.1(b) of the SCM Agreement.[138] The Panel added that "the practice of providing subsidies to firms only so long as they engage in domestic production activity can and will many times … increase{} consumption of domestic goods" thereby "limit{ing} competitive opportunities for relevant imported goods in certain markets".[139] The Panel emphasized, however, that "{s}ignificant problems arise … if such alterations in the conditions of competition … become the focus and determinant of whether a subsidy should be disciplined as being contingent on the use of domestic over imported goods."[140]

5.30. The Panel understood the United States to argue that the A350XWB LA/MSF contracts are "contingent on the *use* of domestic over imported goods" because they condition "the A350XWB LA/MSF subsidies' receipt on the *production* of domestic LCA goods".[141] The Panel found that the discipline of Article 3.1(b) is "narrow and specific" and that it is "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".[142] The Panel further found that "{n}one of the contingencies in the A350XWB LA/MSF contracts … operate in this manner with respect to any entity."[143] The Panel thus found 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 upon the use of domestic over imported goods is unsupported by sufficient evidence and therefore fails.[144]

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[132] Panel Report, para. 6.774.

[133] Panel Report, para. 6.774. In this regard, the Panel noted that: (i) the **[BCI]** contracts appear to condition subsidy payments on the recipient **[BCI]** on the development and/or production phases of the A350XWB project in the territory of the grantor (Domestic A350XWB Employment Contingency); (ii) the **[BCI]** contract appears to condition subsidy payments on the recipient maintaining a **[BCI]** (Domestic A350XWB Workshare Contingency); and (iii) the **[BCI]** contract appears to condition subsidy payments on the recipient maintaining certain **[BCI]** (Domestic Non-A350XWB Workshare Contingency). (Ibid.)

[134] Panel Report, para. 6.775. For purposes of its subsequent analysis, the Panel "assume{d} *arguendo*" that all the contingencies it had identified actually exist and, when satisfied, result in the manufacture of LCA-related goods in the territories of the respective grantors. (Ibid., para. 6.776)

[135] Panel Report, para. 6.780.

[136] Panel Report, para. 6.781. In particular, the Panel considered that the publicly available information was "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". (Ibid.)

[137] Panel Report, para. 6.783 (referring to Appellate Body Report, *Canada – Autos*, para. 140).

[138] Panel Report, para. 6.785. (fn omitted)

[139] Panel Report, para. 6.786.

[140] Panel Report, para. 6.787. In particular, the Panel noted that "disciplining such effects under Article 3.1(b) of the SCM Agreement transforms the provision into an effects-based provision, thereby significantly blurring … 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." (Ibid.)

[141] Panel Report, para. 6.788. (emphasis original)

[142] Panel Report, para. 6.788. (fn omitted)

[143] Panel Report, para. 6.788. (fn omitted)

[144] Panel Report, para. 6.790.

5.2.2 Arguments on appeal

5.31. The United States notes that, while it agrees with the Panel's reading of Article 3.1(b) of the SCM Agreement, at the time of these proceedings, a "competing interpretation" was under consideration in the *US – Tax Incentives* dispute.[145] The United States maintains that, if we find the "competing interpretation" of Article 3.1(b) developed by the panel in *US – Tax Incentives* to be correct, "then there is no question that the Panel {in the present case} erred in finding that the French, German, Spanish, and UK LA/MSF for the A350 XWB do not constitute import substitution subsidies prohibited by Article 3.1(b)."[146] The United States argues that, following this interpretation, "if (i) a subsidy is granted to a domestic producer conditional on the domestic siting of production activities to produce a domestic input in an industrial process, and (ii) a substitution of imported goods for these inputs would result in the producer's loss of the entitlement to the subsidy, then the subsidy is contingent on the use of domestic over imported goods, and therefore is inconsistent with Article 3.1(b)."[147] The United States submits that, because "the subsidies at issue in this dispute are contingent upon" a number of intermediate goods "being produced in the {European Union} and then used to manufacture the A350 XWB", "the goods are 'domestic goods' and therefore Airbus is required to use domestic over imported goods to receive the subsidy."[148] If we confirm this "competing interpretation", then the United States requests that we complete the legal analysis based on undisputed facts and Panel findings in this dispute, which establish that the French, German, Spanish, and UK A350XWB LA/MSF contracts are contingent upon the use of domestic over imported goods and therefore inconsistent with Article 3.1(b) of the SCM Agreement.[149]

5.32. Referring to "undisputed facts from each of the LA/MSF contracts containing the contingencies, as well as other relevant evidence"[150], the United States argues, for instance, that the French A350XWB *Protocole* requires **[BCI]**[151], and that these would be domestic goods for purposes of Article 3.1(b).[152] The United States adds that "it would be theoretically possible to import this good instead of using a domestic version".[153] The United States further submits that "the LA/MSF agreements address the comprehensive program undertaken by Airbus to develop and produce the A350 XWB, including inputs and tooling developed specifically for that model as well as the finished LCA."[154] According to the United States, "in manufacturing finished A350 XWBs, Airbus must use the **[BCI]**"[155], and "if **[BCI]**, Airbus would **[BCI]** French A350 XWB LA/MSF."[156] The United States submits that, accordingly, under the interpretation of Article 3.1(b) developed by the panel in *US – Tax Incentives*, the French A350XWB LA/MSF subsidy "is contingent on the use of domestic over imported **[BCI]** in breach of Article 3.1(b)".[157]

5.33. The European Union responds that the "assertions upon which the United States seeks the Appellate Body's review of the Panel's findings do not properly constitute an 'appeal' within the meaning of the DSU", and therefore fall outside the scope of appellate review under Article 17.6 of the DSU.[158] The European Union submits that the United States "agrees with the Panel's interpretation of Article 3.1(b)"[159] and does not allege any legal error in the Panel's interpretation

[145] United States' Notice of Other Appeal, para. 1; other appellant's submission, paras. 20-22.
[146] United States' other appellant's submission, para. 23.
[147] United States' other appellant's submission, para. 25. In addition, according to the United States, this interpretation "assumes that any good completed in a domestic territory is 'domestic' for purposes of Article 3.1(b), without the need to examine the significance of the operations undertaken in the domestic territory, the proportion of foreign content contained in the good, rules of origin, or any other considerations." (Ibid.)
[148] United States' other appellant's submission, para. 26.
[149] United States' other appellant's submission, para. 29.
[150] United States' other appellant's submission, para. 31.
[151] **[BCI]**
[152] United States' other appellant's submission, para. 34 (referring to French A350XWB *Protocole* (Panel Exhibit EU-(Article 13)-03 (BCI)); Panel Report, para. 6.757).
[153] United States' other appellant's submission, para. 34.
[154] United States' other appellant's submission, para. 34. (fn omitted)
[155] United States' other appellant's submission, para. 34.
[156] United States' other appellant's submission, para. 35.
[157] United States' other appellant's submission, para. 35.
[158] European Union's appellee's submission, para. 86.
[159] European Union's appellee's submission, para. 119 (quoting United States' Notice of Other Appeal, para. 1).

or application of this provision, or a failure to make an objective assessment of the matter under Article 11 of the DSU.[160] Instead, the United States "merely asserts that Article 3.1(b) 'can be given a different reading'" "without explaining what the legal error is supposed to be" in the present case.[161] The European Union requests us to reject the United States' appeal as falling outside the scope of appellate review under Article 17.6 of the DSU "because it is based on a case that is entirely different from the case advanced by the United States before the Panel" in this dispute.[162]

5.34. Moreover, the European Union argues that, even if we were to consider the United States' appeal, we should reject it on the merits.[163] According to the European Union, "the ordinary meaning of the terms used {in Article 3.1(b)} suggests that a subsidy contingent on domestic *production*, without more, does not fall within the prohibition set out in that provision."[164] The European Union further argues that "the line drawn by the {SCM} Agreement between prohibited … subsidies and actionable production subsidies would be blurred"[165] if "a requirement of domestic production of goods, coupled with the *fact* that those goods are used downstream, suffices to attract the prohibition" under Article 3.1(b).[166]

5.35. Finally, the European Union argues that the United States' request for completion of the legal analysis should be rejected because it relies on three categories of factual assertions that "were never made by the United States before the Panel", and which "{t}he European Union never had an opportunity to dispute".[167] The European Union details the relevant assertions for each of the four LA/MSF contracts as follows: (i) "'in manufacturing finished A350 XWBs, Airbus must use' the components that the subsidy recipient is allegedly required to produce" in France, Germany, Spain, or the UK, in order to receive LA/MSF for the A350XWB from the respective country[168]; (ii) for certain components that the A350XWB LA/MSF contracts "allegedly require{} the subsidy recipient to manufacture, 'it would be theoretically possible to import' the relevant component"[169]; and (iii) as interpreted by the United States, certain provisions in the French, German, Spanish, and UK A350XWB LA/MSF contracts[170] provide that "the subsidy recipient **[BCI]** the … LA/MSF loan if Airbus SAS used imported instead of domestically-produced components" in the assembly of the A350XWB.[171]

5.2.3 Whether the United States' appeal is within the scope of appellate review

5.36. We now turn to the European Union's request that we reject this aspect of the United States' appeal as falling outside the scope of appellate review under Article 17.6 of the DSU on the basis that the United States has not alleged on appeal that the Panel committed a legal error in its analysis of the United States' claim under Article 3.1(b) of the SCM Agreement.[172] The European Union finds support for its position in the language of Articles 16.4 and 17.13 of the DSU, as well as Rules 20(2)(d)(i), 21(2)(b)(i), and 23(2)(c)(ii)(A) of the Working Procedures.[173]

[160] European Union's appellee's submission, para. 119.
[161] European Union's appellee's submission, para. 120 (quoting United States' other appellant's submission, para. 21) and para. 121.
[162] European Union's appellee's submission, para. 148.
[163] European Union's appellee's submission, para. 185.
[164] European Union's appellee's submission, para. 192. (emphasis original)
[165] European Union's appellee's submission, para. 194 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1054) and para. 195.
[166] European Union's appellee's submission, para. 196. (emphasis original)
[167] European Union's appellee's submission, para. 215. (emphasis omitted)
[168] European Union's appellee's submission, para. 217 (quoting United States' other appellant's submission, paras. 26, 34, 36, 40, 42, 44, 46, 48, 50, 52, and 54 (emphasis added by the European Union)) and paras. 227, 238, and 248.
[169] European Union's appellee's submission, para. 217 (quoting United States' other appellant's submission, paras. 34 and 36) and paras. 227, 238, and 248.
[170] Namely, Article 9.1 of the French A350XWB *Protocole* (Panel Exhibit EU-(Article 13)-03 (BCI)), **[BCI]** of the German KfW A350XWB Loan Agreement (Panel Exhibit EU-(Article 13)-14-ENG (BCI)), Clause 11 of the Spanish A350XWB *Convenio* (Panel Exhibit EU-(Article 13)-29 (BCI)), and Section 21.14 of the UK A350XWB Repayable Investment Agreement (Panel Exhibit EU-(Article 13)-30 (BCI)).
[171] European Union's appellee's submission, para. 217 (referring to United States' other appellant's submission, paras. 35, 37, 41, 43, 45, 47, 49, 51, 53, and 55) and paras. 227, 238, and 248.
[172] European Union's appellee's submission, paras. 114-144.
[173] European Union's appellee's submission, paras. 116-117.

The European Union adds that the United States has failed to provide arguments in support of any "specific allegations of errors"[174] and improperly seeks to litigate a new case before the Appellate Body, in that it asserts the existence of an express requirement to "use" domestic over imported goods on the basis of the terms of the French, German, Spanish, and UK A350XWB LA/MSF contracts, and in particular by reference to the **[BCI]** clauses in those contracts.[175] We address each of these claims in turn below.

5.37. According to Article 17.6 of the DSU, appellate review centres on "issues of law covered in the panel report and legal interpretations developed by the panel". In turn, Article 17.12 of the DSU calls upon the Appellate Body to "address each of the issues raised" on appeal in accordance with Article 17.6. In exercising its mandate, the Appellate Body may thus be called upon to review any aspect of a panel's legal analysis. Moreover, according to Article 3.2 of the DSU, the dispute settlement system "is a central element in providing security and predictability to the multilateral trading system", and "serves to preserve the rights and obligations of Members under the covered agreements" and "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".[176] Article 3.7 further states that "{t}he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Therefore, the Appellate Body's review of issues of law covered in a panel report and legal interpretations developed by a panel should be seen as part of its duty under Article 17.12 of the DSU to "address each of the issues raised"[177], which, as provided for under Articles 3.2 and 3.7, may require it to "clarify the existing provisions" of the covered agreements with a view to securing a "positive solution to a dispute" between the parties and ensuring the "security and predictability" of the multilateral trading system. The Appellate Body has noted that such "{c}larification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements" and that "the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case."[178]

5.38. The European Union does not contest that the Panel's interpretation and application of Article 3.1(b) constitute issues of law that the Appellate Body must address if properly raised; rather, it submits that the United States has failed to "appeal" an issue of law or a legal interpretation, because it did not raise a specific allegation of error before the Appellate Body regarding the manner in which the Panel in this dispute interpreted and applied Article 3.1(b). In the European Union's view, the United States "*agrees* with the interpretation of Article 3.1(b) set out in the Panel Report" and, on appeal, "merely asserts that Article 3.1(b) 'can be given a different reading'", without explaining what the Panel's legal error is.[179]

5.39. We begin by considering the nature of the United States' appeal. In its Notice of Other Appeal, the United States frames its appeal as follows:

> The United States seeks review by the Appellate Body of the Panel's finding that the United States failed to establish that the French, German, Spanish, and UK LA/MSF subsidies for Airbus's A350 XWB constituted prohibited import substitution subsidies, within the meaning of Article 3.1(b) of the *Agreement on Subsidies and Countervailing*

[174] European Union's appellee's submission, paras. 145-147.
[175] European Union's appellee's submission, paras. 148-183.
[176] Article 3.2 also provides that "{r}ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."
[177] Therefore, while Article 17.13 clarifies that the Appellate Body "may uphold, modify or reverse the legal findings and conclusions of the panel", Article 17.12 confirms that the Appellate Body's mandate in addressing a panel's "legal findings and conclusions" on appeal is not limited to these actions. For instance, in *US – Carbon Steel (India)*, India argued that "the United States' request for the Appellate Body to clarify the meaning of Article 1.1(a)(1) of the SCM Agreement should be rejected because, in seeking such a clarification, the United States {was} not challenging 'issues of law covered in the panel report and legal interpretations developed by the panel'." (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.13) Based on its analysis, the Appellate Body found, however, that the United States' "request for clarification" fell within the ambit of that appeal, and the Appellate Body was therefore required to adjudicate it. (Ibid., para. 4.15) See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.310.
[178] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.
[179] European Union's appellee's submission, para. 120 (quoting United States' other appellant's submission, para. 21). (emphasis original)

> *Measures* ("SCM Agreement"). While the United States agrees with the Panel's interpretation of Article 3.1(b), a competing interpretation is under consideration in another dispute, *US – Conditional Tax Incentives for Large Civil Aircraft* (DS487). If the Appellate Body were to determine that this competing interpretation of Article 3.1(b) is correct, then the Panel here erred in its interpretation and application of Article 3.1(b) and its finding that the French, German, Spanish, and UK LA/MSF for the A350 XWB do not constitute import substitution subsidies prohibited by Article 3.1(b).[180]

5.40. In its other appellant's submission, the United States further clarifies the meaning and content of its Notice of Other Appeal and the nature of its claims of error. It explains that, "*to the extent that* the Appellate Body considers that {another} interpretation of Article 3.1(b) is correct, and the Panel's interpretation of that provision is incorrect", the Panel "erred in finding that the French, German, Spanish, and UK LA/MSF for the A350 XWB do not constitute import substitution subsidies prohibited by Article 3.1(b)".[181] In this regard, the United States notes that the Panel found that "subsidies conditioned on the domestic production of inputs to be used in the manufacture of the A350 XWB are not prohibited under Article 3.1(b)".[182] The United States observes, however, that "Article 3.1(b) can be given a different reading", that it advocated this reading before the Panel in the present dispute, and that the panel in *US – Tax Incentives* agreed with this other reading of Article 3.1(b).[183] The United States underscores that this other reading of Article 3.1(b) may not be "the best interpretation" of this provision, but emphasizes that it "has an interest in ensuring that the same legal approach is applied" in this case and in *US – Tax Incentives*.[184]

5.41. As we see it, the United States contends that, *depending on* our reading of Article 3.1(b) of the SCM Agreement, the Panel erred in its application of Article 3.1(b) to the facts of the present case, and in particular in finding that the relevant A350XWB LA/MSF do not constitute import substitution subsidies prohibited by Article 3.1(b).[185] Specifically, in its other appellant's submission, the United States describes the approach of the Panel in the present case[186], and sets out the elements of what it considers to constitute a different interpretation, including by reference to its arguments before the Panel.[187] Based on our reading of the United States' Notice of Other Appeal together with its other appellant's submission, and as clarified by the United States at the oral hearing, we understand the United States' request to be that, if we consider the Panel to have erred in its interpretation of Article 3.1(b), we review the Panel's application of this provision, and in particular its finding that the United States has not established that the French, German, Spanish, and UK A350XWB LA/MSF contracts are inconsistent with Article 3.1(b).[188] Therefore, in our view, in its appeal, the United States has identified "issues of law covered in the panel report and legal interpretations developed by the panel", within the meaning of Article 17.6 of the DSU, with regard to the Panel's interpretation and application of Article 3.1(b) of the SCM Agreement.

5.42. We also consider that the United States has "alleged errors" and identified "specific allegations of errors" within the meaning of Rules 21(2)(b)(i), 23(2)(c)(ii)(A), and 23(3) of the Working Procedures with regard to the Panel's interpretation and application of

[180] United States' Notice of Other Appeal, para. 1. (fn omitted)
[181] United States' other appellant's submission, para. 23. (emphasis added)
[182] United States' other appellant's submission, para. 20 (referring to Panel Report, para. 6.790).
[183] United States' other appellant's submission, paras. 20-21.
[184] United States' other appellant's submission, para. 22.
[185] United States' other appellant's submission, para. 23.
[186] United States' other appellant's submission, paras. 19-20 and 27.
[187] United States' other appellant's submission, paras. 21, 25, and 28.
[188] United States' other appellant's submission, paras. 23, 26, and 29. The United States further requests that we complete the legal analysis and find that the four A350XWB LA/MSF contracts at issue are inconsistent with Article 3.1(b).

Article 3.1(b).[189] In particular, in its Notice of Other Appeal and other appellant's submission, the United States alleges an error in the Panel's application of Article 3.1(b), conditional upon the existence of an error in the Panel's interpretation of this provision. We are therefore called upon to review and clarify the proper meaning of Article 3.1(b), and, if we find that the Panel erred, to examine whether we are in a position to complete the legal analysis and rule on the conformity of the measures at issue with this provision.

5.43. The European Union also argues that the United States' appeal is based on a "hypothetical" situation that does not arise in the present dispute.[190] According to the European Union, "{c}onsiderations relating to {*US – Tax Incentives*} cannot serve as a basis for appellate review, in these proceedings, of interpretative findings allegedly under consideration by a *different* panel in a *different* dispute, and cannot serve as a surrogate for a valid allegation of error by the Panel in this dispute."[191] However, contrary to what the European Union argues, the United States is not simply asking us "to address an interpretive position" because of the asserted relevance of this position to the dispute in *US – Tax Incentives*.[192] Instead, while the United States refers to the interpretation of Article 3.1(b) developed by the panel in that dispute, it requests that we review the interpretation of this provision developed by the Panel *in this dispute*. As observed, if we find that the Panel erred in its interpretation of Article 3.1(b), then the United States considers that we should reverse the Panel's findings applying Article 3.1(b) to the measures at issue and complete the legal analysis.[193] We therefore disagree with the European Union to the extent that it claims that the United States' request to review the interpretation and application of Article 3.1(b) adopted by the Panel in the present dispute constitutes a "hypothetical" situation.

5.44. Insofar as the United States has appealed an issue of law covered in this Panel Report, or a legal interpretation of the Panel in this case, the fact that a similar interpretative issue may have arisen in the context of another dispute is not relevant for the admissibility of the present appeal. In fact, there is nothing exceptional about participants referring to legal interpretations developed in other panel and Appellate Body reports in support of their arguments on appeal.

5.45. The European Union further asserts that the United States' other appellant's submission fails to provide "legal arguments" in support of the "specific allegations of errors" as required by the Working Procedures, insofar as it "offers no explanation of how the (alleged) two interpretations (allegedly) 'compete', using the customary rules of interpretation of public international law found in the *Vienna Convention on the Law of Treaties*".[194] In the European Union's view, this is because "there are no 'competing interpretations' in the sense alleged by the United States."[195]

5.46. We consider that, in its other appellant's submission, the United States adequately provides legal arguments in support of its request for us to review the Panel's interpretation and application of Article 3.1(b). While referring to the interpretation and reasoning developed by the panel in *US – Tax Incentives*, the United States has included and further developed legal argumentation on that basis in its submission filed in this appeal. More specifically, the United States sets out, albeit briefly, a reading of Article 3.1(b) that would arguably lead to a finding of inconsistency under this

[189] We recall that, pursuant to Rule 23(2)(c)(ii)(A) of the Working Procedures, a Notice of Other Appeal shall include "a brief statement of the nature of the other appeal, including … identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel". In turn, pursuant to Rules 21(2)(b)(i) and 23(3), an other appellant's submission shall set out "a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof". The Working Procedures therefore contemplate that a Notice of Other Appeal will identify "alleged errors", and that an other appellant's submission will set out "specific allegations of errors" with regard to a panel's interpretation and/or application of the covered agreements.

[190] European Union's appellee's submission, para. 121 (referring to Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.378).

[191] European Union's appellee's submission, para. 125. (emphasis original)

[192] European Union's appellee's submission, para. 130.

[193] United States' other appellant's submission, para. 23.

[194] European Union's appellee's submission, paras. 145-146 (referring to Rules 21(2)(b)(i) and 23(3) of the Working Procedures). (emphasis original)

[195] European Union's appellee's submission, para. 146.

provision in the present case.[196] The United States also contrasts this with the approach taken by the Panel[197], and concludes:

> This raises a threshold interpretive question that the Appellate Body has yet to consider. Where a subsidy is contingent not only on the production of a finished good, but is also contingent on the production, in the grantor's territory, of intermediate goods for use as inputs (or goods used to produce other goods, *i.e.*, instrumentalities of production) − which are then presumed to be "domestic" − in manufacturing the downstream good, is the subsidy in breach of Article 3.1(b)?[198]

5.47. Notwithstanding the terminology used by the United States, the question before us is not whether the interpretation of Article 3.1(b) by the Panel in the present dispute is different from the interpretation of this provision by the panel in *US − Tax Incentives*. Rather, we are called upon to examine whether the Panel here erred in its interpretation and application of Article 3.1(b). Consistent with the principle *jura novit curia*, it was not the responsibility of the United States to provide us with the "correct" legal interpretation of Article 3.1(b)[199], nor does the United States' appeal of the Panel's interpretation of Article 3.1(b) fall outside the scope of appellate review merely because the United States has expressed an opinion as to a "preferred" interpretation.

5.48. We see in the United States' request and in its stated "interest in ensuring that the same legal approach is applied in this proceeding and in {*US − Tax Incentives*}"[200] a reflection of Article 3.2 of the DSU, which provides that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system, and that it serves to preserve the rights and obligations of Members under the covered agreements, as well as to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

5.49. Regarding the admissibility of the United States' appeal, the European Union also submits that the United States improperly "seeks to litigate a fundamentally different case" on appeal than the one it did before the Panel[201] by basing its appeal "on factual assertions about the content and meaning of specific provisions of the A350XWB LA/MSF contracts *never referred to by the United States when laying out it{s} case to the compliance Panel*".[202] The European Union underscores in this regard that, while the four A350XWB LA/MSF contracts form part of the Panel record, "the *meaning in municipal law* that the United States accords to" the **[BCI]** clauses was not argued before the Panel, and that a proper determination as to the meaning of those clauses would require us "to entertain complex new factual arguments", including arguments that we would need "to solicit, receive and review from the European Union".[203]

5.50. In previous disputes, the Appellate Body has considered that "new arguments are not *per se* excluded from the scope of appellate review, simply because they are new."[204] At the same time, the ability of the Appellate Body to consider new arguments is circumscribed by its mandate under Article 17.6 of the DSU to address "issues of law covered in the panel report and legal interpretations developed by the panel".[205] Thus, the Appellate Body has found that it would not be able to consider new arguments if such arguments required it "to solicit, receive and review new facts", or if a new argument did "not involve either an 'issue of law covered in the panel report' or

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[196] United States' other appellant's submission, paras. 25-26.
[197] United States' other appellant's submission, para. 27.
[198] United States' other appellant's submission, para. 28.
[199] See Appellate Body Report, *EC − Tariff Preferences*, para. 105.
[200] United States' other appellant's submission, para. 22.
[201] European Union's appellee's submission, para. 168.
[202] European Union's appellee's submission, para. 172. (emphasis original)
[203] European Union's appellee's submission, paras. 181-182. (emphasis original) We recall that the **[BCI]** clauses on which the United States relies are Article 9.1 of the French A350XWB *Protocole* (Panel Exhibit EU-(Article 13)-03 (BCI)), **[BCI]** of the KfW A350XWB Loan Agreement (Panel Exhibit EU-(Article 13)-14-ENG (BCI)), Clause 11 of the Spanish LA/MSF *Convenio* (Panel Exhibit EU-(Article 13)-29 (BCI)), and Article 21.14 of the UK A350XWB Repayable Investment Agreement (Panel Exhibit EU-(Article 13)-30 (BCI)).
[204] See e.g. Appellate Body Report, *Canada − Aircraft*, para. 211.
[205] Appellate Body Reports, *Canada − Aircraft*, para. 211; *US − FSC*, paras. 102-103.

'legal interpretations developed by the panel'".[206] As we see it, the United States' argument on appeal is not new in the sense that it involves an issue of law that was not covered in the Panel Report.[207] However, we understand the European Union to argue that, to the extent that the United States relies, only on appeal, on certain clauses in the French, German, Spanish, and UK A350XWB LA/MSF contracts to establish the existence of an inconsistency under Article 3.1(b), its claim falls outside the scope of appellate review under Article 17.6 of the DSU.

5.51. We recall in this regard that we have no authority to solicit, receive, and review new facts that were not before the Panel and were not considered by it.[208] The Appellate Body can review a Member's municipal law on its face "to determine whether the legal characterization by the panel was in error"[209], focusing on its text, the context of the provision, and the "overall structure and logic"[210] of the municipal law.[211] However, in instances where a panel's assessment of municipal law goes "beyond the text of an instrument on its face" and "further examination may be required {which} may involve factual elements", the Appellate Body will not lightly interfere on appeal with a panel's finding.[212]

5.52. The **[BCI]** clauses are part of the French, German, Spanish, and UK A350XWB LA/MSF contracts and are therefore part of the Panel record. We note, however, that the meaning of those clauses and how they would operate were not examined by the Panel in any detail. Therefore, to the extent that the proper construction of the **[BCI]** clauses and their operation in practice under the municipal laws of the four member States would require us to go beyond the text of those clauses and may involve the examination of factual elements, the analysis of those clauses would, as we see it, extend beyond our mandate under Article 17.6 of the DSU and may prejudice the due process rights of the European Union.[213] The absence of Panel findings and further exploration by the Panel concerning the meaning of the **[BCI]** clauses may well have a bearing on our ability to complete the legal analysis, in the event that we reverse the Panel's findings under Article 3.1(b) of the SCM Agreement. However, the absence of such factual findings does not preclude us from examining the United States' arguments regarding the Panel's articulation of the legal standard under Article 3.1(b), and whether, by reason of this legal standard, the Panel erred in finding that the A350XWB LA/MSF subsidies do not constitute import substitution subsidies prohibited by Article 3.1(b).

5.53. In light of the foregoing, we find that the United States' appeal under Article 3.1(b) of the SCM Agreement falls within the scope of appellate review under Article 17.6 of the DSU, and is properly before us. We therefore proceed to examine the merits of the United States' appeal regarding the Panel's interpretation and application of Article 3.1(b) of the SCM Agreement.

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[206] Appellate Body Report, *US – FSC*, paras. 102-103. Similarly, in *US – COOL (Article 21.5 – Canada and Mexico)*, the Appellate Body observed that it could not consider a new argument on appeal, if that would have required it "to address legal issues quite different from those which confronted the {p}anel and which may well {have} require{d} proof of new facts". (Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.349 (quoting Appellate Body Report, *US – FSC*, para. 103))

[207] The United States argued before the Panel that "all four A350XWB LA/MSF contracts are conditioned on Airbus producing specific Airbus LCA components in the relevant member States' territories", that "{t}hose components, therefore, become domestic goods of the relevant member States, and are then used in downstream Airbus LCA production activity" and, "therefore, that the contracts 'effectively require{} Airbus to source a large part of its components' from domestic sources." (Panel Report, para. 6.748 (quoting United States' first written submission to the Panel, para. 239; referring to second written submission to the Panel, paras. 338-355)) On appeal, the United States argues that "there is no question that, in manufacturing finished A350 XWBs", Airbus must use the **[BCI]**. (United States' other appellant's submission, paras. 34, 36, 40, 42, 44, 46, 48, 50, 52, 54, 59, 63, and 68)

[208] Appellate Body Report, *Canada – Aircraft*, para. 211. See also Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 240-242.

[209] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.99 (quoting Appellate Body Reports, *China – Auto Parts*, para. 225).

[210] Appellate Body Reports, *China – Auto Parts*, para. 238.

[211] Appellate Body Reports, *China – Auto Parts*, paras. 225-245; *China – Publications and Audiovisual Products*, para. 177.

[212] Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.99; *China – Auto Parts*, para. 225.

[213] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 222. See also Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, paras. 13-15.

5.2.4 The legal standard under Article 3.1(b) of the SCM Agreement

5.54. 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.

Article 3.2 adds that "{a} Member shall neither grant nor maintain subsidies referred to in paragraph 1."

5.55. The SCM Agreement distinguishes between two categories of subsidies: prohibited subsidies (Part II of the Agreement); and actionable subsidies (Part III of the Agreement). The granting of subsidies is not, in and of itself, prohibited under the SCM Agreement; nor does the granting of subsidies constitute, without more, an inconsistency with that Agreement.[214] Only subsidies contingent upon export performance within the meaning of Article 3.1(a) (commonly referred to as export subsidies), or contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) (commonly referred to as import substitution subsidies), are prohibited *per se* under Article 3 of the SCM Agreement.[215] In any event, subsidies, if specific, are disciplined under Part III of the SCM Agreement, but a complaining Member must demonstrate the existence of adverse effects under Article 5 of that Agreement.

5.56. Article 3.1(b) of the SCM Agreement prohibits subsidies the granting of which is "contingent ... upon the use of domestic over imported goods". The Appellate Body has found that the legal standard for establishing the existence of "contingency" under Article 3.1(b) is the same as under Article 3.1(a) of the SCM Agreement.[216] Since the ordinary meaning of "contingent" is "conditional" or "dependent for its existence on something else", a subsidy would be prohibited under Article 3.1(b) if it is "conditional" or "dependent for its existence on" the use of domestic over imported goods.[217] Therefore, a subsidy would be "contingent" upon the use of domestic over imported goods where the use of those goods is a condition, in the sense of a requirement[218], for receiving the subsidy.[219]

5.57. The Appellate Body in *US – Tax Incentives* noted that the term "use" in Article 3.1(b) refers to the action of using or employing something[220] and "may, depending on the particular circumstances, refer to consuming a good in the process of manufacturing, but may also refer to, for instance, incorporating a component into a separate good, or serving as a tool in the

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[214] See Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47.

[215] In accordance with Article 2.3 of the SCM Agreement, any subsidy falling under the provisions of Article 3 shall be deemed to be "specific". A complaining Member that is able to prove the existence of such a prohibited subsidy need not demonstrate that the subsidy also causes adverse effects to the interests of other Members within the meaning of Articles 5 and 6 of the SCM Agreement.

[216] Appellate Body Report, *Canada – Autos*, para. 123.

[217] Appellate Body Report, *Canada – Autos*, para. 123 (referring to Appellate Body Report, *Canada – Aircraft*, para. 166).

[218] For instance, the Appellate Body observed in *Canada – Autos* that the measure at issue in that case would be inconsistent with Article 3.1(b) if "the use of domestic goods {was} a necessity and thus {} required as a *condition* for eligibility" under the measure. (Appellate Body Report, *Canada – Autos*, para. 130 (emphasis original))

[219] Appellate Body Report, *Canada – Autos*, para. 126. The link between "contingency" and "conditionality" is also borne out by the text of Article 3.1(b), which states that import substitution contingency can be the sole or "one of several other *conditions*". (Appellate Body Report, *Canada – Aircraft*, para. 166 (emphasis added by the Appellate Body)) As with Article 3.1(a), this "relationship of conditionality or dependence" lies at the "very heart" of the legal standard in Article 3.1(b) of the SCM Agreement. (Appellate Body Reports, *Canada – Aircraft*, para. 171; *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47)

[220] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.374 and fn 1009 thereto (referring to *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3484).

production of a good."[221] The Appellate Body also noted that the term "goods" in Article 3.1(b) is qualified by the adjectives "domestic" and "imported", which implies that the "goods" concerned should be at least potentially tradable.[222] Finally, the term "over" expresses a preference between two things and, in the context of the phrase "contingent … upon the use of domestic over imported goods", refers to the use of domestic goods in preference to, or instead of, imported goods.[223]

5.58. The term "contingency" under Article 3.1(b) covers contingency both in law and in fact, but the legal standard expressed by the term "contingent" is the same for *de jure* and *de facto* contingency.[224] A subsidy will be *de jure* contingent upon the use of domestic over imported goods "when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure", or can "be derived by necessary implication from the words actually used in the measure".[225] The Appellate Body has observed that proving *de facto* contingency "is a much more difficult task".[226] The existence of *de facto* contingency "must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case".[227] Factors that may be relevant in this regard include the design and structure of the measure granting the subsidy, the modalities of operation set out in such a measure, and 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.[228] While these factors have been relied upon in addressing *de facto* contingency under Article 3.1(a), the Appellate Body considered in *US – Tax Incentives* that they are also relevant to a *de facto* contingency analysis under Article 3.1(b).

5.59. Where an analysis of contingency does not yield a finding of inconsistency under Article 3.1(b) on the basis of the words actually used in the measure, or any necessary implication therefrom, the existence of a requirement to use domestic over imported goods may still be found on the basis of the above-mentioned factors and factual circumstances that form part of the total configuration of the facts constituting and surrounding the granting of the subsidy.[229] The Appellate Body in *US – Tax Incentives* noted that the analysis of *de jure* and *de facto* contingency under Article 3.1(b), in light of the above-mentioned factors and circumstances, should be understood as a continuum, and a panel should conduct a holistic assessment of all relevant elements and evidence on record.[230]

5.60. Accordingly, Article 3.1(b) prohibits those subsidies that are *de jure* or *de facto* contingent such that they require the use of domestic goods in preference to, or instead of, imported goods as a condition for receiving the subsidy. While the distinction between *de jure* and *de facto* contingency lies in the "evidence {that} may be employed to prove" that a subsidy is contingent upon the use of domestic over imported goods[231], in both its *de jure* and *de facto* analyses, a panel assesses the consistency of the granting of a subsidy under Article 3.1(b) with the same obligation and against a single legal standard of contingency. In each case, an assessment of whether a subsidy is contingent within the meaning of Article 3.1(b) requires a thorough analysis

[221] Appellate Body Report, *US – Tax Incentives*, para. 5.8.

[222] Appellate Body Report, *US – Tax Incentives*, para. 5.9. This term may refer to any type of good that may be used by the subsidy recipient, including parts or components that are incorporated into another good, materials or substances that are consumed in the production process of another good, or tools or instruments that are used in the production process. (Ibid.)

[223] Appellate Body Report, *US – Tax Incentives*, para. 5.11.

[224] Appellate Body Reports, *Canada – Aircraft*, para. 167; *Canada – Autos*, para. 143.

[225] Appellate Body Report, *Canada – Autos*, paras. 100 and 123.

[226] Appellate Body Report, *Canada – Aircraft*, para. 167.

[227] Appellate Body Report, *Canada – Aircraft*, para. 167. (emphasis original)

[228] Appellate Body Report, *US – Tax Incentives*, para. 5.12 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1046).

[229] Appellate Body Report, *US – Tax Incentives*, para. 5.13. In that report, the Appellate Body mentioned that, for instance, factual circumstances potentially relevant to an assessment of whether a subsidy is *de facto* contingent may include the existence of a multi-stage production process, the level of specialization of the subsidized inputs, or the level of integration of the production chain in the relevant industry. (Ibid., fn 49 to para. 5.13)

[230] Appellate Body Report, *US – Tax Incentives*, para. 5.13.

[231] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, fn 46 to para. 47 (quoting Appellate Body Report, *Canada – Aircraft*, para. 167).

of whether the conditional relationship between the granting of the subsidy and the use of domestic over imported goods is objectively observable on the basis of a careful and rigorous scrutiny of all the relevant evidence. This is especially important when the alleged contingency is not clearly expressed in the language used in the relevant legal instrument.[232]

5.61. The Appellate Body in *US – Tax Incentives* further observed that, insofar as, by its terms, Article 3.1(b) does not prohibit the subsidization of domestic "production" *per se*, but rather the granting of subsidies contingent upon the use of domestic over imported goods, subsidies that relate to domestic production are not, for that reason alone, prohibited under Article 3 of the SCM Agreement.[233] In particular, such subsidies can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy.[234]

5.62. With regard to the relevance of Article III:8(b) of the GATT 1994, we note that this provision exempts from the national treatment obligation in Article III "the payment of subsidies exclusively to domestic producers", and thus makes clear that the provision of subsidies to domestic producers only, and not to foreign producers, does not in itself constitute a breach of Article III.[235] The Appellate Body in *US – Tax Incentives* observed that, while Article III:8(b) of the GATT 1994 comports with a reading of Article 3.1(b) of the SCM Agreement under which something more than mere subsidization of domestic production is required for finding an import substitution subsidy, a subsidy exempt from the Article III national treatment obligation by virtue of it being paid exclusively to domestic producers within the meaning of Article III:8(b) of the GATT 1994 may still be found to be contingent upon the use by those producers of domestic over imported goods under Article 3.1(b) of the SCM Agreement.[236]

5.63. In light of the above, to the extent that no conditionality requiring the use of domestic over imported goods can be determined, but the effect of the subsidy is to displace or impede, or otherwise cause adverse effects to imports, those effects are disciplined under Part III of the SCM Agreement. In other words, the relevant question in determining the existence of contingency under Article 3.1(b) is not whether the eligibility requirements under a subsidy may *result* in the use of more domestic and fewer imported goods. Rather, the question is whether *a condition requiring* the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from its design, structure, modalities of operation, and the relevant factual circumstances constituting and surrounding the granting of the subsidy that provide context for understanding the operation of these factors.[237]

5.2.5 The United States' claim on appeal

5.64. In the interpretation section of its Report, the Panel summarized the jurisprudence of the Appellate Body under Article 3.1(b) of the SCM Agreement.[238] In particular, the Panel noted the Appellate Body's findings that "Article 3.1(b)'s scope covers both *de jure* and *de facto* contingency"[239] and "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".[240] The Panel further developed its understanding of Article 3.1(b) in applying this legal standard to the measures at issue in this dispute.[241] We proceed by reviewing the Panel's interpretation in light of our own understanding of the proper interpretation of Article 3.1(b) as set out above.

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[232] Appellate Body Report, *US – Tax Incentives*, para. 5.14.
[233] Appellate Body Report, *US – Tax Incentives*, para. 5.15. (referring to Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47).
[234] Appellate Body Report, *US – Tax Incentives*, para. 5.15.
[235] See Appellate Body Report, *US – Tax Incentives*, para. 5.16.
[236] Appellate Body Report, *US – Tax Incentives*, para. 5.16.
[237] Appellate Body Report, *US – Tax Incentives*, para. 5.18.
[238] See Panel Report, paras. 6.777-6.778.
[239] Panel Report, para. 6.778 (referring to Appellate Body Report, *Canada – Autos*, paras. 139-143).
[240] Panel Report, para. 6.778.
[241] Panel Report, paras. 6.782-6.789.

5.65. As the Appellate Body noted in *US – Tax Incentives*, both import substitution subsidies and other subsidies that relate to domestic production may have detrimental effects in respect of imported goods. Subsidies contingent upon import substitution, by their nature, adversely affect competitive conditions of imported goods. Yet, also subsidies that relate to the production of certain goods in a Member's domestic territory can ordinarily be expected to increase the supply of the subsidized goods in the relevant market, which would have the consequence of increasing the use of subsidized domestic goods downstream and adversely affecting imports. In the specific case of subsidies granted for the production of both an input and a final good, subsidy recipients would likely both "produce" and "use" the subsidized inputs in the production of the subsidized final good. Such subsidies would have consequences for the subsidized producers' input-sourcing decisions to the extent that, having been required to produce an input domestically, and for reasons of production costs and efficiency, they would likely use at least some of these inputs in their downstream production activities. This is even more so in instances where the subsidized input is specialized in nature or where vertical integration between the upstream and downstream stages of the production chain exists. However, while such subsidies may foster the use of subsidized domestic goods and result in displacement in respect of imported goods, such effects do not, in and of themselves, demonstrate the existence of a requirement to use domestic over imported goods.[242] As observed, the relevant question in determining the existence of contingency under Article 3.1(b) is not whether conditions for eligibility and access to the subsidy may *result* in the use of more domestic and fewer imported goods, but whether the measure reflects *a condition requiring* the use of domestic over imported goods.[243]

5.66. At the same time, we recall that whether a subsidy is contingent upon the use of domestic over imported goods has to be established on the basis of the total configuration of the facts constituting and surrounding the granting of the subsidy.[244] In particular, in discerning whether or not a *de facto* contingency exists, relevant factual circumstances may form part of the context for understanding the measure's design, structure, and modalities of operation in a particular market. The Appellate Body in *US – Tax Incentives* noted in this regard that the design and structure of a measure granting a subsidy may be adapted to factual circumstances – such as a multi-stage production process where specialized inputs and final goods are subsidized, or where the production chain is vertically integrated. The modalities of a measure so designed or structured may then operate such that conditions for eligibility or access to the subsidy may entail a condition requiring the use of domestic over imported goods.[245] Ultimately, whether a subsidy is simply conditional upon the domestic production of certain goods, or upon the use by the subsidy recipient of domestic over imported goods, should be assessed on a case-by-case basis.[246] We consider these observations made in *US – Tax Incentives* also useful for our review of the Panel's analysis under Article 3.1(b) in this appeal.

5.67. In the present case, the Panel began its analysis by addressing 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."[247] The Panel found Article III:8(b) to confirm 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."[248] The Panel considered this to suggest that "the act of granting subsidies to firms so long 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."[249]

5.68. As observed above, Article III:8(b) of the GATT 1994 comports with a reading of Article 3.1(b) of the SCM Agreement under which something more than mere subsidization of domestic production is required for finding the existence of an import substitution subsidy. That

[242] Appellate Body Report, *US – Tax Incentives*, para. 5.49.
[243] Appellate Body Report, *US – Tax Incentives*, para. 5.18.
[244] Appellate Body Report, *Canada – Aircraft*, para. 167.
[245] Appellate Body Report, *US – Tax Incentives*, para. 5.50.
[246] Appellate Body Report, *US – Tax Incentives*, para. 5.50.
[247] Panel Report, para. 6.783.
[248] Panel Report, para. 6.785.
[249] Panel Report, para. 6.785. (fn omitted)

said, a subsidy exempt from the Article III national treatment obligation by virtue of it being paid exclusively to domestic producers within the meaning of Article III:8(b) of the GATT 1994 may still be found to be contingent upon the use by those producers of domestic over imported goods under Article 3.1(b) of the SCM Agreement.[250] Thus, we do not disagree with the Panel's statement that "the act of granting subsidies to firms so long 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."[251] However, we do not see that this statement addresses the specific question of the circumstances under which domestic production subsidies may be found to be contingent upon the use of domestic over imported goods.

5.69. The Panel then distinguished subsidies found to be prohibited under Article 3.1(b) in previous cases from those domestic subsidies requiring the production of certain goods on domestic territory.[252] In particular, the Panel observed that prohibited import substitution subsidies would be those that "contain{} 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."[253] By contrast, "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."[254] In the Panel's view, while these latter subsidies could limit competitive opportunities for relevant imported goods in certain markets, Part III, and not Part II, of the SCM Agreement is concerned with such event chains.[255]

5.70. We see no error in the Panel's reading of Article 3.1(b) in this context. To begin with, the Panel rightly reasoned that a subsidy conditioning eligibility on the production of a certain good on domestic territory is not *per se* inconsistent with Article 3.1(b). As we have noted, while subsidies that relate to the production of certain goods in a Member's territory may foster the use of subsidized domestic goods and result in displacement in respect of imported goods, such effects do not, in and of themselves, demonstrate the existence of a requirement to use domestic over imported goods. The Panel similarly observed that the fact "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*."[256] We also agree with the Panel that basing the legal standard under Article 3.1(b) on the market effects of a subsidy would result in "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".[257] As we have observed, to the extent that no conditionality on the use of domestic over imported goods can be established, but the effects of the subsidy are to displace or impede, or otherwise cause adverse effects to imports, those effects are disciplined under Part III of the SCM Agreement.[258]

5.71. With regard to the legal standard under Article 3.1(b), the Panel stated that the phrase "contingent … upon the use of domestic over imported goods" refers to those subsidies that "contain{} elements requiring firms to use certain amounts of domestic goods as production inputs" and "condition{} the availability of the subsidy on discrimination between upstream sources of goods".[259] Moreover, the Panel observed that the discipline of Article 3.1(b) is "narrow and specific, activated by a subsidy that appropriates an entity's judgment by conditioning {the} receipt {of the subsidy} on that entity discriminating among inputs with respect to their domestic or imported nature, whether in law or in fact."[260] The Panel also correctly noted that the mere fact that the French, German, Spanish, and UK A350XWB LA/MSF contracts may "affect the

[250] Appellate Body Report, *US – Tax Incentives*, para. 5.16.
[251] Panel Report, para. 6.785. (fn omitted)
[252] Panel Report, para. 6.786 (referring to Panel Reports, *Indonesia – Autos*; *US – Upland Cotton*; Appellate Body Report, *Canada – Autos*, paras. 118-146). (additional text in fn 1418 thereto omitted)
[253] Panel Report, para. 6.786. (emphasis original; fn omitted)
[254] Panel Report, para. 6.786.
[255] Panel Report, paras. 6.786 and 6.788.
[256] Panel Report, fn 1422 to para. 6.788. (emphasis original)
[257] Panel Report, para. 6.787.
[258] See Appellate Body Report, *US – Tax Incentives*, para. 5.18.
[259] Panel Report, para. 6.786.
[260] Panel Report, para. 6.788. (fn omitted)

domestic/import composition of a supply of inputs …, thereby displacing or impeding competitive opportunities for relevant substitute imported goods", cannot in itself demonstrate the existence of a requirement, whether express or implicit, to use domestic over imported goods.[261] The focus of the Panel's legal standard under Article 3.1(b) on the need to establish a condition requiring the use of domestic over imported goods accords with our reading of this provision.

5.72. With regard to the Panel's references to "discrimination", we observe that the Appellate Body has held that Article 3.1(b) addresses discriminatory conduct.[262] Import substitution subsidies, by their nature, adversely affect competitive conditions of imported goods and thereby intrinsically distort the preferences of the subsidy recipient by requiring it to obtain goods from domestic sources, to the detriment of imports.[263] We consider that, in the context of the phrase "contingent … upon the use of domestic over imported goods", it is the word "over", linking the words "domestic" and "imported", that captures this inherent discriminatory nature of import substitution subsidies. Yet, also subsidies that relate to the production of certain goods in a Member's domestic territory can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, which would have the consequence of increasing the use of these subsidized domestic goods downstream, and have discriminatory effects in respect of imported goods. However, the legal standard under Article 3.1(b) requires establishing the existence of "contingency", namely, whether the measure granting the subsidy reflects a condition requiring the use of domestic over imported goods, and not whether the measure may result in any discriminatory effects to the detriment of imported goods.

5.73. We wish to highlight in this regard the following statement by the Panel:

> {R}ather 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.[264]

5.74. Since the granting of both subsidies concerning the production of inputs and final goods domestically and subsidies conditional upon the use of domestic over imported goods may result in "*discriminat{ion}* between upstream sources of domestic and imported goods in favour of the former", we do not consider that the distinction articulated by the Panel between a requirement under the subsidy relating to upstream sourcing decisions ("conditioning the availability of the subsidy on discrimination between upstream sources of goods") and effects occurring downstream resulting from the subsidy ("an effect occurring downstream from the mandated domestic production activity") is particularly useful in establishing the existence of contingency under Article 3.1(b).[265] However, we understand the Panel to have made this statement as an example illustrating its understanding of the legal standard under Article 3.1(b), namely, the need to establish the existence of a condition that requires the use of domestic over imported goods, as opposed to relying solely on the existence of displacement effects in respect of imported goods. Therefore, we do not consider that this statement undermines the Panel's articulation of the legal standard under Article 3.1(b).

5.75. Referring to the approach taken by the panel in *US – Tax Incentives*, the United States argues that the implication of that approach would be that, "if (i) a subsidy is granted to a domestic producer conditional on the domestic siting of production activities to produce a domestic input in an industrial process, and (ii) a substitution of imported goods for these inputs would result in the producer's loss of the entitlement to the subsidy, then the subsidy is contingent on the use of domestic over imported goods, and therefore is inconsistent with Article 3.1(b)."[266] We recall that the Appellate Body reversed the relevant findings appealed by the United States in

[261] Panel Report, para. 6.788.
[262] See Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.5.
[263] See Appellate Body Report, *US – Tax Incentives*, para. 5.49.
[264] Panel Report, para. 6.786. (emphasis added)
[265] Panel Report, para. 6.786. (emphasis original; fn omitted)
[266] United States' other appellant's submission, para. 25.

US – Tax Incentives. In so doing, the Appellate Body reasoned that, "{w}hile it is not unusual that, in order to receive a subsidy, the recipient is required to meet certain conditions", it was not entirely clear, in the circumstances of that case, "how the Washington Department of Revenue would exercise its discretion and whether a loss of the subsidy by the recipient, if these conditions are not met, would demonstrate the existence of a requirement to use domestic over imported goods."[267]

5.76. Indeed, as noted above, subsidies granted for the production of both an input and a final good may well have consequences for the subsidized producers' input-sourcing decisions to the extent that the producer would likely use at least some of the subsidized inputs in the production of the subsidized final good.[268] However, even if such subsidies are likely to affect adversely imported inputs, such effects cannot, in and of themselves, establish the existence of a requirement to use domestic over imported goods within the meaning of Article 3.1(b). Admittedly, factual circumstances such as the existence of a multi-stage production process, the level of specialization of the subsidized inputs, or the level of integration of the production chain in the relevant industry may form part of the context for understanding the design, structure, and modalities of operation of a measure granting a subsidy in a particular market.[269] Ultimately, however, whether a subsidy is simply conditional upon the domestic production of certain goods, or upon the use by the subsidy recipient of domestic over imported goods, should be assessed case by case on the basis of the terms of the measure at issue, their necessary implication, and other relevant factors and circumstances.[270]

5.77. In light of our analysis above, we uphold the Panel's interpretation of Article 3.1(b) of the SCM Agreement.

5.78. We note that the United States' appeal of the Panel's application of Article 3.1(b) and its request for us to complete the legal analysis are conditional upon us reversing the Panel's interpretation of Article 3.1(b).[271] Having upheld the Panel's interpretation of Article 3.1(b), we therefore do not need to examine the United States' arguments relating to the Panel's application of the legal standard under Article 3.1(b) to the facts of the present case. Nor do we need to address the United States' arguments concerning its request that we complete the legal analysis. In any event, we note that the meaning of the **[BCI]** clauses in the French, German, Spanish, and UK A350XWB LA/MSF contracts[272] and how they would operate was not discussed before and examined by the Panel in any detail. Thus, to the extent that the proper construction of those clauses and their operation in practice under the municipal laws of the four member States would require us to solicit and review new factual arguments, and in the absence of sufficient factual findings by the Panel or undisputed facts on the Panel record, any analysis of those clauses would extend beyond our mandate under Article 17.6 of the DSU and may prejudice the participants' due process rights.[273]

5.79. The Panel's finding that the United States' claim under Articles 3.1(b) and 3.2 of the SCM Agreement is unsupported by sufficient evidence therefore stands.[274]

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[267] Appellate Body Report, *US – Tax Incentives*, para. 5.73.
[268] Appellate Body Report, *US – Tax Incentives*, para. 5.49.
[269] Appellate Body Report, *US – Tax Incentives*, paras. 5.48 and 5.50.
[270] Appellate Body Report, *US – Tax Incentives*, para. 5.50.
[271] We recall that the United States argues that the Panel erred in its application of Article 3.1(b) of the SCM Agreement and requests us to reverse the Panel's findings that the French, German, Spanish, and UK LA/MSF for the A350XWB are not inconsistent with Article 3.1(b) "*to the extent that* the Appellate Body considers that … the Panel's interpretation of {Article 3.1(b)} is incorrect". (United States' other appellant's submission, para. 23 (emphasis added)) Moreover, at the oral hearing, the United States confirmed that what it is appealing is the interpretation of Article 3.1(b) adopted by the Panel in the present case.
[272] The United States raises on appeal the relevance of the so-called **[BCI]** clauses in the four A350XWB LA/MSF contracts, arguing that, in light of those clauses, if **[BCI]**, Airbus would **[BCI]** the A350XWB LA/MSF. (See e.g. United States' other appellant's submission, para. 35)
[273] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 222. See also Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 13.
[274] Panel Report, para. 6.790.

5.2.6 Conclusion

5.80. With respect to the admissibility of the United States' appeal under Article 3.1(b) of the SCM Agreement raised by the European Union, we find that the United States' appeal falls within the scope of appellate review under Article 17.6 of the DSU. In particular, we consider that the United States' appeal adequately identifies "issues of law covered in the panel report and legal interpretations developed by the panel" pursuant to Article 17.6 of the DSU, as well as "specific allegations of errors" within the meaning of the Working Procedures, with regard to the interpretation and application of Article 3.1(b) of the SCM Agreement. Regarding the merits of the United States' appeal, we uphold the Panel's interpretation of Article 3.1(b). While we have expressed concerns with certain aspects of the Panel's reasoning, the focus of the Panel's legal standard on the need to establish a condition requiring the use of domestic over imported goods comports with our reading of this provision.

5.81. Having upheld the Panel's interpretation of Article 3.1(b) of the SCM Agreement, we are not required to make findings regarding the application of this provision to the facts of the present case, or to address the United States' arguments concerning completion of the legal analysis. The Panel's finding that the United States' claim under Articles 3.1(b) and 3.2 of the SCM Agreement is unsupported by sufficient evidence therefore stands.

5.3 Benefit

5.82. We turn now to the European Union's appeal of the Panel's findings concerning the assessment of whether each of the French, German, Spanish, and UK A350XWB LA/MSF contracts confers a "benefit", and therefore constitutes a "subsidy", within the meaning of Article 1.1(b) of the SCM Agreement.[275]

5.83. In determining whether the A350XWB LA/MSF contracts confer a benefit, the Panel divided its analysis into two parts. First, the Panel assessed the expected rate of return on the loans provided to Airbus through each of the four A350XWB LA/MSF contracts.[276] Second, the Panel examined 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. In evaluating these two issues, the Panel sought to determine whether a benefit had been conferred, by conducting a comparison between the expected rates of return of the A350XWB LA/MSF contracts and the market benchmark rate of return.

5.84. The European Union's appeal concerns *only* the second aspect of the Panel's analysis, namely, the identification of the market benchmark rate of return. The Panel divided this part of its analysis into two main subsections: (i) the calculation of a *general corporate borrowing rate* that Airbus would have had to pay to a commercial lender to borrow money; and (ii) the calculation of a *project-specific risk premium* that represents the additional rate of return that a commercial lender would have required for offering financing to Airbus on the particular terms of the relevant A350XWB LA/MSF contracts.[277] On appeal, the European Union challenges the Panel's analysis regarding both the corporate borrowing rate and the project-specific risk premium. We begin by examining the European Union's appeal concerning the Panel's analysis of the corporate borrowing rate.

5.3.1 Corporate borrowing rate

5.85. The European Union argues that the Panel erred in identifying the corporate borrowing rate that served as a basis for the market benchmark used in the benefit analysis. In particular, the European Union takes issue with the fact that, in identifying the time period over which to

[275] European Union's Notice of Appeal, paras. 6-15; appellant's submission, paras. 276 and 328.

[276] In referring to the expected rates of return for each of the four A350XWB LA/MSF contracts, the United States used the terms "rate of return" and "interest rate". In turn, the European Union referred to the expected rates of return as the "internal rate of return" (IRR) of the A350XWB LA/MSF contracts. The Panel decided to use "rates of return" as a generic term, and referred to the European Union's proposed rates for the A350XWB LA/MSF contracts as "internal rates of return", or "IRR estimates". (Panel Report, fn 485 to para. 6.306)

[277] Panel Report, para. 6.350.

observe the corporate borrowing rate, the Panel erroneously relied on a *range* of *average* yields of the EADS bond at issue[278], rather than the yield of such a bond *on the day of conclusion* of each of the French, German, Spanish, and UK A350XWB LA/MSF contracts. The European Union therefore requests us to reverse the Panel's conclusion that the corporate borrowing rate component of the market benchmark in the present case can be based on "the average yields one-month prior and six-months prior to the conclusion of the contract, in the form of a range"[279], and, consequently, also the Panel's findings related to the corporate borrowing rate set out in Table 7 ("Corporate borrowing rate estimates") at paragraph 6.430 and Table 10 ("Approximate difference between rates of return and market benchmark rate") at paragraph 6.632 of its Report.[280]

5.86. The European Union brings two *principal* claims of error concerning the manner in which the Panel identified the time period over which to observe the corporate borrowing rate component of the market benchmark. First, the European Union contends that the Panel erred in its application of Article 1.1(b) of the SCM Agreement by rejecting data pertaining to the yield of the relevant EADS bond on the day of conclusion of each A350XWB LA/MSF contract. Second, the European Union asserts that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU, because its decision to reject the EADS bond yield on the day of conclusion of each A350XWB LA/MSF contract lacks an evidentiary basis and reflects a lack of objectivity and even-handedness.

5.87. In the event that we reject the above claims, the European Union brings two *conditional* claims − a claim of error in the application of Article 1.1(b) of the SCM Agreement and a claim of inconsistency with Article 11 of the DSU − challenging the Panel's decision to accept the average yield of the EADS bond over the six months prior to the conclusion of each of the A350XWB LA/MSF contracts as part of the range of average yields that was used to determine the corporate borrowing rate.[281]

5.88. Before addressing the European Union's claims of error, we begin by summarizing the Panel's findings.

5.3.1.1 The Panel's findings

5.89. Having determined the expected rates of return of the four A350XWB LA/MSF contracts, the Panel turned to examine 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 (i.e. the market benchmark rate of return). Before the Panel, the United States proposed constructing such a benchmark based on: (i) a general borrowing rate that the recipient (Airbus) would have had to pay to a market lender; plus (ii) a project-specific risk premium that represents the additional return that a lender would have required for offering financing on the particular terms of the relevant A350XWB LA/MSF contracts.[282] The European Union did not object to this approach for examining whether the A350XWB LA/MSF contracts confer a benefit. However, the Panel observed that the parties had diverging positions regarding *both* the general corporate borrowing rate *and* the project-specific risk premium.[283]

5.90. The Panel began by noting that the determination of the market benchmark rate of return raised the initial question of whether to use the rates derived from the data and regression models

[278] As explained in more detail below, the European Union proposed determining the corporate borrowing rate on the basis of bond data of Airbus' parent company, EADS. In particular, the European Union proposed using the EADS Finance B.V. 5.5% coupon 03/18 medium-term note (MTN), a bond issued on 24 September 2003 and maturing on 25 September 2018. (Panel Report, paras. 6.357-6.358)

[279] European Union's appellant's submission, para. 319 (quoting Panel Report, para. 6.389).

[280] European Union's appellant's submission, para. 319.

[281] We note that, in taking issue with the Panel's decision to include the average yield over the six months prior to the conclusion of each of the A350XWB LA/MSF contracts in the relevant time period over which to observe the EADS bond yield, the European Union does not appear to challenge the use of the one-month average yield of the EADS bond.

[282] Panel Report, para. 6.350.

[283] Panel Report, para. 6.351. The Panel observed, in particular, that the parties disagreed on not only what the values of the two components should be, but also what bases these values should be derived from. (Ibid.)

used in the original proceedings, as proposed by the United States, or from EADS' actual general borrowing costs, as proposed by the European Union.[284] The United States requested an expert − Dr James Jordan − to prepare a report calculating Airbus' corporate borrowing rate.[285] On the basis of this report, the United States presented general corporate borrowing rates that were based on the same data used to derive the general corporate borrowing rates applied in the original proceedings, updated to account for the timing of the conclusion of the relevant A350XWB LA/MSF contracts.[286] The European Union rejected the United States' approach, maintaining that, unlike in the original proceedings, the borrowing history and bond data of Airbus' parent company, EADS, were directly observable when the A350XWB LA/MSF contracts were concluded.[287] The European Union also relied on an expert − Professor Robert Whitelaw − to calculate the relevant corporate borrowing rate.[288] Professor Whitelaw asserted 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'."[289]

5.91. The Panel agreed with the European Union that the integration of the Airbus entities and the availability of the EADS bond data are relevant factual differences between the original and the compliance proceedings.[290] Thus, the Panel considered that using relevant bond data directly observable at the time that the A350XWB LA/MSF contracts were concluded − to the extent that such data reflect borrowing by the relevant entities − would, in principle, be preferable to the approach proposed by the United States.[291] However, before reaching its conclusion on the appropriate corporate borrowing rate for constructing the market benchmark, the Panel addressed a series of criticisms by the United States questioning the extent to which the EADS bond data may be used to construct the relevant corporate borrowing rates. In particular, the Panel examined the following four issues raised by the United States: (i) whether the EADS bond reflects the identity of the borrower; (ii) the relevant dates for observing the EADS bond yield; (iii) whether to adjust the EADS bond yield in terms of maturity and duration; and (iv) whether to add to the corporate borrowing rate an amount for normal fees and charges associated with general corporate borrowing on the market.[292]

5.92. With respect to the first issue, the United States questioned whether a bond representing the corporate borrowing rate of EADS − Airbus' parent company − is a good reflection of the general corporate borrowing rate associated with the Airbus entities with which the A350XWB LA/MSF contracts were concluded.[293] In the Panel's view, the borrowing rate can be expected to be closest to the parent company's borrowing rate where the parent is explicitly a co-contractor **[BCI]**. Noting that the German KfW A350XWB Loan Agreement and UK A350XWB LA/MSF contract implicate EADS directly as a co-contractor **[BCI]**, the Panel agreed with the European Union that the reference to EADS' corporate borrowing rate is appropriate for those two contracts.[294] By contrast, the Panel indicated that general corporate borrowing rates may be higher than the parent

[284] Panel Report, para. 6.352.

[285] See Dr James Jordan, NERA Economic Consulting, "Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks", 18 October 2012 (Jordan Report) (Panel Exhibit USA-475 (BCI/HSBI)).

[286] Panel Report, para. 6.353. In the original proceedings, the United States constructed a corporate borrowing rate for each of the four member States, using what limited bond data was then available regarding the relevant Airbus companies for the time periods in question and regression models and other techniques to fill data gaps. The constructed corporate borrowing rate for each of the four 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 in France and the United Kingdom (i.e. 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. (Ibid. (referring to Ellis-Jordan Report, 10 November 2006 (Panel Exhibit USA-474/506 (BCI) (exhibited twice)), pp. 1 and 7))

[287] Panel Report, para. 6.357.

[288] Professor Robert Whitelaw, "Response to Dr Jordan's report on the benefits of MSF", 13 December 2012 (Whitelaw Response to Jordan) (Panel Exhibit EU-121 (BCI/HSBI)).

[289] Panel Report, para. 6.357 (quoting Whitelaw Response to Jordan (Panel Exhibit EU-121 (BCI/HSBI)), paras. 8 and 11-12, and fns 10 and 13 thereto).

[290] Panel Report, para. 6.360.

[291] Panel Report, para. 6.364.

[292] Panel Report, paras. 6.367-6.428.

[293] Panel Report, para. 6.367.

[294] Panel Report, para. 6.372.

company rate where the parent **[BCI]**. The Panel thus considered that the corporate borrowing rate for the French Airbus entity, Airbus SAS (Toulouse), and for the Spanish Airbus entity, Airbus Operations SL, could be higher than the corporate borrowing rate for EADS.[295] As a result, for the French A350XWB LA/MSF contract and the Spanish A350XWB *Convenio*, the EADS bond may be an understatement of the general corporate borrowing rate. However, the Panel considered that using the EADS bond for all four A350XWB LA/MSF contracts was preferable to the United States' proposed alternative on the understanding that the EADS bond may well be an underestimate for at least the French A350XWB LA/MSF contract and Spanish A350XWB *Convenio*.[296]

5.93. Regarding the relevant dates for observing the EADS bond yield, the Panel identified two main issues raised by the United States: (i) whether Professor Whitelaw's approach − which averaged the yield over a period representing the time during which the A350XWB LA/MSF contracts were concluded − was an appropriate way of determining the EADS bond rate; and (ii) which date is relevant for deriving the yield applicable to the French A350XWB LA/MSF contract.[297]

5.94. With respect to Professor Whitelaw's average, the European Union indicated that his proposed corporate borrowing rate was obtained by averaging the EADS bond's yield to maturity (YTM) over **[BCI]** months. Therefore, Professor Whitelaw derived the YTM of the EADS 5.5% 03/18 medium-term note (MTN) bond for the period **[BCI]**. According to the European Union, this is the period over which all four of the A350XWB LA/MSF contracts were concluded. On this basis, Professor Whitelaw calculated a rate of **[BCI]** for EADS' actual cost of long-term borrowing for the French, German, and Spanish A350XWB LA/MSF contracts, and **[BCI]** for the UK A350XWB LA/MSF contract.[298]

5.95. In response, the United States' expert, Dr Jordan, criticized "the manner in which Professor Whitelaw derive{d} the results for EADS' actual cost of long-term debt based on the EADS bond, submitting that the **[BCI]** 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".[299] Dr Jordan maintained 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."[300]

5.96. The Panel compared Professor Whitelaw's average yields with Dr Jordan's observation of the EADS bond yield on various dates (i.e. the average yield over the six months prior to the conclusion of the relevant A350XWB LA/MSF contract, the average yield over the month prior to the conclusion of the relevant contract, and the yield on the day of conclusion of the relevant contract).[301] The Panel's comparison is reproduced below:

[295] Panel Report, para. 6.373.
[296] Panel Report, para. 6.374.
[297] Panel Report, para. 6.377.
[298] Panel Report, para. 6.378. Professor Whitelaw revealed that the average YTM on the bond was computed for the **[BCI]** for each of the three euro-denominated A350XWB LA/MSF contracts, with an adjustment based on the average EUR to GBP swap rates being made for the UK A350XWB LA/MSF contract. (Ibid.)
[299] Panel Report, para. 6.379 (quoting Dr James Jordan, NERA Economic Consulting, "Reply to Professor Whitelaw's Response to Jordan Report", 20 May 2013 (Jordan Reply) (Panel Exhibit USA-505 (BCI/HSBI)), para. 16 (fn omitted)).
[300] Panel Report, para. 6.379 (quoting Jordan Reply (Panel Exhibit USA-505 (BCI/HSBI)), paras. 24-28).
[301] Panel Report, para. 6.382 (referring to Jordan Reply (Panel Exhibit USA-505 (BCI/HSBI)), Table 6; Jordan Materials in Response to Panel Questions Nos. 110, 111, 112, and 114 (Panel Exhibit USA-567 (BCI/HSBI)), supplement to Table 6).

Table 1: 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 [BCI] starting [BCI]
France **[BCI]** (**[BCI]**)[302] **[BCI]**	**[BCI]** (**[BCI]**) **[BCI]**	**[BCI]** (**[BCI]**) **[BCI]**	**[BCI]** (**[BCI]**) **[BCI]**	**[BCI]**
Germany **[BCI]**	**[BCI]**	**[BCI]**	**[BCI]**	**[BCI]**
Spain **[BCI]**	**[BCI]**	**[BCI]**	**[BCI]**	**[BCI]**
United Kingdom **[BCI]**	**[BCI]**	**[BCI]**	**[BCI]**	**[BCI]**

Source: Panel Report, Table 6 at paragraph 6.382.

5.97. The Panel then noted the Appellate Body's guidance from the original proceedings:

> Under a "benefit" analysis, a comparison is made between the terms and conditions of the financial contribution when it is granted {and} 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 participant would have been able to secure on the market at that time.[303]

5.98. On the basis of this guidance, the Panel indicated that "borrowing costs should be observed at the time that each particular contract was concluded."[304] The Panel explained that "{a}veraging the borrowing rate of contracts concluded over a time-period during which there were different market borrowing rates may lead to distortions."[305] For this reason, the Panel considered that:

> 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.[306]

5.99. The Panel observed that "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."[307] By way of example, the Panel noted that "the market rate for the UK loan agreement, coming later, would be distorted upwards by higher yields from the time when

[302] In their submissions before the Panel, the parties referred to the date of the conclusion of the French A350XWB *Protocole* as **[BCI]**. The Panel noted that the French A350XWB *Protocole* was signed and dated **[BCI]** and that **[BCI]** is the date of a cover letter enclosing copies of the French A350XWB *Protocole* sent to the Director General of Airbus. Therefore, the Panel considered the correct date for the French A350XWB *Protocole* to be **[BCI]**. However, the Panel also decided to include the yields on both dates in the table of calculations for the sake of completeness. (Panel Report, fn 585 to Table 6 at para. 6.382)

[303] Panel Report, para. 6.384 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 706 (emphasis original)). The Panel also noted the Appellate Body's statement that "{t}he 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". (Ibid. (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 835-836))

[304] Panel Report, para. 6.385.

[305] Panel Report, para. 6.385.

[306] Panel Report, para. 6.385.

[307] Panel Report, para. 6.386 (referring to Jordan Reply (Panel Exhibit USA-505 (BCI/HSBI)), para. 27). (emphasis added; additional text in fn 588 thereto omitted)

the French agreement was concluded – some **[BCI]** earlier".[308] However, "{t}he market rate for the French loan agreement … would not be judged against market rates from **[BCI]** prior to its conclusion, when the bond yields were even higher and would have likewise distorted the rates upwards."[309] Thus, the Panel considered that there was no "justification for judging the four LA/MSF agreements by different standards".[310]

5.100. In addition, the Panel pointed out that "Professor Whitelaw's averaging approach would also incorporate data from *after* the conclusion of three of the four contracts."[311] In the Panel's view, "{m}arket rates for debt *after* the conclusion of a contract do not seem … to be a good measure of what the market would have offered *at the time* it was concluded."[312] The Panel found it "difficult to see how what … happens after the conclusion of an agreement is relevant for the purposes of establishing a market benchmark".[313]

5.101. In light of these considerations, the Panel concluded that, contrary to the Appellate Body's guidance, "Professor Whitelaw's approach of observing the average daily yield to maturity over a **[BCI]**-month period during which the four contracts were signed, d{id} not provide the yields 'at the time' that the terms, and thus rates, of the individual contracts were negotiated and agreed."[314] Therefore, the Panel "reject{ed} 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".[315]

5.102. The Panel then turned to determine which of the periods provided by Dr Jordan should be utilized for constructing the market benchmark: (i) the average yield over the six months prior to the conclusion of the contract; (ii) the average yield over the month prior to the conclusion of the contract; or (iii) the yield on the day of conclusion of the contract. In this regard, the Panel considered that "the yield on the day of the signature of contract may reflect atypical fluctuations."[316] First, the Panel considered that parties agreeing to a complex loan contract may rather set the rates in the lead-up to the conclusion of the contract. Therefore, in the Panel's view, "the one-month average would appear to be a reasonable proxy for the parties' expectations."[317] The Panel added that "{t}he six-month average may be less likely to reflect expectations during the finalisation period, but may also be a helpful indication of market expectations."[318] On this basis, the Panel decided to carry out the "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".[319]

5.103. Second, with respect to the relevant date of the French A350XWB LA/MSF contract, the Panel considered that this question would be a material issue only if Professor Whitelaw's averaging approach were used. The Panel pointed out that, having rejected that approach, there was no material difference in the yields regardless of the chosen dates.[320] However, for the sake of completeness, the Panel examined the issue and concluded that the date of conclusion of the French A350XWB *Protocole*, signed on **[BCI]**, should be used given that it reflected the relevant time when the French Government committed to the terms and conditions of LA/MSF, while the

[308] Panel Report, para. 6.386.
[309] Panel Report, para. 6.386. (emphasis omitted)
[310] Panel Report, para. 6.386.
[311] Panel Report, para. 6.387. (emphasis added)
[312] Panel Report, para. 6.387. (emphasis original)
[313] Panel Report, para. 6.387. In contrast to market rates *after* the time of conclusion of the relevant contract, the Panel noted that 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 at the time of conclusion of the relevant contract. (Ibid.)
[314] Panel Report, para. 6.388. In particular, the Panel considered that Professor Whitelaw's approach was not consistent with the Appellate Body's guidance that: (i) the benchmark entails a consideration of what a market participant would have been able to secure on the market at that time; and (ii) the assessment focuses on the moment in time when the lender and borrower commit to the transaction. (Ibid.)
[315] Panel Report, para. 6.388.
[316] Panel Report, para. 6.389.
[317] Panel Report, para. 6.389.
[318] Panel Report, para. 6.389.
[319] Panel Report, para. 6.389.
[320] Panel Report, para. 6.392.

date of conclusion of the French A350XWB *Convention* (i.e. **[BCI]**) related to when the relevant funds were attributed.[321]

5.104. Third, the Panel turned to assess whether it was necessary to adjust the EADS bond yield in terms of maturity and duration. The United States sought to adjust the EADS bond yield based on similarly rated bonds with a term of 20 years, on the ground that the LA/MSF measures at issue have a much longer term to maturity than the EADS bond.[322] The Panel noted that, if an adjustment is made to take into account differences in maturity, then account must also be taken of differences that may exist in terms of structure. The Panel therefore considered that 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".[323] Consequently, the Panel concluded that the United States' proposal to adjust the EADS bond was not appropriate, and proceeded on the basis of the unadjusted EADS bond yield.[324]

5.105. Finally, the Panel examined the United States' proposal of adding to the corporate borrowing rate an amount for normal fees and charges associated with general corporate borrowing on the market. The Panel agreed that fee amounts normally charged as part of the corporate borrowing rate should be considered in the benefit analysis. However, the Panel expressed concerns about some of the estimates provided by the United States.[325] The Panel thus decided to accept the European Union's estimate of the underwriting fee for the EADS bond itself, leading to an adjustment to the EADS bond yield of approximately **[BCI]** basis points.[326]

5.106. In sum, the Panel decided to use the yield of the EADS bond identified by the European Union as the basis for the corporate borrowing rate. As regards the dates for observing the yield, the Panel 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".[327] However, the Panel observed 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)."[328] Similarly, the Panel observed that it would 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".[329] On this basis, in Table 7 at paragraph 6.430 of its Report, the Panel concluded that the quantitative implications of its findings on the corporate borrowing rate are the following:

[321] Panel Report, para. 6.399.
[322] Panel Report, para. 6.400.
[323] Panel Report, para. 6.417.
[324] Panel Report, para. 6.421.
[325] The Panel considered it unclear that the United States' underwriting fee estimate, derived from an analysis of complex, equity-linked, derivative, and innovative instruments, would match the kind of normal fees that Airbus would face if it turned to the market for funding for the A350XWB. (Panel Report, para. 6.428)
[326] Panel Report, para. 6.428 (referring to European Union's comments on the United States' response to Panel question No. 161, para. 16 and fn 41 thereto; Whitelaw Comments on US Responses (Panel Exhibit EU-508 (BCI)), para. 16).
[327] Panel Report, para. 6.429.
[328] Panel Report, para. 6.429.
[329] Panel Report, para. 6.429.

Table 2: 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	**[BCI]** to **[BCI]**	**[BCI]**	**[BCI]** to **[BCI]**
Germany	**[BCI]** to **[BCI]**	**[BCI]**	**[BCI]** to **[BCI]**
Spain	**[BCI]** to **[BCI]**	**[BCI]**	**[BCI]** to **[BCI]**
United Kingdom	**[BCI]** to **[BCI]**	**[BCI]**	**[BCI]**[330] to **[BCI]**

Source: Panel Report, Table 7 at paragraph 6.430.

5.3.1.2 Overview of the relevant jurisprudence regarding the benefit analysis

5.107. A financial contribution constitutes a subsidy within the meaning of Article 1.1 of the SCM Agreement if it confers a benefit. With respect to the nature of the benefit analysis, the Appellate Body has explained that the concept of "benefit" under Article 1.1(b) of the SCM Agreement implies conducting a comparison. This is because "there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution."[331] The Appellate Body has pointed out that the "marketplace" provides an appropriate basis for comparison in determining whether a benefit has been conferred, because the trade-distorting potential of a financial contribution can be identified by determining whether the recipient has received such financial contribution on terms more favourable than those available to the recipient on the market.[332]

5.108. The Appellate Body has stated that Article 14 of the SCM Agreement provides relevant context to Article 1.1(b).[333] Article 14 sets forth guidelines relating to equity investments, loans, loan guarantees, and the provision of goods or services by a government and the purchase of goods by a government. Under each of the guidelines, a benefit arises if the recipient has received a financial contribution on terms more favourable than those available to it on the market.[334] Thus, Article 14 confirms the view that the "marketplace" should be used as the benchmark for the comparison in determining whether a benefit exists.[335]

5.109. With regard to financial contributions provided in the form of a loan, Article 14(b) of the SCM Agreement sets out that government loans 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 that it could actually obtain on the market. Article 14(b) also specifies that the benefit "shall be the difference between these two amounts". Thus, there is a benefit where the amount that the recipient pays on the government loan is less than what the recipient would have paid on a comparable commercial loan that the recipient could have obtained on the market.

5.110. The Appellate Body has specified that a benchmark loan under Article 14(b) must be a loan that is "comparable" to the investigated government loan. In the Appellate Body's view, "a benchmark loan under Article 14(b) should have as many elements as possible in common with

[330] As reflected in Table 10 of the Panel Report, the correct figure representing the lower bound of the total corporate borrowing rate component of the market benchmark rate for the UK LA/MSF contract is **[BCI]**. This figure has been used in reproducing Table 7 of the Panel Report.

[331] Appellate Body Report, *Canada – Aircraft*, para. 157.

[332] Appellate Body Report, *Canada – Aircraft*, para. 157.

[333] Although Article 14 is in Part V of the SCM Agreement, "it is relevant context to the interpretation of Article 1.1(b) for the purpose of Part II of the SCM Agreement" and "can be used as relevant context to determine whether a subsidy exists". (Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.163 (fn omitted)) See also Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, fn 1293 to para. 616.

[334] Appellate Body Report, *Canada – Aircraft*, para. 158.

[335] Appellate Body Report, *Canada – Aircraft*, paras. 155 and 158.

the investigated loan to be comparable."[336] In the context of that provision, the Appellate Body has observed that, "ideally, an investigating authority should use as a benchmark a loan to the same borrower that has been established around the same time, has the same structure as, and similar maturity to, the government loan, is about the same size, and is denominated in the same currency."[337]

5.111. The Appellate Body has, however, acknowledged that, "in practice, the existence of such an ideal benchmark loan would be extremely rare, and that a comparison should also be possible with other loans that present a lesser degree of similarity."[338] This means that a certain degree of *flexibility* applies under Article 14(b) in the selection of benchmarks, so that such selection can ensure a meaningful comparison for the determination of benefit.[339] In line with this flexibility, the Appellate Body has indicated that, "{i}n the absence of an actual comparable commercial loan that is available on the market, an investigating authority should be allowed to use a proxy for what 'would' have been paid on a comparable commercial loan that 'could' have been obtained on the market."[340] In this regard, the Appellate Body has specified that "selecting a benchmark under Article 14(b) involves a progressive search for a comparable commercial loan".[341] The aim is to find "the commercial loan that is closest to the investigated loan (a loan to the same borrower that is nearly identical to the investigated loan in terms of timing, structure, maturity, size and currency)".[342] The "further away an investigating authority moves from the ideal benchmark of the identical or nearly identical loan, the more adjustments will be necessary to ensure that the benchmark loan approximates the 'comparable commercial loan which the firm could actually obtain on the market' specified in Article 14(b)".[343]

5.112. The Appellate Body has mentioned a series of factors that inform whether the benchmark loan is "comparable" to the investigated government loan, such as the timing, structure, size, and currency of the relevant loans.[344] Regarding the *timing* of the relevant transactions, the Appellate Body in the original proceedings in this dispute stated that, pursuant to Article 14(b), the comparison of the "amount the firm receiving the loan pays on the government loan" with "the amount the firm would pay on a comparable commercial loan" is "to be performed as though the loans were obtained at the same time."[345] Thus, "the comparable commercial loan is one that would have been available to the recipient firm at the time it received the government loan."[346] The Appellate Body reasoned that the assessment focuses "on the moment in time when the lender and borrower commit to the transaction", and that a panel conducting this assessment must therefore consider "how the loan is structured and how risk is factored in, *rather than looking at how the loan actually performs over time*".[347]

5.113. In this regard, the Appellate Body further explained in the original proceedings that financial transactions should be analysed on an *ex ante* basis. This is because, in deciding whether to commit resources to a particular investment, an investor will consider alternative investment opportunities and will make a decision on the basis of information available at that time about market conditions and projections. It is on the basis of this information that a panel should determine whether a particular investment was "commercially rational".[348] For this reason, the Appellate Body *rejected* the notion that it is relevant to examine how the investment at issue

[336] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476.
[337] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476.
[338] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476. (fn omitted)
[339] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 489. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345.
[340] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 487.
[341] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486.
[342] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486.
[343] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 488.
[344] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476.
[345] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 835.
[346] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 835.
[347] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 836. (emphasis added; fn omitted)
[348] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 836.

actually performed.[349] Such an *ex post* analysis "has nothing useful to say about the basis upon which the investment was made".[350] In light of these considerations, the Appellate Body emphasized that a benefit analysis "must examine the terms and conditions of a loan at the time it is made and compare them to the terms and conditions that would have been offered by the market at that time."[351]

5.3.1.3 Whether the Panel erred in its application of Article 1.1(b) of the SCM Agreement by failing to identify properly the "corporate borrowing rate"

5.114. The European Union submits that the Panel erred in its application of Article 1.1(b) of the SCM Agreement by identifying the corporate borrowing rate component of the market benchmark rate of return as "the average yields {on an EADS bond} one-month prior and six-months prior to the conclusion of the {relevant LA/MSF} contract, in the form of a range".[352] The European Union submits that the Panel correctly identified the legal standard applicable under Article 1.1(b) when it explained that "borrowing costs 'should be observed *at the time* that each particular contract was *concluded*'".[353] However, the European Union maintains that, in applying this standard, the Panel should have used the actual data on the bond yield at the time each of the four A350XWB LA/MSF contracts was concluded (i.e. the yield on the day of conclusion of each A350XWB LA/MSF contract).[354] Instead, the Panel "replac{ed} this single yield for each contract with a range based on the average yields one month and six months prior to the date on which each contract was concluded".[355]

5.115. According to the European Union, the Panel justified its rejection of the data pertaining to the yield on the day of conclusion of the A350XWB LA/MSF contracts by "speculating" that it "*may* reflect atypical fluctuations".[356] However, "the Panel did *not* find that there were 'atypical fluctuations' in the yields of the relevant EADS bond on the day of conclusion of the LA/MSF contracts."[357] Rather, the Panel's own factual findings reveal that "the yield on the day of the conclusion of the contract was very similar − and sometimes even identical − to the average yield over the month prior to the conclusion of the contract."[358] In addition, the European Union noted that the Panel criticized Professor Whitelaw's averaging approach, arguing that it could lead to distortions.[359] For the European Union, a similar concern applies to the range of average yields used by the Panel because they "could artificially increase or lower a market borrowing rate, leading to a false positive or a false negative subsidy finding".[360]

5.116. For the foregoing reasons, the European Union requests us to reverse the Panel's conclusion that the corporate borrowing rate component of the market benchmark can be based on "the average yields one-month prior and six-months prior to the conclusion of the contract, in

[349] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 836. Given that the assessment focuses "on the moment in time when the lender and borrower commit to the transaction", a panel conducting this assessment "must look at how the loan is structured and how risk is factored in, rather than looking at how the loan actually performs over time". (Ibid. (fn omitted))
[350] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 836.
[351] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 838.
[352] European Union's appellant's submission, para. 278 (quoting Panel Report, para. 6.389). See also para. 290.
[353] European Union's appellant's submission, para. 288 (quoting Panel Report, para. 6.385 (emphasis added by the European Union)).
[354] The European Union maintains that, for each A350XWB LA/MSF contract, "the day of conclusion of the contract represents 'the moment in time when the lender and borrower committ{ed} to the transaction'". (European Union's appellant's submission, para. 289 (quoting Panel Report, para. 6.388))
[355] European Union's appellant's submission, para. 290. (emphasis omitted)
[356] European Union's appellant's submission, para. 291 (quoting Panel Report, para. 6.389 (emphasis added by the European Union)).
[357] European Union's appellant's submission, para. 291. (emphasis original)
[358] European Union's appellant's submission, para. 292.
[359] European Union's appellant's submission, para. 293 (quoting Panel Report, para. 6.385).
[360] European Union's appellant's submission, para. 294.

the form of a range", and the Panel's findings related to the corporate borrowing rate set out in Tables 7 and 10 of the Panel Report.[361]

5.117. The United States disagrees with the European Union that Article 1.1(b) of the SCM Agreement requires the use of a corporate borrowing rate based exclusively on data from the 24-hour period coinciding with the finalization of the terms and conditions of each A350XWB LA/MSF contract. According to the United States, Article 1.1(b) affords panels "a degree of discretion in selecting the appropriate methodology to determine 'benefit'"[362], which encompasses the choice of whether to consult data pre-dating the date of conferral of an alleged subsidy. The United States argues that, in evaluating whether a financial contribution confers a benefit within the meaning of Article 1.1(b), panels should conduct an *ex ante* analysis, and that "determining whether the investment was commercially rational is to be ascertained based on the information that was available to the investor at the time the decision to invest was made".[363] Therefore, "the body of 'information available at the time the decision is made' will necessarily include information that pre-dates the decision itself".[364]

5.118. Additionally, the United States argues that, "in situations where the relevant 'decision' to confer a subsidy is 'made' over an extended period of time, the Appellate Body's guidance implies that the corresponding commercial benchmark should include information from the same period of time (as well as additional information preceding it)".[365] In this case, the Panel found that the terms and conditions for all four A350XWB LA/MSF contracts were the product of **[BCI]**.[366] This process had begun by **[BCI]**, and various stages were completed **[BCI]**.[367] In the United States' view, these facts further support the Panel's finding that the average corporate borrowing rate in the one-month period preceding finalization is a "reasonable proxy" for investor expectations, and that the six-month average is also a "helpful indication" of such expectations, though to a lesser extent.[368] Consequently, the United States argues that the Panel's decision to use the one-month and six-month average yields as the basis for the corporate borrowing rate is consistent with Article 1.1(b) of the SCM Agreement.

5.119. A meaningful benefit analysis pursuant to Article 1.1(b) requires panels to carry out a careful and thorough comparison between the financial contribution provided by a government and a market benchmark. Regarding the manner in which the timing of the relevant transactions should be factored into the benefit analysis, we reiterate that the benefit comparison must be undertaken on an *ex ante* basis, and thus focuses "on the moment in time when the lender and borrower commit to the transaction".[369] Information that is closer in time to the conclusion of the terms and conditions of a loan will usually be more probative than information that derives from time periods preceding the final stages of negotiation and conclusion of a transaction. Nevertheless, a panel's determination regarding the appropriate timing of when the lender and borrower committed to the relevant terms and conditions of the transaction at issue should be made on a case-by-case basis, taking into account the specific nature and features of the financing at issue and in light of the arguments and evidence presented by the parties.

5.120. Therefore, a panel conducting this assessment must look at how the relevant government financial contribution is structured, focusing on the nature and type of financing that is being provided and whether aspects thereof were agreed upon in the period leading up to the formal signing of the legal instrument providing the financial contribution. While in some cases parties

[361] European Union's appellant's submission, para. 319 (referring to Panel Report, para. 6.389, Table 7 at para. 6.430, and Table 10 at para. 6.632).

[362] United States' appellee's submission, para. 198 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 883).

[363] United States' appellee's submission, para. 202 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 836).

[364] United States' appellee's submission, para. 202.

[365] United States' appellee's submission, para. 204 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 836).

[366] United States' appellee's submission, para. 204 (quoting Panel Report, para. 6.644, in turn quoting Statement by Tom Williams, Executive Vice President, Programmes, Airbus SAS, 17 May 2013 (Williams Statement) (Panel Exhibit EU-354 (BCI)), para. 3).

[367] United States' appellee's submission, para. 204 (referring to Panel Report, paras. 6.55 and 6.645).

[368] United States' appellee's submission, para. 204.

[369] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 836.

may commit to a complex financing instrument only after all the relevant terms and conditions in their overall configuration are known, it is also possible to envisage cases where parties may have committed to a transaction – or to key aspects thereof – during a finalization period of the negotiations preceding the moment of formal conclusion of *all* aspects of that transaction. This may be the case, in particular, where the financial contribution at issue consists of complex financing instruments, the terms and conditions of which have been negotiated and agreed over a certain contracting period. In such circumstances, it would be appropriate for a panel to take into account in its analysis information that pre-dates the moment or actual day on which the legal instruments underlying the relevant transaction were formally signed, bearing in mind that information closer in time to the formal conclusion of the financing instrument will be more probative than information from earlier stages of the negotiations.

5.121. While the European Union correctly notes that, in conducting the benefit analysis, the comparison focuses "on the moment in time when the lender and borrower commit to the transaction"[370], we disagree with the European Union to the extent that it suggests that the Panel was required to limit its analysis to data from "the day of conclusion" of each A350XWB LA/MSF contract *regardless* of the time period over which the parties may have committed to the terms and conditions of that financing instrument. Rather, for purposes of conducting its benefit analysis, the Panel was required to take into account the specific financing instrument at issue, including the relevant circumstances surrounding the conclusion of that instrument, to determine the period over which the terms and conditions of the relevant contract were agreed.

5.122. With these considerations in mind, in order to determine whether the Panel erred under Article 1.1(b), we turn to review its analysis regarding the specific nature and features of A350XWB LA/MSF financing, including the time period over which the parties negotiated and committed to that financing.

5.123. Before doing so, however, we note that the Panel relied on the yield of the EADS bond as an analytical tool to determine the first component of the market benchmark proposed by the United States – namely, a corporate borrowing rate that Airbus would have had to pay to a market lender. In conducting this examination, the Panel addressed a series of criticisms by the United States regarding the extent to which the EADS bond data could be used to construct the relevant corporate borrowing rate. In assessing the relevant dates for observing the EADS bond yield, we do not understand the Panel to have sought to determine the "price of the EADS bond" *per se*. Rather, the Panel examined the time period over which the relevant A350XWB LA/MSF contracts were concluded to draw a conclusion as to the corporate borrowing rate that would have been applicable to Airbus during that period using the yield of the EADS bond as a proxy in this regard.

5.124. With respect to the specific nature and features of LA/MSF financing, the original panel held that, despite a number of variations in the terms and conditions of the legal instruments making up the contractual framework of the challenged LA/MSF measures, numerous similarities in the type and form of financing existed.[371] In these compliance proceedings, the United States argued before the Panel that the four A350XWB LA/MSF contracts contain the same "core" terms as the pre-A350XWB LA/MSF measures.[372] After examining the similarities and differences between the A350XWB LA/MSF contracts and the LA/MSF measures examined in the original proceedings, the Panel indicated that "the LA/MSF contracts for the A350XWB resemble the contracts at issue in the original proceeding{s}, 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."[373] Thus, the Panel considered that, overall, the repayment of the

[370] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 836.
[371] Panel Report, para. 6.286 (referring to Original Panel Report, paras. 7.374, 7.410, and 7.525).
[372] Panel Report, para. 6.58 (referring to United States' first written submission to the Panel, paras. 140, 143-144, and 147; second written submission to the Panel, paras. 85 and 89-101).
[373] Panel Report, para. 6.286.

A350XWB LA/MSF is back-loaded[374], primarily levy-based[375], dependent on the sales of aircraft, and unsecured.[376] To this extent, the Panel concluded that the A350XWB LA/MSF contracts share the same core features as the LA/MSF measures considered in the original proceedings.[377]

5.125. Moreover, the Panel made relevant findings regarding the time period over which the parties negotiated and committed to the A350XWB LA/MSF contracts. In particular, the Panel found that, "the Airbus governments {i.e. France, Germany, Spain, and the United Kingdom} formally entered into negotiations with Airbus for LA/MSF {to support the A350XWB programme} in late 2008, individually agreeing on its terms on different dates between **[BCI]**."[378] **[BCI]**[379] As will be elaborated below, the Panel's reasoning reveals that the terms and conditions of the relevant instruments were negotiated and agreed over a contracting period spanning across **[BCI]**.

5.126. In terms of the reasoning provided by the Panel in support of its conclusion regarding the relevant dates for observing the EADS bond yield, we recall that, in conducting this analysis, the Panel began by rejecting Professor Whitelaw's averaging approach because such approach "would result in the application of corporate borrowing rates derived over time periods that are *different* for the four LA/MSF contracts."[380] In addition, the Panel indicated that "Professor Whitelaw's averaging approach would also incorporate data from after the conclusion of three of the four contracts."[381] On this basis, the Panel was unable to accept Professor Whitelaw's approach.

5.127. Then, the Panel decided to determine the corporate borrowing rate using the average yields one month prior and six months prior to the conclusion of the four A350XWB LA/MSF contracts, in the form of a range. The Panel provided two reasons in support of its decision. First, the Panel considered that "the yield on the day of the signature of contract may reflect atypical fluctuations."[382] In this regard, we note the European Union's contention that "the Panel did *not* find that there were 'atypical fluctuations' in the yields of the relevant EADS bond on the day of conclusion of the LA/MSF contracts."[383] The European Union also makes this argument in its challenge under Article 11 of the DSU, where it is further elaborated.[384] We will therefore address it in more detail in our analysis of that claim. At this juncture, however, we observe that we do not understand the Panel to have based its finding on speculation that there might have been *atypical fluctuations* in the yield of the EADS bond on the day of signature of the A350XWB LA/MSF contracts. Rather, we understand the Panel to have merely observed, as a general matter, that choosing the yield on the day of conclusion of the A350XWB LA/MSF contract at issue might

[374] The Panel stated that, "{i}n some instances, repayment begins only after Airbus has made a specified number of aircraft deliveries. Although the amount of the per-aircraft levies varies {among} the different contracts, it appears in nearly all cases to be **[BCI]**. In this way, the contracts are *back-loaded*." (Panel Report, para. 6.273 (emphasis original))

[375] The Panel explained that reimbursement of the loan principal in all four A350XWB LA/MSF contracts 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. According to the Panel, repayment of the principal may thus be said to be *levy-based*. (Panel Report, para. 6.270)

[376] The Panel observed that, similar to the situation in the original proceedings where the loans were said to be *unsecured*, in these compliance proceedings "no security or collateral is nominated or provided by another entity for repaying {A350XWB} 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". (Panel Report, para. 6.277)

[377] Panel Report, para. 6.286.

[378] Panel Report, para. 6.55 (referring to Williams Statement (Panel Exhibit EU-354 (BCI)), para. 3; European Union's response to Panel question No. 101).

[379] Panel Report, Table 6 at para. 6.382.

[380] Panel Report, para. 6.386 (referring to Jordan Reply (Panel Exhibit USA-505 (BCI/HSBI)), para. 27). (emphasis added; additional text in fn 588 thereto omitted)

[381] Panel Report, para. 6.387.

[382] Panel Report, para. 6.389.

[383] European Union's appellant's submission, para. 291. (emphasis original) According to the European Union, "rather than reflecting *atypical* fluctuations, the Panel's own factual findings reveal that the yield on the day of conclusion of each {A350XWB} LA/MSF contract was *typical*." (Ibid., para. 292 (emphasis original))

[384] See section 5.3.1.4 of this Report.

raise some methodological concerns for purposes of constructing the market benchmark because, on the day of conclusion of a contract, the yield "*may* reflect atypical fluctuations".[385]

5.128. The Panel's second reason in support of its conclusion regarding the relevant dates for observing the EADS bond yield was that "{p}arties 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 actual day on which the contract is signed."[386] Earlier in its analysis, the Panel had also stated that "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".[387]

5.129. The Panel applied these general considerations to the facts of the present dispute by making relevant findings with respect to the length of the negotiations between Airbus and the four member States, thereby shedding light on the period of time during which the investment decisions were made in the present case. For instance, the Panel observed that, "{a}fter publicly signalling their support for the new programme in July 2006, the Airbus governments {i.e. France, Germany, Spain, and the United Kingdom} formally entered into negotiations with Airbus for LA/MSF {to support the A350XWB programme} in late 2008, individually agreeing on its terms on different dates between **[BCI]**."[388] As noted, **[BCI]**.[389]

5.130. The above considerations served as the basis for the Panel's decision to determine the corporate borrowing rate using the average yields one month prior and six months prior to the conclusion of the four A350XWB LA/MSF contracts, in the form of a range. In this regard, we observe that, although the Panel determined the corporate borrowing rate in the form of a *range* of average yields, the Panel rightly gave more prominence to the one-month average yield on the EADS bond than to the six-month average yield. Indeed, the Panel found that "the one-month average would appear to be a reasonable proxy for the parties' expectations."[390] By contrast, the Panel considered that "{t}he six-month average may be less likely to reflect expectations during the finalisation period, but may also be a helpful indication of market expectations."[391]

5.131. As noted, in the present case, the Panel found that "{p}arties 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 actual day on which the contract is signed."[392] In our view, this understanding is in line with our observation that, in some cases, parties may have committed to a transaction – or to key aspects thereof – during a finalization period of the negotiations preceding the moment of formal conclusion of *all* aspects of that transaction. This may be the case, in particular, where, as here, the financial contribution at issue consists of complex financing instruments, the terms and conditions of which have been negotiated and agreed over a certain contracting period. We have indicated that, in such circumstances, it would be appropriate for a panel to take into account in its analysis information that pre-dates the moment or actual day on which the legal instruments underlying the relevant transaction were formally signed.

5.132. Specifically, with regard to the A350XWB LA/MSF contracts, the Panel's findings support the view that the four A350XWB LA/MSF contracts fall within this category of complex financing, the terms and conditions of which have been negotiated and agreed over a certain period of time. Indeed, we recall that the Panel indicated that these contracts share the same core features as the LA/MSF measures considered in the original proceedings in that their repayment is back-loaded,

[385] Panel Report, para. 6.389. (emphasis added)
[386] Panel Report, para. 6.389.
[387] Panel Report, para. 6.387.
[388] Panel Report, para. 6.55 (referring to Williams Statement (Panel Exhibit EU-354 (BCI)), para. 3; European Union's response to Panel question No. 101). According to the Panel, "Airbus commenced *formal* negotiations with the Airbus governments for A350XWB LA/MSF in **[BCI]** after the launch of the A350XWB." (Ibid., para. 6.144 (referring to European Union's response to Panel question No. 101) (emphasis original; additional text in fn 290 thereto omitted))
[389] Panel Report, Table 6 at para. 6.382.
[390] Panel Report, para. 6.389.
[391] Panel Report, para. 6.389.
[392] Panel Report, para. 6.389.

primarily levy-based, dependent on the sales of aircraft, and unsecured.[393] As to the manner in which the terms and conditions of the A350XWB LA/MSF contracts were negotiated and agreed, the Panel found that "the Airbus governments {i.e. France, Germany, Spain, and the United Kingdom} formally entered into negotiations with Airbus for LA/MSF {to support the A350XWB programme} in late 2008, individually agreeing on its terms on different dates between **[BCI]**."[394] Indeed, **[BCI]**.[395] These findings by the Panel show that Airbus and the four member States negotiated and agreed the terms and conditions of the different A350XWB LA/MSF contracts over a certain period of time.

5.133. Moreover, our review of the manner in which the parties presented their arguments and evidence regarding the relevant dates for observing the yield of the EADS bond reveals that the parties did *not* focus their discussion before the Panel on determining *which* of the three time periods proposed by Dr Jordan would be the correct one for determining such yield. Indeed, the market benchmark that the United States originally proposed to the Panel did not include a reference to the EADS bond.[396] In turn, most of the European Union's argumentation sought to support Professor Whitelaw's averaging approach as a basis for determining the relevant dates of the EADS bond yield.[397] In response, the United States criticized Professor Whitelaw's averaging approach[398] and presented as Exhibit USA-505 an additional report prepared by Dr Jordan.[399] In that report, Dr Jordan provided a table comparing the average yield calculated by Professor Whitelaw with yields for "more relevant dates and periods for each of the agreements".[400] Through this table, the United States submitted to the Panel information regarding: (i) the average yield over the six months prior to the conclusion of the A350XWB LA/MSF contracts; (ii) the average yield over the month prior to the conclusion of the A350XWB LA/MSF contracts; and (iii) the yield on the day of conclusion of the A350XWB LA/MSF contracts.[401]

5.134. Following the report presented by Dr Jordan as Exhibit USA-505, the discussion between the United States and the European Union focused mostly on the question of whether the EADS bond yield to maturity should be adjusted based on similarly rated bonds with a term of 20 years, as proposed by the United States. In its subsequent communications to the Panel, the European Union did not appear to criticize expressly the relevant dates for observing the EADS bond yield proposed by the United States. Nor did the European Union, for instance, in its comments to the United States' responses to Panel questions, seem to express a preference for

[393] Panel Report, para. 6.286.

[394] Panel Report, para. 6.55 and fn 132 thereto (referring to Williams Statement (Panel Exhibit EU-354 (BCI)), para. 3; European Union's response to Panel question No. 101). (fn 131 omitted)

[395] Panel Report, Table 6 at para. 6.382.

[396] The general corporate borrowing rates originally proposed by the United States were based on the same data used to derive the general corporate borrowing rates applied in the original proceedings, updated to account for the timing of the conclusion of the relevant A350XWB LA/MSF contracts. (Panel Report, para. 6.353)

[397] We recall that the European Union asserted before the Panel 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". (Panel Report, para. 6.357 (quoting Whitelaw Response to Jordan (Panel Exhibit EU-121 (BCI/HSBI)), paras. 8 and 11-12, and fns 10 and 13 thereto)) In particular, the European Union proposed using the EADS Finance B.V. 5.5% coupon 03/18 MTN, a bond issued on 24 September 2003 and maturing on 25 September 2018. (Ibid., para. 6.358) The European Union specified that Professor Whitelaw derived "the average yield to maturity ('YTM') of the EADS bond maturing in the last quarter of 2018 for the period when all four member State financing agreements were concluded – *i.e.*, **[BCI]**". (European Union's second written submission to the Panel, para. 312)

[398] The United States took issue with the fact that Professor Whitelaw calculated an average of the daily YTM on the EADS bond over "an arbitrary **[BCI]** time period that beg{an} **[BCI]**". (United States' comments to the European Union's responses to Panel question No. 99, para. 275 (fn omitted)) The United States disagreed with the fact that Professor Whitelaw's approach also relied on debt instruments with a maturity that is "far shorter than the actual term of the A350 XWB LA/MSF loans to Airbus". (Ibid. (quoting Jordan Reply (Panel Exhibit USA-505 (BCI/HSBI)), fn 3 to para. 3))

[399] Jordan Reply (Panel Exhibit USA-505 (BCI/HSBI)).

[400] Jordan Reply (Panel Exhibit USA-505 (BCI/HSBI)), para. 29.

[401] Jordan Reply (Panel Exhibit USA-505 (BCI/HSBI)), Table 6 at para. 29.

observing the EADS bond yield on the day of conclusion of the contracts.[402] Thus, there was not much debate between the parties regarding which of the three yields of the EADS bond presented by the United States should be chosen for purposes of determining the corporate borrowing rate.

5.135. In light of these considerations, we see no error in the Panel's observation that "{p}arties 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 actual day on which the contract is signed"[403], and its conclusion that the four A350XWB LA/MSF contracts are complex financing instruments that were negotiated and agreed by Airbus and the four member States over a contracting period spanning across **[BCI]**.

5.136. We note that the European Union additionally argues that the range of average yields used by the Panel raises concerns similar to those expressed by the Panel itself regarding Professor Whitelaw's averaging approach. According to the European Union, "{b}y using average yields − instead of the yield at the time each contract was signed − the Panel's approach could artificially increase or lower a market borrowing rate, leading to a false positive or a false negative subsidy finding."[404] We find the European Union's position difficult to reconcile with the fact that, before the Panel, the European Union itself proposed determining the corporate borrowing rate on the basis of average yields.[405] Moreover, the European Union appears to assume that the reason why the Panel rejected Professor Whitelaw's approach was the fact that it used average yields. We disagree. As we see it, the Panel's conclusion was based on other reasons. For example, the Panel observed that "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."[406] Also, the Panel indicated that "Professor Whitelaw's averaging approach would also incorporate data from after the conclusion of three of the four contracts."[407]

5.137. Other aspects of the Panel's analysis are also relevant in addressing the European Union's argument that the use of average yields could lead to a "false" finding of benefit. In particular, we recall that, in addition to the question of the relevant dates for observing the EADS bond yield, the Panel examined other issues in determining the applicable corporate borrowing rate.[408] In assessing these issues, it seems that the Panel preferred to follow an approach whereby the calculations would most likely be a *conservative* reflection of the corporate borrowing rate.[409] For instance, the Panel pointed out 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)."[410] In addition, the Panel stated that, contrary to the United States' position, it decided *not* to adjust the EADS bond yield for a 20-year maturity. The Panel considered it preferable to "use the unadjusted yields of the EADS bond on the understanding that *it is likely to be a conservative reflection of the*

[402] See e.g. European Union's comments on the United States' response to Panel questions Nos. 92 and 110-112.

[403] Panel Report, para. 6.389.

[404] European Union's appellant's submission, para. 294.

[405] Panel Report, para. 6.378.

[406] Panel Report, para. 6.386 (referring to Jordan Reply (Panel Exhibit USA-505 (BCI/HSBI)), para. 27). (emphasis added; additional text in fn 588 thereto omitted) The Panel explained in this regard:

> 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 **[BCI]** earlier (according to Professor Whitelaw). The market rate for the French loan agreement, however, would *not* be judged against market rates from **[BCI]** prior to its conclusion, when the bond yields were even higher and would have likewise distorted the rates upwards.

(Ibid. (emphasis original))

[407] Panel Report, para. 6.387.

[408] We recall that, in determining the general corporate borrowing rate, the Panel examined the following four issues raised by the United States: (i) whether the EADS bond reflects the identity of the borrower; (ii) the relevant dates for observing the EADS bond yield; (iii) whether to adjust the EADS bond yield in terms of maturity and duration; and (iv) whether to add to the corporate borrowing rate an amount for normal fees and charges associated with general corporate borrowing on the market. (Panel Report, paras. 6.367-6.428)

[409] Indeed, the Panel indicated that it would "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". (Panel Report, para. 6.429)

[410] Panel Report, para. 6.429.

corporate borrowing rate that should be used to construct the relevant market benchmark for the LA/MSF contracts".[411] In light of these considerations, we doubt that the use of average yields could, in and of itself, have led to "a false positive or a false negative subsidy finding" in the present case, as the European Union suggests.[412]

5.138. As indicated above, the European Union correctly argues that, in conducting the benefit analysis, the comparison focuses "on the moment in time when the lender and borrower commit to the transaction".[413] However, we disagree with the European Union to the extent that it suggests that the Panel was required, pursuant to Article 1.1(b) of the SCM Agreement, to limit its analysis to data regarding the yield "on the day of conclusion" of each A350XWB LA/MSF contract *regardless* of the time period over which the parties may have committed to the terms and conditions of that financing instrument. Rather, a panel conducting this assessment must look at how the relevant government financial contribution is structured, focusing on the nature and type of financing that is being provided and whether aspects thereof were agreed in the lead-up to the formal signing of the legal instrument providing the financial contribution.

5.139. We recall that the Panel provided two reasons in support of its decision to determine the corporate borrowing rate using the average yields one month prior and six months prior to the conclusion of the A350XWB LA/MSF contracts, in the form of a *range*. First, the Panel considered that "the yield on the day of the signature of contract may reflect atypical fluctuations."[414] As noted above, we see no error in this observation by the Panel. The Panel's second reason was that "{p}arties 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 actual day on which the contract is signed."[415] We have found this understanding to be in line with our observation that, in some cases, parties may have committed to a transaction − or to key aspects thereof − during a finalization period of the negotiations preceding the moment of formal conclusion of *all* aspects of that transaction. This may be the case, for example, where, as here, the financial contribution at issue consists of complex financing the terms and conditions of which have been negotiated and agreed over a certain contracting period. The Panel's findings, in our view, support the view that the A350XWB LA/MSF contracts fall within this category of complex financing. This is particularly the case, given the Panel's findings that: (i) the A350XWB LA/MSF contracts share certain unique features compared to other forms of financing, namely, that their repayment terms are back-loaded, primarily levy-based, dependent on the sales of aircraft, and unsecured; and (ii) "the Airbus governments {i.e. France, Germany, Spain, and the United Kingdom} formally entered into negotiations with Airbus for LA/MSF {to support the A350XWB programme} in late 2008, individually agreeing on its terms on different dates between **[BCI]**."[416]

5.140. The above considerations served as the basis for the Panel's determination of the corporate borrowing rate. As noted, while the Panel determined the corporate borrowing rate in the form of a range of average yields, it rightly gave more prominence to the one-month average yield of the EADS bond than to the six-month average yield. Indeed, the Panel found that "the one-month average would appear to be a reasonable proxy for the parties' expectations."[417] By contrast, the Panel considered that "{t}he six-month average may be less likely to reflect expectations during the finalisation period, but may also be a helpful indication of market expectations."[418] In these circumstances, we find that the Panel did not err in its application of Article 1.1(b) of the SCM Agreement in finding that the corporate borrowing rate component of the market benchmark could be based on the average yields of the EADS bond "one-month prior and

[411] Panel Report, para. 6.429. (emphasis added) In this regard, the Panel indicated that "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*". (Ibid. (emphasis original)) Moreover, the Panel stated that "the higher Macaulay durations of the **[BCI]** 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*." (Ibid. (emphasis original))

[412] European Union's appellant's submission, para. 294.

[413] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 836.

[414] Panel Report, para. 6.389.

[415] Panel Report, para. 6.389.

[416] Panel Report, para. 6.55 (referring to Williams Statement (Panel Exhibit EU-354 (BCI)), para. 3; European Union's response to Panel question No. 101).

[417] Panel Report, para. 6.389.

[418] Panel Report, para. 6.389.

six-months prior to the conclusion" of the French, German, Spanish, and UK A350XWB LA/MSF contracts, "in the form of a range", attributing more weight to the former average yields than it did to the latter.[419]

5.3.1.4 Whether the Panel acted inconsistently with Article 11 of the DSU by rejecting the yield of the relevant EADS bond on the day of conclusion of each A350XWB LA/MSF contract

5.141. The European Union presents two main lines of argumentation in support of its claim that the Panel acted inconsistently with its obligations under Article 11 of the DSU. First, the European Union argues that the Panel acted inconsistently with Article 11 because it "lacked a sufficient evidentiary basis" for rejecting the EADS bond yield on the day of conclusion of each of the four A350XWB LA/MSF contracts.[420] According to the European Union, the Panel justified the rejection of the EADS bond yield on the day of conclusion of the contracts due to "the possibility that that yield *'may* reflect atypical fluctuations'".[421] The European Union asserts that the Panel did not test whether such atypical fluctuations in fact existed, and argues that the Panel therefore had no evidentiary basis to reject the yield on the day of conclusion of the four contracts.

5.142. Second, the European Union asserts that two aspects of the Panel's analysis reflect a "lack of objectivity and even-handedness".[422] The European Union argues that, on the one hand, the Panel's rejection of the data pertaining to the EADS bond yield on the day of conclusion of each contract occurred against the background of a downward trend in such yield, which resulted in an "artificial increase in the market benchmark" used by the Panel.[423] On the other hand, the Panel provided no plausible explanation for its "unsupported" decision to set the corporate borrowing rate component of its market benchmark in the form of a *range* of average yields.[424]

5.143. The United States requests that we reject the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU in this regard. According to the United States, the Panel in this case provided a thoroughly reasoned explanation, supported by evidence, for each of its findings. In particular, the United States disagrees that the Panel acted inconsistently with Article 11 by stating that the EADS bond yield "may reflect atypical fluctuations" without "test{ing} whether such atypical fluctuations in fact existed".[425] The United States points out that the Panel Report contains a graph that displays daily fluctuations in the EADS bond yield, which confirms that the Panel's concern about potentially atypical fluctuations in the bond yield was "reasonable – not egregiously erroneous".[426] The United States also disagrees with the European Union's assertion that the Panel provided no "plausible explanation" for its decision to express the corporate borrowing rate in the form of a *range* of average yields, contrary to Article 11 of the DSU.[427] The United States points out that such a plausible explanation is found in paragraph 6.389 of the Panel Report. Additionally, the United States asserts that the inclusion of such a range "enhances the robustness" of any findings based on a market benchmark because it allows for a comparison that reflects the variability of the bond yields.[428]

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[419] Panel Report, para. 6.389.
[420] European Union's appellant's submission, para. 296.
[421] European Union's appellant's submission, para. 297 (quoting Panel Report, para. 6.389 (emphasis added by the European Union)).
[422] European Union's appellant's submission, para. 298.
[423] European Union's appellant's submission, para. 298.
[424] European Union's appellant's submission, para. 299. The European Union submits that eliminating the range chosen by the Panel narrows the gap between the benchmark and the internal rate of return, which increases the "stress" on the Panel's overall benefit finding. (Ibid.)
[425] United States' appellee's submission, para. 211 (quoting European Union's appellant's submission, para. 297).
[426] United States' appellee's submission, para. 211 (referring to Panel Report, para. 6.381 and Figure 1 thereto).
[427] United States' appellee's submission, para. 210 (quoting European Union's appellant's submission, para. 299).
[428] United States' appellee's submission, para. 210. Furthermore, while the United States acknowledges that there could be cases where the inclusion of such a range calls into question the existence of a subsidy, this is not the case in the present dispute, "as the terms of LA/MSF for the A350 XWB were better than both ends of the Panel's ranges". (Ibid.)

5.144. Before addressing the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU, we begin by recalling key aspects of the Appellate Body's jurisprudence under this provision.

5.145. Article 11 of the DSU provides:

Function of Panels

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

5.146. As the Appellate Body has observed, "Article 11 of the DSU imposes upon panels a comprehensive obligation to make an 'objective assessment of the matter', an obligation which embraces all aspects of a panel's examination of the 'matter', both factual and legal."[429] In disputes concerning actionable subsidies under the SCM Agreement, a panel serves as the initial trier of facts. In such cases, panels have the responsibility to gather and analyse relevant factual data and information.[430] The Appellate Body has explained that a panel's duty as the trier of facts, in such cases, requires it to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence".[431] In the context of addressing claims under Part III of the SCM Agreement, the Appellate Body has further specified the conditions that a panel must comply with to remain within the bounds of its authority as the initial trier of facts.[432] In particular, a panel may not "make affirmative findings that lack a basis in the evidence contained in the panel record".[433] As the initial trier of facts, a panel must also provide "reasoned and adequate explanations and coherent reasoning"[434] and not reveal a lack of "even-handedness" in the "treatment of the evidence".[435]

5.147. Within these parameters, however, it is generally within the discretion of a panel to decide which evidence it chooses to utilize in making its findings[436], and to determine how much weight to attach to the various items of evidence placed before it by the parties.[437] A panel does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.[438] Moreover, the mere fact that a panel has not explicitly referred to each and every piece of evidence in its reasoning is insufficient to establish a claim of violation under Article 11.[439] Rather, an appellant must explain why such evidence is so material to its case that the panel's failure to address it explicitly has a bearing on the objectivity of its factual assessment.[440]

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[429] Appellate Body Report, *US – Hot-Rolled Steel*, para. 54.

[430] Appellate Body Report, *US – Upland Cotton*, para. 458.

[431] Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 992; *Brazil – Retreaded Tyres*, para. 185. See also Appellate Body Reports, *EC – Hormones*, paras. 132-133; *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines,* para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258.

[432] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 881 and 1317.

[433] Appellate Body Report, *US – Carbon Steel*, para. 142 (referring to Appellate Body Report, *US – Wheat Gluten*, paras. 161-162).

[434] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 618 to para. 293.

[435] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 292.

[436] Appellate Body Report, *EC – Hormones*, para. 135.

[437] Appellate Body Report, *Korea – Dairy*, para. 137.

[438] Appellate Body Reports, *Australia – Salmon*, para. 267; *Japan – Apples*, para. 221; *Korea – Alcoholic Beverages*, para. 164.

[439] Appellate Body Reports, *EC – Fasteners (China)*, paras. 441-442; *Brazil – Retreaded Tyres*, para. 202.

[440] Appellate Body Report, *EC – Fasteners (China)*, para. 442.

5.148. The Appellate Body has also considered it unacceptable for an appellant simply to recast factual arguments that it made before the panel in the guise of an Article 11 claim.[441] Instead, an appellant must identify specific errors regarding the objectivity of the panel's assessment[442] and "explain *why* the alleged error *meets* the standard of review under that provision".[443] Indeed, a claim that a panel has failed to conduct the "objective assessment of the matter before it" as required by Article 11 of the DSU is "a very serious allegation"[444], and the Appellate Body will not "interfere lightly" with a panel's fact-finding authority.[445] Rather, for a claim under Article 11 to succeed, the Appellate Body "must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts".[446] According to the Appellate Body, "not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU"[447], but only those that are so material that, "taken together or singly"[448], they undermine the objectivity of the panel's assessment of the matter before it.[449]

5.149. In its first line of argumentation, the European Union challenges the *lack of a sufficient evidentiary basis* for the Panel's rejection of the yield of the EADS bond on the day of conclusion of each A350XWB LA/MSF contract because of "the possibility that that yield *'may* reflect atypical fluctuations'".[450] According to the European Union, the undisputed data on the record show that the yield on the day of conclusion of each A350XWB LA/MSF contract did not reflect atypical fluctuations, but was very similar − and sometimes even identical − to the average yield over the one-month period prior to the conclusion of each contract.

5.150. In our view, in making this argument, the European Union appears to be assuming that the Panel intended to base its conclusion on the fact that, in effect, *there were* "atypical fluctuations" in the EADS bond yield on the day of conclusion of the four A350XWB LA/MSF contracts. However, as noted above, we do not understand the Panel to have based its finding on such an assumption. Rather, the Panel appears to have merely observed, *as a general matter*, that choosing the yield on the day of conclusion of the contract at issue might raise some methodological concerns for purposes of constructing the market benchmark because, on the day of conclusion of a contract, the yield "*may* reflect atypical fluctuations".[451] Had the Panel intended to *make the factual finding* that the yield of the EADS bond was indeed affected by atypical fluctuations on the day of conclusion of each of the four contracts, there could well be good reasons to criticize the Panel for not having verified whether the data substantiated that finding and for not having reflected such review of the data in its reasoning. However, this is not how we read the Panel's analysis. Moreover, the Panel provided further reasoning as to why it would be preferable *not* to choose the yield of the bond on the day of conclusion of a contract by stating that "{p}arties 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 actual day on which the contract is signed."[452] Therefore, we are not persuaded by the European Union's argument in this regard.

5.151. In its second line of argumentation under Article 11 of the DSU, the European Union argues that the Panel's analysis reflects a *lack of objectivity and even-handedness*. The European Union's argument is two-fold. First, the European Union contends that the fact that the Panel rejected the EADS bond yield on the day of conclusion of each A350XWB LA/MSF contract against the background of a downward trend in such yield evidences a lack of objectivity

[441] Appellate Body Report, *EC − Fasteners (China)*, para. 442.
[442] Appellate Body Report, *EC − Fasteners (China)*, para. 442.
[443] Appellate Body Reports, *China − Rare Earths*, para. 5.178 (quoting Appellate Body Report, *EC − Fasteners (China)*, para. 442 (emphasis original)).
[444] Appellate Body Reports, *China − Rare Earths*, para. 5.227 (quoting Appellate Body Report, *EC − Poultry*, para. 133).
[445] Appellate Body Reports, *EC − Sardines*, para. 299 (quoting Appellate Body Report, *US − Wheat Gluten*, para. 151); *US − Carbon Steel*, para. 142.
[446] Appellate Body Report, *US − Wheat Gluten*, para. 151.
[447] Appellate Body Report, *EC − Fasteners (China)*, para. 442.
[448] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1318. See also Appellate Body Report, *EC − Fasteners (China)*, para. 499.
[449] Appellate Body Reports, *China − Rare Earths*, para. 5.179.
[450] European Union's appellant's submission, para. 297 (quoting Panel Report, para. 6.389 (emphasis added by the European Union)).
[451] Panel Report, para. 6.389. (emphasis added)
[452] Panel Report, para. 6.389.

and even-handedness. According to the European Union, this resulted in an "artificial increase in the market benchmark" used by the Panel.[453]

5.152. We agree with the European Union that, given the risk of false findings of benefit being made, a panel must be particularly vigilant when it engages in a benefit analysis with respect to complex financial contributions, the terms and conditions of which have been negotiated and agreed over a period of time. In particular, a panel is required to take into account the time period over which the terms and conditions of the financial contribution were negotiated and agreed, so that the benefit comparison focuses "on the moment in time when the lender and borrower commit{ted} to the transaction".[454] However, the fact that the Panel relied on averages of data is not in itself objectionable, provided that this information is close enough in time to the conclusion of the contract terms and conditions to be probative for the benefit comparison. In any event, the fact that there was a downward trend in the yield of the EADS bond does not *per se* establish that the Panel failed to conduct a proper benefit analysis when it relied on a range of average yields, let alone that it acted inconsistently with Article 11 of the DSU. In fact, we view the European Union's arguments under Article 11 of the DSU as being largely premised on its view that the Panel misapplied Article 1.1(b) of the SCM Agreement.

5.153. As noted above, we see no error in the Panel's analysis of the corporate borrowing rate component of the market benchmark under Article 1.1(b) of the SCM Agreement. Indeed, we consider that the Panel based its conclusion on the specific nature and features of the A350XWB LA/MSF financing at issue in light of the arguments and evidence presented by the parties. In particular, one of the reasons provided by the Panel was that "{p}arties 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 actual day on which the contract is signed."[455] The Panel's findings support the view that the French, German, Spanish, and UK A350XWB LA/MSF contracts fall within this category of complex financing.[456]

5.154. As we understand it, these considerations served as the basis for the Panel's decision to determine the corporate borrowing rate using the average yields one month prior and six months prior to the conclusion of each contract, in the form of a range, placing more reliance on the one-month average, while considering the six-month average "helpful". Since we disagree with the European Union's arguments in the context of its claim of error under Article 1.1(b) of the SCM Agreement, we consequently disagree with this line of argumentation under Article 11 of the DSU.

5.155. Second, the European Union asserts that the Panel's lack of objectivity and even-handedness is also revealed by its decision to set the corporate borrowing rate component of the market benchmark in the form of a range of average yields, without supporting its decision with any explanation.[457]

5.156. In addressing this challenge under Article 11 of the DSU, we begin by noting that the Panel expressed a clear preference for determining the EADS bond yield on the basis of evidence about market rates "in the lead-up to the conclusion of a contract".[458] We recall that the information on the record regarding the relevant yields of the EADS bond included: (i) the average yield over the six months prior to the conclusion of the A350XWB LA/MSF contracts; and (ii) the average yield

[453] European Union's appellant's submission, para. 298.

[454] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 836.

[455] Panel Report, para. 6.389.

[456] This is particularly the case, given the Panel's findings that: (i) the four A350XWB LA/MSF contracts share certain unique features compared to other forms of financing, namely, that their repayment terms are back-loaded, primarily levy-based, dependent on the sales of aircraft, and unsecured; and (ii) "the Airbus governments {i.e. France, Germany, Spain, and the United Kingdom} formally entered into negotiations with Airbus for LA/MSF {to support the A350XWB programme} in late 2008, individually agreeing on its terms on different dates between **[BCI]**." (Panel Report, para. 6.55 (referring to Williams Statement (Panel Exhibit EU-354 (BCI)), para. 3; European Union's response to Panel question No. 101))

[457] European Union's appellant's submission, para. 299.

[458] Panel Report, para. 6.387. For instance, in its concluding sentence addressing Professor Whitelaw's averaging approach, the Panel stated that it "reject{ed} 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". (Ibid., para. 6.388 (emphasis added))

over the month prior to the conclusion of the A350XWB LA/MSF contracts. In selecting those two periods proposed by Dr Jordan, the Panel reasoned that "{p}arties 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 actual day on which the contract is signed."[459] In light of these considerations, the Panel, in our view, did provide an explanation for its decision to set the corporate borrowing rate in the form of a range of average yields. In any event, we reiterate our understanding that, even though the corporate borrowing rate was determined in the form of a range of average yields, the Panel rightly gave more prominence to the one-month average yield of the EADS bond than to the six-month average yield.

5.157. In addition, we highlight that the European Union itself fails to indicate why relying on a range of average yields for purposes of identifying the general corporate borrowing rate necessarily shows a lack of objectivity. An appellant must identify specific errors regarding the objectivity of the panel's assessment[460], and "it is incumbent on a participant raising a claim under Article 11 on appeal to explain *why* the alleged error *meets* the standard of review under that provision".[461] It certainly fell well within the bounds of the Panel's discretion under Article 11 of the DSU to refer to both averages in the form of a range.

5.158. For the foregoing reasons, we disagree with the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU because it *lacked a sufficient evidentiary basis* for rejecting the EADS bond yield on the day of conclusion of each A350XWB LA/MSF contract. Moreover, we do not believe that the European Union has established that the Panel's decision to set the corporate borrowing rate in the form of a range of average yields, or the fact that such decision was done against the background of a downward trend in the yield of the EADS bond, reflects a lack of objectivity and even-handedness contrary to the requirements of Article 11 of the DSU. Consequently, we find that the European Union has failed to establish that the Panel acted inconsistently with its obligations under Article 11 of the DSU.

5.3.1.5 The European Union's conditional appeal

5.159. The European Union brings two *conditional* claims – one claim of error in the application of Article 1.1(b) of the SCM Agreement and one claim of inconsistency with Article 11 of the DSU – challenging the Panel's decision to accept the average yield of the EADS bond over the *six months* prior to the conclusion of each of the four A350XWB LA/MSF contracts as part of the range that was used to determine the corporate borrowing rate.[462] These claims are conditional upon us rejecting the European Union's principal claims on appeal. Given that we have rejected these claims of error, we turn to address the European Union's conditional claims.

5.3.1.5.1 Whether the Panel erred in its application of Article 1.1(b) of the SCM Agreement by including the six-month average yield of the EADS bond in its determination of the corporate borrowing rate

5.160. The European Union argues that the Panel erroneously used, "as part of the range of corporate borrowing rates forming part of its market benchmark, the average yield {of the EADS bond} over the six months prior to the conclusion of each of the {four A350XWB} LA/MSF contracts".[463] In the European Union's view, "{t}he average yield of the relevant EADS bond over those six-month periods does not reflect the yield '*at the time* that each particular contract was *concluded*', and does not 'focus{} on the moment in time when the lender and borrower *commit to the transaction*'."[464] The European Union points out that "{t}he Panel itself found that the six-month average was '*less likely to reflect* expectations during the finalisation period' of each

[459] Panel Report, para. 6.389. (emphasis added)
[460] Appellate Body Report, *EC – Fasteners (China)*, para. 442.
[461] Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 442 (emphasis original)).
[462] European Union's appellant's submission, paras. 300-301.
[463] European Union's appellant's submission, para. 302.
[464] European Union's appellant's submission, para. 303 (quoting Panel Report, paras. 6.385 and 6.388 (emphasis added by the European Union)).

LA/MSF contract than the one-month average."[465] Thus, in the European Union's view, the Panel "adopted a market benchmark that the Panel itself recognised does not reflect the yield *at the time* the LA/MSF contracts were concluded".[466]

5.161. Moreover, according to the European Union, the six-month average yield used by the Panel was "particularly prone to result in misplaced findings of subsidisation", given that "there was a downward trend in yields on the relevant EADS bond in the months leading-up to the conclusion of each contract."[467] Consequently, with regard to each of the four A350XWB LA/MSF contracts, "the average yield over the six-months prior to the conclusion of each contract was substantially *higher* than the average yield over the one-month period prior to the conclusion of each contract".[468] Therefore, the European Union maintains that, "by using the six-month average yield, the Panel 'artificially increase{d} a lower market borrowing rate', thereby 'creat{ing} a danger that a benefit might be found in a case where LA/MSF was really obtained at, or above, market rate'."[469]

5.162. In response, the United States asserts that, as in the context of its principal claim of error in the application of Article 1.1(b) of the SCM Agreement, the European Union adopts an "improperly narrow" reading of the Appellate Body's guidance that the commercial benchmark should be based on the time at which each particular contract was concluded.[470] Therefore, for the same reasons advanced in the context of the European Union's principal claim, the United States disagrees that the Panel erred in its application of Article 1.1(b) by including in the calculation of the corporate borrowing rate the average yield of the EADS bond over the six months prior to the conclusion of the four A350XWB LA/MSF contracts.[471]

5.163. In our analysis above, we indicate that, although the Panel determined the corporate borrowing rate in the form of a range of average yields, it rightly gave more prominence to the one-month average yield of the EADS bond than to the six-month average yield. Indeed, the Panel found that "the one-month average would appear to be a reasonable proxy for the parties' expectations."[472] By contrast, the Panel considered that "{t}he six-month average may be less likely to reflect expectations during the finalisation period, but may also be a helpful indication of market expectations."[473] Moreover, we find that Article 1.1(b) of the SCM Agreement does not require the Panel to have conducted its benefit analysis by focusing exclusively on the yield of the EADS bond "on the day of conclusion" of each A350XWB LA/MSF contract. Indeed, while in conducting the benefit analysis the comparison focuses "on the moment in time when the lender and borrower commit to the transaction"[474], we disagree with the European Union to the extent that it suggests that the Panel should have conducted the benefit comparison exclusively using data concerning the yield "on the day of conclusion" of each A350XWB LA/MSF contract *regardless* of the time period over which the parties may have committed to the terms and conditions of that financing instrument.

5.164. As we see it, in claiming that the Panel committed legal error under Article 1.1(b) by including in its analysis "the average yield {of the EADS bond} over the six months prior to the conclusion of each of the LA/MSF contracts"[475], the European Union's claim is similarly challenging the Panel's benefit analysis *regardless* of the time period over which the parties may have committed to the terms and conditions of that financing instrument. Therefore, the same considerations provided in our analysis of the earlier claim of error also apply in the context of the present claim. As noted, we consider it relevant for a panel to evaluate the specific financing instrument at issue, including the relevant circumstances surrounding the conclusion of that

[465] European Union's appellant's submission, para. 304 (quoting Panel Report, para. 6.389 (emphasis added by the European Union)).
[466] European Union's appellant's submission, para. 304. (emphasis original)
[467] European Union's appellant's submission, para. 306 (referring to Panel Report, para. 6.381).
[468] European Union's appellant's submission, para. 306. (emphasis original)
[469] European Union's appellant's submission, para. 307 (quoting Panel Report, para. 6.385).
[470] United States' appellee's submission, para. 213.
[471] United States' appellee's submission, para. 213.
[472] Panel Report, para. 6.389.
[473] Panel Report, para. 6.389.
[474] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 836.
[475] European Union's appellant's submission, para. 302.

instrument, to determine the period over which the terms and conditions of those contracts were agreed. This is because it is possible to envisage cases where, as here, the parties may have committed to a transaction – or to key aspects thereof – during a finalization period of the negotiations preceding the moment of formal conclusion of *all* aspects of that transaction. In such circumstances, it would be appropriate for a panel to take into account in its analysis information that pre-dates the moment or actual day on which the legal instruments underlying the relevant transaction were formally signed.

5.165. As indicated above, the Panel's findings in the present case support the view that the four A350XWB LA/MSF contracts fall within this category of complex financing. This is particularly the case, given the Panel's findings that: (i) the A350XWB LA/MSF contracts share certain unique features compared to other forms of financing, namely, that their repayment terms are back-loaded, primarily levy-based, dependent on the sales of aircraft, and unsecured; and (ii) "the Airbus governments {i.e. France, Germany, Spain, and the United Kingdom} formally entered into negotiations with Airbus for LA/MSF {to support the A350XWB programme} in late 2008, individually agreeing on its terms on different dates between **[BCI]**."[476] These considerations served as the basis for the Panel's decision to determine the corporate borrowing rate using the average yields one month prior and six months prior to the conclusion of each of the four contracts, in the form of a range.

5.166. Moreover, our review of the arguments and evidence presented by the parties regarding the relevant dates for observing the yield of the EADS bond reveals that the parties did *not* focus their discussion on determining *which* of the three time periods proposed by Dr Jordan would be the correct one for determining such yield. Rather, much of the European Union's argumentation supported the relevant dates of the EADS bond yield on the basis of Professor Whitelaw's averaging approach. In turn, the United States criticized Professor Whitelaw's averaging approach and submitted a report by Dr Jordan that included a table comparing the average yield calculated by Professor Whitelaw with yields for "more relevant dates and periods for each of the agreements"[477], which contained data on the three periods from which the Panel ultimately chose the corporate borrowing rate. As noted, since the six- and one-month average yields were not contested by the parties before the Panel, it does not seem unreasonable for the Panel to have relied on this evidence, especially given the Panel's observation that "{p}arties 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 actual day on which the contract is signed"[478], and its conclusion that the four A350XWB LA/MSF contracts are complex financing instruments, the terms and conditions of which were negotiated and agreed by Airbus and the four member States over a contracting period spanning across **[BCI]**.

5.167. The European Union argues that "{t}he six-month average yield used by the Panel was particularly prone to result in misplaced findings of subsidisation" because "there was a downward trend in yields on the relevant EADS bond in the months leading up to the conclusion of each contract."[479] We agree with the European Union that, given the risk of false findings of the existence of benefit being made, a panel must be particularly vigilant where it engages in a benefit analysis with respect to complex financial contributions, the terms and conditions of which are negotiated and agreed over a certain finalization period before the time of formal conclusion. In particular, a panel has to scrutinize the time period over which the terms and conditions of the financial contribution were negotiated and agreed, so as to ensure that the benefit comparison focuses "on the moment in time when the lender and borrower commit{ted} to the transaction".[480] As noted, the fact that there was a downward trend in the yield of the EADS bond does not *per se* establish that the Panel failed to conduct a proper benefit analysis when it relied on the average yields of the EADS bond. In our analysis above, we reject the European Union's claims that the Panel committed legal error under Article 1.1(b) of the SCM Agreement in its analysis of the corporate borrowing rate component of the market benchmark. Instead, we find that the Panel

[476] Panel Report, para. 6.55 (referring to Williams Statement (Panel Exhibit EU-354 (BCI)), para. 3; European Union's response to Panel question No. 101).
[477] Jordan Reply (Panel Exhibit USA-505 (BCI/HSBI)), Table 6 at para. 29.
[478] Panel Report, para. 6.389.
[479] European Union's appellant's submission, para. 306 (referring to Panel Report, para. 6.381).
[480] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 836.

based its conclusion on the specific A350XWB LA/MSF financing at issue and the relevant time period over which its terms and conditions were concluded.

5.168. For the foregoing reasons, we do not consider that it was inappropriate for the Panel to have included in its analysis information regarding the average yield of the EADS bond over the six months prior to the conclusion of each of the four A350XWB LA/MSF contracts. In any event, we recall that, although the corporate borrowing rate was determined in the form of a range of average yields, the Panel rightly gave more prominence to the one-month average yield of the EADS bond than to the six-month average yield, which was considered to be only a "helpful indication of market expectations".[481] Consequently, we find that the European Union has not established that the Panel erred under Article 1.1(b) of the SCM Agreement "by accepting, as part of the range for the corporate borrowing rate, the average yield on the relevant EADS bond over the six months prior to conclusion of each LA/MSF contract".[482]

5.3.1.5.2 Whether the Panel acted inconsistently with Article 11 of the DSU by including the six-month average yield of the EADS bond in its determination of the corporate borrowing rate

5.169. We now turn to the European Union's conditional appeal that the Panel acted inconsistently with Article 11 of the DSU by including in the calculation of the corporate borrowing rate the average yield of the EADS bond over the six months prior to the conclusion of each of the four A350XWB LA/MSF contracts. The European Union's challenge under Article 11 of the DSU is based on two grounds.

5.170. First, the European Union contends that the Panel failed to provide a reasoned and adequate explanation for including, as part of the range, the average yield over the six-month period prior to the conclusion of each A350XWB LA/MSF contract. The European Union points out that, even though the Panel had noted that "the six-month average was *'less likely to reflect* expectations during the finalisation period' of each contract than the one-month average"[483], the Panel "chose to adopt a *range* of values that included the six-month average".[484] The other part of the range (i.e. the one-month average yield) consisted of a more appropriate proxy. According to the European Union, the inclusion of what the Panel itself considered to be an inferior benchmark required, at a minimum, an explanation from the Panel. Nonetheless, according to the European Union, the Panel failed to provide such explanation, let alone a reasoned and adequate one, in contravention of Article 11 of the DSU.[485]

5.171. In response, the United States rejects the European Union's conditional claim under Article 11 of the DSU by reiterating that the European Union erroneously asserts that the Panel "failed to provide any explanation for the inclusion of the six-month average yield".[486]

[481] Panel Report, para. 6.389.
[482] European Union's appellant's submission, para. 308.
[483] European Union's appellant's submission, para. 310 (quoting Panel Report, para. 6.389 (emphasis added by the European Union)).
[484] European Union's appellant's submission, para. 311. (emphasis original)
[485] European Union's appellant's submission, para. 311.
[486] United States' appellee's submission, para. 213 (quoting European Union's appellant's submission, para. 311).

5.172. We begin by closely examining the Panel's analysis. In the relevant passage of the Panel Report referred to by the European Union[487], the Panel indicated that it would need to choose yields from among the periods of time provided by Dr Jordan – i.e. the average yield over the six months prior to the conclusion of the relevant contract; the average yield over the month prior to the conclusion of the relevant contract; and the yield on the day of conclusion of the relevant contract. The Panel pointed out that the yield on the day of conclusion of the relevant contract "may reflect atypical fluctuations".[488] The Panel added that "{p}arties 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 actual day on which the contract is signed."[489] Then, the Panel made a few observations about yields from the other two time periods. With regard to the one-month average yield, the Panel stated that it "would appear to be a reasonable proxy for the parties' expectations". In turn, regarding the six-month average yield, the Panel indicated that such average "may be less likely to reflect expectations during the finalisation period, but may also be a helpful indication of market expectations".[490] Finally, having made all of the above remarks, the Panel reached the conclusion that it would "therefore carry out {its} 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".[491]

5.173. Moreover, with respect to the six-month average yield proposed by Dr Jordan, the European Union correctly notes that the Panel indicated that "{t}he six-month average may be less likely to reflect expectations during the finalisation period".[492] However, the European Union omits that, in the same sentence, the Panel added that such a six-month average "may also be a helpful indication of market expectations".[493] To us, these statements are consistent with the Panel's earlier reasoning that "{p}arties 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 actual day on which the contract is signed."[494] This understanding is in line with our observation that, in some cases, parties may have committed to a transaction – or to key aspects thereof – during a finalization period of the negotiations preceding the moment of formal conclusion of *all* aspects of that transaction. We are thus of the view that the Panel did not exceed its margin of appreciation of the evidence when it included the six-month average yield in the range for determining the corporate borrowing rate component of the market benchmark. We also agree with the Panel when it found that the one-month average prior to the conclusion of the transaction "would appear to be a reasonable proxy for the parties' expectations" and thus gave it more prominence than the six-month average, which was considered to be only a "helpful indication of market expectations".[495]

5.174. In light of these considerations, we do not see grounds for a finding of inconsistency with Article 11 of the DSU due to the alleged failure by the Panel to provide a reasoned and adequate explanation. We recall that, although the Panel determined the corporate borrowing rate in the form of a *range* of average yields, the Panel rightly gave more prominence to the one-month average yield of the EADS bond than to the six-month average yield. While further analysis and explanation may have provided a more robust basis for the Panel's decision to conduct the benchmarking analysis using a range of average yields, we disagree with the European Union's claim that the Panel's analysis lacks objectivity. Consequently, we find that the European Union has not established that the Panel acted inconsistently with Article 11 of the DSU by failing to provide a reasoned and adequate explanation for including, as part of its range, the average yield over the six-month period prior to the conclusion of each of the four A350XWB LA/MSF contracts.[496]

[487] See Panel Report, para. 6.389.
[488] Panel Report, para. 6.389.
[489] Panel Report, para. 6.389.
[490] Panel Report, para. 6.389.
[491] Panel Report, para. 6.389.
[492] Panel Report, para. 6.389.
[493] Panel Report, para. 6.389.
[494] Panel Report, para. 6.389.
[495] Panel Report, para. 6.389.
[496] European Union's appellant's submission, para. 310.

5.175. In its second line of argumentation, the European Union considers that the Panel's acceptance of the six-month average yield is based on *inconsistent and incoherent reasoning*.[497] The European Union puts forward two reasons to substantiate its challenge.

5.176. First, the European Union highlights that, while the Panel criticized Professor Whitelaw's use of an average yield over **[BCI]**, due to the possibility that such an approach could result in an "artificially" lower (or higher) market borrowing rate, the Panel also included the six-month average yield in the market benchmark. This is despite the fact that the six-month average demonstrably resulted in an "artificial" increase of the market borrowing rate, which could result in "misplaced" findings of subsidization. Consequently, the European Union considers that the Panel's reasoning is "internally inconsistent".[498]

5.177. The United States rejects the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU in this regard and points out that the European Union does not state what is inconsistent or incoherent about the Panel's finding.[499] According to the United States, the European Union fails to appreciate the actual reason why the Panel rejected Professor Whitelaw's **[BCI]** average. This rejection was not based on a concern that **[BCI]** is "too wide a window" from which to draw the relevant data.[500] Rather, the Panel criticized Professor Whitelaw's **[BCI]** average because it applied a uniform commercial bond yield from the time period of **[BCI]** for each of the four A350XWB LA/MSF contracts, despite the fact that they were finalized on different dates. Given that the Panel did not criticize Professor Whitelaw's approach because it is based on data from a **[BCI]** time period, the United States maintains that there is nothing inconsistent or incoherent about rejecting Professor Whitelaw's **[BCI]** average while using the one-month and six-month averages specific to the date of finalization of each A350XWB LA/MSF contract.[501]

5.178. The European Union's arguments appear to neglect important aspects of the reasoning provided by the Panel for rejecting the averaging approach proposed by Professor Whitelaw. In particular, the European Union seems to suggest that the *sole* reason why the Panel rejected Professor Whitelaw's approach is that such approach "*could* result in an 'artificially' lower (or higher) market borrowing rate, therefore resulting in a 'misplaced' finding of subsidisation (or of no subsidisation)".[502] In so doing, the European Union overlooks the *specific* problems that the Panel identified regarding the averaging approach proposed by Professor Whitelaw. As noted above, the Panel's conclusion was based on two main reasons. First, the Panel observed that "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."[503] Second, the Panel indicated that "Professor Whitelaw's averaging approach would also incorporate data from after the conclusion of three of the four contracts."[504]

5.179. These considerations, in our view, confirm that the Panel did not take issue with Professor Whitelaw's averaging approach for the mere reason that it was an *average*. We acknowledge that, had that indeed been the case, the European Union may have some legitimate grounds to question the consistency and objectivity of the Panel's decision to include the six-month average in the market benchmark. Instead, the Panel's misgivings in relation to Professor Whitelaw's averaging approach stemmed from the above-mentioned issues that the Panel identified. Therefore, we do not consider that the Panel's reasoning was inconsistent or incoherent for, on the one hand, rejecting Professor Whitelaw's averaging approach and, on the other hand, including the six-month average as part of the range of average yields it used in determining the corporate borrowing rate. Consequently, the European Union has not properly substantiated this challenge under Article 11 of the DSU.

[497] European Union's appellant's submission, para. 312.
[498] European Union's appellant's submission, para. 313.
[499] United States' appellee's submission, para. 214.
[500] United States' appellee's submission, para. 215.
[501] United States' appellee's submission, para. 215.
[502] European Union's appellant's submission, para. 312 (referring to Panel Report, para. 6.385). (emphasis original; additional text in fn 278 thereto omitted)
[503] Panel Report, para. 6.386 (referring to Jordan Reply (Panel Exhibit USA-505 (BCI/HSBI)), para. 27). (emphasis added; additional text in fn 588 thereto omitted)
[504] Panel Report, para. 6.387.

5.180. Moreover, the European Union considers that the Panel's reasoning is internally inconsistent for one additional reason. According to the European Union, on the one hand, the Panel rejected the EADS bond yield on the day of conclusion of the A350XWB LA/MSF contracts based on the mere possibility that it "may" be "distorted", even though the evidence on the record demonstrated that no such distortion existed. On the other hand, the Panel accepted the six-month average yield for the EADS bond as a basis for determining the corporate borrowing rate, even though that average bore the same risk of being "distorted", and the evidence on the record demonstrated that this average was, indeed, distorted. Therefore, according to the European Union, the Panel's decision to accept the six-month average yield was based on incoherent and inconsistent reasoning.[505]

5.181. In our view, this challenge under Article 11 of the DSU does not represent a full and accurate characterization of the Panel's analysis. The European Union contends that the evidence on the record demonstrated that there was *no* distortion in the yield of the EADS bond on the day of conclusion of the A350XWB LA/MSF contracts, and that the six-month average was, in fact, distorted. We see no support for the European Union's assertions in the Panel's findings or the evidence on the record. In particular, we recall that we do not understand the Panel to have based its finding on speculation that there might have been *atypical fluctuations* in the yield of the EADS bond on the day of signature of the A350XWB LA/MSF contracts. Rather, the Panel merely observed, as a general matter, that choosing the yield on the day of conclusion of the A350XWB LA/MSF contract at issue might raise some methodological concerns for purposes of constructing the market benchmark because, on the day of conclusion of a contract, the yield "*may* reflect atypical fluctuations".[506] In any event, we observe that the Panel's analysis did not hinge on whether or not there were any actual distortions on the yield of the EADS bond. Instead, the Panel properly focused on the specific nature and features of the A350XWB LA/MSF financing at issue and whether aspects thereof were agreed in the lead-up to the formal signing of the legal instrument providing the financial contribution.

5.182. In addition, the European Union contends that the six-month average yield "bore the same risk of being 'distorted'"[507] as the yield on the day of conclusion of the A350XWB LA/MSF contracts. However, the European Union has not substantiated *why* that would be the case. It appears to us that there is a clear difference in the way "atypical fluctuations" could affect, on the one hand, a bond's yield observed *only* on one day and, on the other hand, a six-month average of that same yield. We do not discount that a six-month average yield can also be affected by "distortions" or "atypical fluctuations". However, without an explanation by the European Union as to why the six-month average yield bore the same risks of being "distorted" as the yield on the day of conclusion, we consider that the European Union has failed to substantiate this challenge under Article 11 of the DSU.[508]

5.183. In light of the above considerations, we find that the European Union has failed to establish that the Panel erred under Article 11 of the DSU by deciding to observe the EADS bond yield on the basis of the average yields one month prior and six months prior to the conclusion of each of the French, German, Spanish, and UK A350XWB LA/MSF contracts, in the form of a range.

5.3.1.6 Conclusion on the Panel's findings regarding the corporate borrowing rate

5.184. In our analysis above, we disagree with the European Union's *principal* claims of error concerning the manner in which the Panel identified the relevant time period from which to draw the corporate borrowing rate component of the market benchmark. In particular, while we agree that, in conducting the benefit analysis, the comparison focuses on the moment in time when the lender and borrower commit to the transaction, we disagree with the European Union to the extent that it suggests that the Panel was required to limit its analysis to data from "the day of conclusion" of each A350XWB LA/MSF contract regardless of the time period over which the parties may have committed to the terms and conditions of that financing instrument. Rather, the Panel

[505] European Union's appellant's submission, paras. 314-316.
[506] Panel Report, para. 6.389. (emphasis added)
[507] European Union's appellant's submission, para. 315.
[508] As stated by the Appellate Body in *EC – Fasteners (China)*, "{i}t is incumbent on a participant raising a claim under Article 11 on appeal to explain why the alleged error meets the standard of review under that provision." (Appellate Body Report, *EC – Fasteners (China)*, para. 442 (emphasis omitted))

was required to take into account the specific financing instrument at issue, including the relevant circumstances surrounding the conclusion of that instrument, to determine the period over which the terms and conditions of the relevant contract were agreed. The Panel provided two reasons in support of its decision to determine the corporate borrowing rate using the average yields one month prior and six months prior to the conclusion of the A350XWB LA/MSF contracts, in the form of a *range*. First, the Panel considered that "the yield on the day of the signature of contract may reflect atypical fluctuations."[509] The Panel's second reason was that "{p}arties 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 actual day on which the contract is signed."[510] We have found this understanding to be in line with our observation that, in some cases, parties may have committed to a transaction − or to key aspects thereof − during a finalization period of the negotiations preceding the moment of formal conclusion of *all* aspects of that transaction. In the present case, the financial contribution at issue consists of complex financing the terms and conditions of which have been negotiated and agreed over a certain contracting period. In these circumstances, we find that the Panel did not err in its application of Article 1.1(b) of the SCM Agreement in finding that the corporate borrowing rate component of the market benchmark could be based on the average yields of the EADS bond "one-month prior and six-months prior to the conclusion" of the French, German, Spanish, and UK A350XWB LA/MSF contracts, "in the form of a range", attributing more weight to the former average yields than it did to the latter.[511]

5.185. Moreover, we reject the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU because it *lacked a sufficient evidentiary basis* for rejecting the EADS bond yield on the day of conclusion of each A350XWB LA/MSF contract. In addition, the European Union has not established that the Panel's decision to set the corporate borrowing rate in the form of a range of average yields, or the fact that such decision was done against the background of a downward trend in the yield of the EADS bond, reflects a lack of objectivity and even-handedness contrary to the requirements of Article 11 of the DSU. Consequently, we find that the European Union has failed to establish that the Panel acted inconsistently with its obligations under Article 11 of the DSU.

5.186. We also reject the European Union's alternative claims that the Panel erred in its application of Article 1.1(b) of the SCM Agreement and acted inconsistently with Article 11 of the DSU by accepting the average yield of the EADS bond over the *six months* prior to the conclusion of the French, German, Spanish, and UK A350XWB LA/MSF contracts as part of the range of average yields that was used to determine the corporate borrowing rate. Although the corporate borrowing rate was determined in the form of a range of average yields, the Panel rightly gave more prominence to the one-month average yield of the EADS bond than to the six-month average yield, which was considered to be only a "helpful indication of market expectations".[512] In these circumstances, we find that the European Union has failed to establish that the Panel erred in its application of Article 1.1(b) of the SCM Agreement or acted inconsistently with Article 11 of the DSU by deciding to observe the EADS bond yield on the basis of the average yields one month prior and six months prior to the conclusion of each of the four A350XWB LA/MSF contracts, in the form of a range, attributing more weight to the former average yields than it did to the latter.

5.187. Accordingly, we uphold the Panel's finding, in paragraph 6.389 of the Panel Report, that the corporate borrowing rate component of the market benchmark be based on "the average yields one-month prior and six-months prior to the conclusion of the {French, German, Spanish, and UK A350XWB LA/MSF contracts}, in the form of a range". Consequently, we also uphold the Panel's findings related to the corporate borrowing rate in Table 7 at paragraph 6.430 and in Table 10 at paragraph 6.632 of the Panel Report. Below, we reproduce Table 7 of the Panel Report, which sets out the quantitative implications of the Panel's findings on the corporate borrowing rate:

[509] Panel Report, para. 6.389.
[510] Panel Report, para. 6.389.
[511] Panel Report, para. 6.389.
[512] Panel Report, para. 6.389.

Table 3: 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)[513]	Representative sum for normal market fees	Total corporate borrowing rate component of market benchmark rate
France	**[BCI]** to **[BCI]**	**[BCI]**	**[BCI]** to **[BCI]**
Germany	**[BCI]** to **[BCI]**	**[BCI]**	**[BCI]** to **[BCI]**
Spain	**[BCI]**[514] to **[BCI]**	**[BCI]**	**[BCI]** to **[BCI]**
United Kingdom	**[BCI]** to **[BCI]**	**[BCI]**	**[BCI]**[515] to **[BCI]**

Source: Panel Report, Table 7 at paragraph 6.430.

5.3.2 Project-specific risk premium

5.188. The European Union argues that the Panel erred in its identification of the "project-specific risk premium" component of the market benchmark that was used to determine whether the French, German, Spanish, and UK A350XWB LA/MSF contracts confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. The European Union challenges many aspects of the Panel's analysis by bringing *three* sets of claims of error allegedly committed by the Panel in identifying the project-specific risk premium. The overarching critique by the European Union is that the Panel erred in using the project-specific risk premium that was developed in the original proceedings for the A380 project as the risk premium for the A350XWB project, "launched at a *different moment in time*, and implicating *different risks*".[516] According to the European Union, the single, undifferentiated project risk premium selected by the Panel does not precisely and accurately reflect the risks involved in the A350XWB project, and does not reflect the differing terms of each of the four individual A350XWB LA/MSF contracts.[517] We describe below the essence of the *three* sets of claims of error brought by the European Union.

5.189. In its first set of claims, the European Union argues that the Panel erred in its application of Article 1.1(b) of the SCM Agreement and acted inconsistently with Article 11 of the DSU. With respect to Article 1.1(b), the European Union submits that "{t}he Panel failed to undertake a 'progressive search' for and to adopt the benchmark that shared 'as many elements as possible in common with' the A350XWB LA/MSF loans".[518] In addition, the European Union asserts that, having failed to adopt the benchmark most closely tailored to the risks associated with the A350XWB project, the Panel failed to make any *adjustments* to account for acknowledged

[513] We recall that, while the Panel determined the corporate borrowing rate in the form of a range of average yields, it rightly gave more prominence to the one-month average yield of the EADS bond in its determination of the corporate borrowing rate. (See para. 5.140 above)

[514] The European Union identifies a clerical error made by the Panel in Tables 7 and 10 of the Panel Report in relation to the one-month average yield prior to the Spanish A350XWB *Convenio*. In particular, the European Union points out that "Table 6 of the Panel Report shows, for Spain, the one-month average yield prior to the date of the contract was **[BCI]**, and not **[BCI]** as inscribed in Table 10 (and Table 7)". (European Union's appellant's submission, fn 286 to Table 2 at para. 322 (referring to Panel Report, Table 7 at para. 6.430 and Table 10 at para. 6.632) (emphasis original)) The European Union is correct in pointing out that the correct figure in relation to the one-month average yield prior to the Spanish A350XWB *Convenio* is **[BCI]**, found in Table 6 of the Panel Report, rather than **[BCI]**, which is the clerical error found in Tables 7 and 10 of the Panel Report. In response to questioning at the oral hearing, the United States agreed that the figure **[BCI]** is a clerical error. Consequently, for purposes of the present Report, we proceed on the basis of the correct figure mentioned by the Panel in Table 6: **[BCI]**.

[515] See *supra*, fn 330.

[516] European Union's appellant's submission, para. 333. (emphasis original)

[517] European Union's appellant's submission, para. 334. The European Union contends that, consistent with the guidance provided in the original proceedings, the Panel "should have required the United States to identify a project risk premium based on the risks associated *with the A350XWB project itself*, and in light of *the terms of each specific LA/MSF contract*". (Ibid. para. 336 (emphasis original))

[518] European Union's appellant's submission, para. 380 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 476 and 486; referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345).

differences between the selected benchmark and the A350XWB LA/MSF contracts.[519] As a result, the Panel erred in its application of Article 1.1(b) by failing "to ensure that the benchmark it selected {was} properly tailored to the specific risks associated with the A350XWB project, and each of the four LA/MSF contracts for that project".[520] With regard to Article 11 of the DSU, the European Union claims that the Panel acted inconsistently with this provision, first, by failing to consider alternative, and more appropriate, benchmarks than those proposed by the United States.[521] Second, the European Union contends that, in adopting a constant, undifferentiated project risk premium not tailored to the risks associated with LA/MSF for the A350XWB, the Panel inappropriately deviated from the findings of the original panel, which called for establishing a risk premium that takes into account the risks involved in *each specific* LCA project.[522]

5.190. In its second set of claims, the European Union submits that the Panel acted inconsistently with Article 11 of the DSU by finding that the project risk premium developed for the A380 project was a suitable benchmark for the A350XWB project on the basis that the risks associated with these two projects were similar.[523] In particular, the European Union challenges the findings regarding the three main categories of risk assessed by the Panel: (i) the risk that the A380 or A350XWB project would fail or not be as successful as anticipated because of a failure to develop or sell the aircraft as expected (programme risk); (ii) 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 (iii) the risk associated with the different terms of the A380 LA/MSF contracts vis-à-vis the four A350XWB LA/MSF contracts, as well as the risks associated with the different terms of the four individual A350XWB LA/MSF contracts (contract risk).[524]

5.191. In its third set of claims, the European Union asserts that the Panel erred in finding that the *same* risk premium could be applied as a benchmark for *each* of the four individual A350XWB LA/MSF contracts. The European Union argues that, in making this finding, the Panel erred in its application of Article 1.1(b) of the SCM Agreement by failing to make adjustments to account for differences that exist *among the four A350XWB LA/MSF contracts*. Moreover, according to the European Union, the Panel also acted inconsistently with Article 11 of the DSU because its conclusions were based on "internally inconsistent" reasoning.[525]

5.192. On these bases, the European Union requests us to reverse the Panel's findings, in paragraphs 6.632 (including Table 10) and 6.633 of the Panel Report, that the French, German, Spanish, and UK A350XWB LA/MSF contracts confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement, and consequently to reverse the Panel's findings, in paragraphs 6.656 and 7.1.c.i of the Panel Report, that the French, German, Spanish, and UK A350XWB LA/MSF contracts each constitute a "subsidy" within the meaning of Article 1 of the SCM Agreement.[526]

5.193. Before addressing the European Union's claims of error, we summarize the Panel's findings below.

[519] European Union's appellant's submission, para. 396.
[520] European Union's appellant's submission, para. 339.
[521] European Union's appellant's submission, para. 408.
[522] European Union's appellant's submission, para. 409.
[523] European Union's appellant's submission, para. 340 (referring to Panel Report, paras. 6.487, 6.492, 6.527, 6.539-6.542, 6.579, 6.595, 6.607-6.610, 6.632 (Table 10), and 6.633).
[524] Panel Report, para. 6.460.
[525] European Union's appellant's submission, para. 341.
[526] European Union's appellant's submission, para. 531.

5.3.2.1 The Panel's findings

5.194. Before the Panel, the parties agreed that, in addition to the corporate borrowing rate, the market benchmark should include a project-specific risk premium reflecting the risk associated with providing financing on the same or similar terms as LA/MSF for the A350XWB project.[527]

5.195. The United States proposed two options for a project-specific risk premium. The first option, preferred by the United States, was the Jordan Risk Premium (JRP), a figure calculated by its expert, Dr Jordan. The second option was the risk premium proposed by Professor Whitelaw in the original proceedings for the A380 project, and was referred to as the Whitelaw Risk Premium (WRP).[528]

5.196. The Panel noted that the European Union did not propose a project-specific risk premium of its own for the A350XWB project, and rejected both of the risk premia advanced by the United States. The European Union asserted, first, that the JRP was not used as a project-specific risk premium in the original proceedings and, second, that the United States had not shown that the WRP was an appropriate risk premium for the A350XWB.[529]

5.197. With respect to the first project-specific risk premium submitted by the United States, the Panel began by noting that the JRP is a figure calculated by Dr Jordan by using "the average of two very similar risk premia" introduced during the original proceedings in relation to the risk associated with the A380 project.[530] The Panel observed that neither of the JRP inputs were accepted or even argued to be an appropriate risk premium for the A380 in the original proceedings.[531] Therefore, the Panel considered that, in these compliance proceedings, the United States was required to present additional argumentation and evidence to support their use as a basis for a risk premium for the A350XWB.[532] The Panel was not persuaded by the reasons provided by the United States to justify its reliance on the JRP.[533] As a result, the Panel was unable to accept the JRP as a project-specific risk premium.[534]

5.198. The Panel then turned to the United States' second option for a project-specific risk premium: the WRP. In this context, the Panel considered the main question to be whether the United States had demonstrated that the project-specific risks of the A350XWB project were "sufficiently similar" to those of the A380 project, such that it would be reasonable to conclude that the WRP could be used as the project-specific risk premium for the A350XWB.[535] The Panel considered that the parties' arguments concerning the relative project-specific risks associated with the A380 and A350XWB projects focused on the following issues: (i) programme risk; (ii) the price of risk; and (iii) contract risk.

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[527] Panel Report, para. 6.431. The Panel indicated that the second component of the market benchmark reflects 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 borrow but also the riskiness of the individual projects". (Ibid. para. 6.432 (quoting Ellis-Jordan Report (Original Panel Exhibit USA-80; Panel Exhibit USA-474/506 (BCI) (exhibited twice)), p. 4))

[528] Panel Report, para. 6.433 (referring to Jordan Report (Panel Exhibit USA-475 (BCI/HSBI)), para. 15; Jordan Reply (Panel Exhibit USA-505 (BCI/HSBI)), para. 5). Both the JRP and the WRP use figures that the United States argued were advanced as project-specific risk premia in the original proceedings. (Ibid.)

[529] Panel Report, para. 6.434 (referring to European Union's first written submission to the Panel, paras. 313-315; second written submission to the Panel, para. 321).

[530] Panel Report, para. 6.437 (quoting Jordan Report (Panel Exhibit USA-475 (BCI/HSBI)), para. 14).

[531] Panel Report, paras. 6.443 and 6.446-6.447.

[532] Panel Report, paras. 6.443 and 6.446.

[533] In particular, the Panel was not convinced that the following arguments by the United States justified relying on the JRP in the present compliance proceedings: (i) the JRP uses the method advanced by the European Union and Professor Whitelaw in the original proceedings; (ii) the JRP responded to specific criticisms of the WRP made by the panel and Appellate Body in the original proceedings; (iii) the two figures on which the JRP is based are "higher" than the WRP; and (iv) the two figures on which the JRP is based are "similar" to one another. (Panel Report, para. 6.455)

[534] Panel Report, para. 6.455.

[535] Panel Report, para. 6.459.

5.199. In the context of the first issue, *programme risk*, the Panel indicated that the parties submitted arguments and evidence with regard to two broad categories: "development" risk and "market" risk.[536] Regarding *development risk*, the Panel understood the parties to consider that development risk relates to the likelihood that Airbus would not be able to deliver the aircraft as and when promised, covering the entire development of the project from conceptualization to certification.[537] The United States considered that, as a result of the A350XWB project using "risky new technologies", it entailed "unique and significant technology risks" that made the A350XWB "at least as risky, if not more risky, than the A380".[538] The European Union disagreed with this contention and submitted that actions pursued by Airbus mitigated the technology-related risk for the A350XWB and, in addition, that risks were already lower and certain maturity levels were reached by the time the A350XWB LA/MSF contracts were concluded.[539] In light of these arguments, the Panel considered that the main factual questions related to: (i) technical or technology-related risks; and (ii) risk-mitigating or -attenuating factors.[540] The Panel also examined whether there were any risks associated with the A350XWB arising from problems with the A380 project.

5.200. The Panel concluded that the evidence on the record indicated that the A350XWB was particularly technologically innovative.[541] The Panel was of the view that, even though the A380 involved its own technological challenges, the A350XWB's technological risk was at least as high as or higher than that of the A380.[542] The Panel also considered that certain aspects of the A350XWB development programme seem to have further increased development risks as compared to the A380.[543] With regard to the risk-mitigating factors identified by the European Union, the Panel concluded that these factors would not have fully offset the increased risks associated with the new "Develop And Ramp-Up Excellence" (DARE) programme and its high level of outsourcing, and also would not have fully offset the technology risks associated with new materials and their lower maturity levels at the start of development.[544] Therefore, taking those factors into consideration, the Panel concluded that "the development risks associated with the A350XWB were *at least as high as, or sufficiently similar to*, those associated with the A380".[545]

5.201. With respect to *market risk*, both parties agreed that market risk refers to "the risk that the new aircraft will not sell as well as anticipated".[546] In comparing the market risk associated with the A380 project against that associated with the A350XWB project, the Panel noted that the parties' arguments concerned risks regarding: (i) predictions about the size of the respective markets for the two aircraft models (market forecasts); and (ii) conditions of competition within the respective markets.[547] As to the risk related to market forecasts, the Panel observed that the market demand predictions for the A350XWB were likely to be subject to a negative economic environment that would affect Airbus' clients, which was known at the time the A350XWB LA/MSF contracts were concluded.[548] The Panel noted that, while the economic environment appears to have been taken into account in predictions with regard to the A380[549], it was not considered in

[536] Panel Report, para. 6.461.
[537] Panel Report, para. 6.462.
[538] Panel Report, para. 6.464 and fns 656-657 thereto.
[539] Panel Report, para. 6.465 (referring to European Union's second written submission to the Panel, para. 332, in turn referring to Airbus, A350XWB Chief Engineering and Future Projects Office, "A350XWB Chief Engineering Statement", 3 July 2012 (A350XWB Chief Engineering Statement) (Panel Exhibit EU-18 (BCI/HSBI)), paras. 13-17 and 33-59; first written submission to the Panel, paras. 1110-1129).
[540] Panel Report, para. 6.466.
[541] Panel Report, para. 6.539.
[542] Panel Report, para. 6.539.
[543] Panel Report, para. 6.540. The Panel noted that, "{u}nder 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'." (Ibid. (quoting A350XWB Chief Engineering Statement (Panel Exhibit EU-18 (BCI/HSBI)), para. 37 (lines 7-12)))
[544] Panel Report, para. 6.542.
[545] Panel Report, para. 6.542. (emphasis original)
[546] Panel Report, para. 6.543 (quoting European Union's second written submission to the Panel, para. 322). (additional text in fn 897 thereto omitted)
[547] Panel Report, para. 6.544.
[548] Panel Report, para. 6.570.
[549] Panel Report, para. 6.568.

the predictions of market demand for the A350XWB. The Panel considered that a market lender would have taken these factors into account in determining their market lending rate.[550]

5.202. With regard to the risk related to conditions of competition within market segments, the Panel was not persuaded by the European Union's argument that the conditions of competition between Airbus and Boeing were more favourable to Airbus in the context of the A350XWB project than in that of the A380 project.[551] The Panel was of the view that the A380 and A350XWB experienced market risks that were different in nature. While the A380's market success or failure rested in large part on the correct identification of the existence and size of the market segment, 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.[552] Moreover, the A350XWB would need to be competitive not only in terms of innovation but, crucially, in terms of timing. On this basis, the Panel concluded that, while the A380 and A350XWB experienced market risks that were different in nature, these risks were nevertheless overall comparable in importance.[553]

5.203. Turning to the second issue, the *price of risk*, the Panel began by noting that the price of risk refers to "risk acceptable to the finance industry at different moments of its own market cycle".[554] The Panel considered that the main question in this regard was whether the financial environment − in particular the global financial and economic crisis − 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.[555] Before the Panel, the United States submitted that LA/MSF for the A350XWB "was finalised at a point in time when lending conditions were historically tight" due to the lingering effects of the 2008 global financial and economic crisis, with the implication that "the true A350XWB risk premium should likely be higher than the A380 risk premium".[556] Given that the United States did not provide certain yield spreads to the Panel, the Panel was unable to accept the United States' 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.[557]

5.204. In the context of the third issue, *contract risk*, the Panel examined two factors. First, the Panel addressed the European Union's argument that "differences in the terms of the LA/MSF agreements for the A380 and the A350XWB reduce{d} the risk for the A350XWB and, hence, the benchmark."[558] The Panel noted that, as the European Union had submitted, "under the **[BCI]** LA/MSF contracts for the A350XWB, **[BCI]** in the event that deliveries are not made (unless **[BCI]**); thus some returns may accrue to those member State governments even in the event of delays to the programme."[559] However, the Panel pointed out that, in the original proceedings, "**[BCI]**, which would likewise constitute 'risk-reducing' terms, existed with respect to **[BCI]** LA/MSF at issue in that proceeding", and that at least one of the **[BCI]** LA/MSF contracts considered in the original proceedings contained a mechanism that similarly "protected" returns.[560] In those proceedings, the WRP was nevertheless applied taking into account that it was a minimum risk premium and would be understated for that contract.[561] Therefore, the Panel

[550] Panel Report, para. 6.570.
[551] Panel Report, paras. 6.571-6.572.
[552] Panel Report, para. 6.579.
[553] Panel Report, para. 6.579.
[554] Panel Report, para. 6.580 (quoting Jordan Report (Panel Exhibit USA-475 (BCI/HSBI)), para. 22; referring to European Union's second written submission to the Panel, para. 344; Whitelaw Response to Jordan (Panel Exhibit EU-121 (BCI/HSBI)), para. 23).
[555] Panel Report, para. 6.580.
[556] Panel Report, para. 6.581 (quoting Jordan Report (Panel Exhibit USA-475 (BCI/HSBI)), para. 22.)
[557] Panel Report, para. 6.588.
[558] Panel Report, para. 6.590 (referring to European Union's second written submission to the Panel, paras. 339-340; response to Panel question No. 100, paras. 404-405).
[559] Panel Report, para. 6.594. (fn omitted)
[560] Panel Report, para. 6.595.
[561] Panel Report, para. 6.595 (referring to Original Panel Report, para. 7.481; Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 923).

considered that such features argued by the European Union should not, in and of themselves, render the WRP inapplicable.[562]

5.205. Second, the Panel assessed the European Union's contention that "differences {among} the terms of the four A350XWB LA/MSF agreements 'could justify the application of, at least, two different risk premiums for those agreements'".[563] The Panel recognized that there were some differences among the risk profiles of the four individual A350XWB LA/MSF contracts, but noted that this was also the case with respect to the contracts in the original proceedings − including among the four A380 LA/MSF contracts − for which the same WRP was applied as a minimum premium for all contracts.[564] Consequently, the Panel was 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."[565]

5.206. Overall, having reviewed the risk differences that may affect the project-specific risk premium, the Panel considered that the risks for the A380 and A350XWB projects were sufficiently similar to allow a valid risk premium applied to the A380 project in the original proceedings to be applied to the A350XWB project.[566] Therefore, the Panel concluded that "Professor Whitelaw's risk premium (the WRP) from the original proceeding could be applied to benchmark LA/MSF for the A350XWB."[567]

5.3.2.2 Whether the Panel committed legal error by failing to establish a project-specific risk premium for the four A350XWB LA/MSF contracts based on the risks associated with the A350XWB project

5.207. In its *first* set of claims, the European Union's overarching critique is that, by focusing on determining whether the risk premium developed to assess the A380 LA/MSF measures (i.e. the WRP) could be applied to assess the French, German, Spanish, and UK A350XWB LA/MSF contracts, the Panel failed to establish a risk premium to benchmark the four A350XWB LA/MSF contracts *based on the specific risks associated* with the A350XWB project.[568] According to the European Union, in conducting its examination, the Panel erred in its application of Article 1.1(b) of the SCM Agreement, and failed to make an objective assessment of the matter as required by Article 11 of the DSU.

5.208. The European Union submits that the Panel erred in its application of Article 1.1(b) of the SCM Agreement, first, by failing to undertake a progressive search for a market benchmark and to adopt the most appropriate benchmark.[569] Second, the European Union asserts that, to the extent that an insufficiently tailored benchmark was used, the Panel failed to make adjustments to the benchmark to ensure comparability.[570] The European Union argues that, "{s}eparately and collectively"[571], these failures by the Panel constitute error in the application of Article 1.1(b).

5.209. In the context of its claim under Article 11 of the DSU, the European Union argues, first, that the Panel acted inconsistently with this provision by failing to consider alternative, and more appropriate, benchmarks than those proposed by the United States.[572] Second, the European Union contends that, in adopting a constant, undifferentiated project risk premium not tailored to the risks associated with LA/MSF for the A350XWB, the Panel inappropriately

[562] Panel Report, para. 6.595.
[563] Panel Report, para. 6.596 (quoting European Union's response to Panel question No. 100, para. 406).
[564] Panel Report, para. 6.604.
[565] Panel Report, para. 6.607.
[566] Panel Report, para. 6.608.
[567] Panel Report, para. 6.610.
[568] European Union's appellant's submission, section V.D.1.
[569] European Union's appellant's submission, section V.D.1.a.ii.
[570] European Union's appellant's submission, section V.D.1.a.iii.
[571] European Union's appellant's submission, para. 406.
[572] European Union's appellant's submission, para. 408.

deviated from the findings of the original panel, which called for establishing a risk premium that takes into account the risks involved in each specific LCA project.[573]

5.210. We begin by addressing the European Union's claim that the Panel erred in its application of Article 1.1(b) of the SCM Agreement.

5.3.2.2.1 Whether the Panel erred by failing to undertake a "progressive search" for a market benchmark and to adopt the most appropriate benchmark

5.211. The European Union argues that the Panel focused its assessment on whether the same project risk premium developed to assess the LA/MSF measures for the A380 project in the original proceedings could be applied to assess the LA/MSF measures for the A350XWB project, instead of asking "whether a benchmark comprising, *inter alia*, a project risk premium *tailored to the risks of financing the A350XWB project itself*, was available and could be used" to assess whether the four A350XWB LA/MSF contracts confer a benefit.[574] Therefore, according to the European Union, the Panel erred in its application of Article 1.1(b) of the SCM Agreement by failing to establish a project-specific risk premium that properly reflected the risks associated with the A350XWB project itself.[575]

5.212. The European Union observes that "Article 14(b) of the SCM Agreement provides that the market benchmark for a government loan must be 'a *comparable* commercial loan which the firm could actually obtain on the market'."[576] The Appellate Body has explained that, to be "comparable", "a commercial loan 'should have *as many elements as possible in common* with the investigated loan'."[577] The European Union considers that "a benchmark loan must be identified through 'a *progressive search*', which must *begin* by assessing the commercial loan that exhibits as many similarities as possible to the investigated loan, *before* progressing to less similar commercial loans."[578] In the European Union's view, "error results if another commercial loan that shares more elements in common with the investigated loan than the loan ultimately selected as the benchmark is not assessed in the course of the panel's 'progressive' consideration".[579] In light of these considerations, the European Union contends that "{t}he Panel failed to undertake a 'progressive search' for and to adopt the benchmark that shared 'as many elements as possible in common with' the A350XWB LA/MSF loans, and that was, therefore, most closely tailored to the risks associated with the A350XWB programme."[580]

5.213. The European Union points out that the Panel did not, for example, inquire whether "risk-sharing supplier financing" for the A350XWB project would have been a more appropriate benchmark. The European Union states that risk-sharing supplier financing for the A350XWB is by definition more closely tailored to the risks associated with the A350XWB than risk-sharing supplier financing for the A380, and reflects market-based pricing at a time considerably more proximate to the conclusion of the A350XWB LA/MSF contracts. The European Union contends that, despite being aware that Airbus had secured risk-sharing supplier financing for the A350XWB project[581], neither the United States nor the Panel explored whether the terms of risk-sharing supplier financing arrangements for the A350XWB had more elements in common with A350XWB LA/MSF

[573] European Union's appellant's submission, para. 409.
[574] European Union's appellant's submission, para. 369. (emphasis original)
[575] European Union's appellant's submission, paras. 368-369.
[576] European Union's appellant's submission, para. 372 (quoting Article 14(b) of the SCM Agreement (emphasis added by the European Union)). (additional text in fn 333 thereto omitted)
[577] European Union's appellant's submission, para. 372 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476 (emphasis added by the European Union); referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345).
[578] European Union's appellant's submission, para. 374. (emphasis original; fn omitted)
[579] European Union's appellant's submission, para. 374. The European Union adds that, "{i}f a properly-executed progressive search for a benchmark nonetheless results in an imperfect match, with the selection of a commercial loan that reflects *differences* with the investigated loan, *adjustments* must be made to ensure comparability with the investigated loan." (Ibid., para. 377 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486) (emphasis original))
[580] European Union's appellant's submission, para. 380 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 476 and 486; referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345).
[581] European Union's appellant's submission, para. 384.

than did risk-sharing supplier financing arrangements for the A380 project. For the above reasons, the European Union concludes that the Panel erred in its application of Article 1.1(b) of the SCM Agreement.[582]

5.214. The United States disagrees. In the United States' view, consistent with Article 1 of the SCM Agreement, the Panel found that, if the project-specific risks of the A350XWB project were sufficiently similar to those of the A380 project, then it could also use the A380 project-specific risk premium for the A350XWB project.[583] To determine if this was the case, the Panel engaged in a detailed, fact-intensive assessment of the relative risks of the two projects.[584] Moreover, the United States points out that the reason the Panel did not consider risk-sharing supplier contracts for the A350XWB project is that the European Union never submitted those contracts and never argued that the Panel should use them to establish the project-specific risk premium.[585] Nor did the European Union propose a project-specific risk premium that could serve as an alternative to those proposed by the United States.[586] The United States notes that, in the "*absence* of argumentation … a panel cannot intervene to raise arguments on a party's behalf".[587]

5.215. The United States additionally argues that, contrary to the European Union's argument, Article 1.1(b) does not require the Panel to have engaged in a "progressive search". According to the United States, the requirement to conduct a "progressive search" applies to domestic investigating authorities in selecting a benchmark under Article 14(b) of the SCM Agreement, and the European Union incorrectly assumes that the same standard applies to WTO panels.[588] Given that the European Union never proposed any alternative project-specific risk premium, including the A350XWB risk-sharing supplier contracts, the Panel had no obligation to engage in a "progressive search".[589] On the contrary, such a "progressive search" would have "been tantamount to making the case for the {European Union}, and thus would itself have been inconsistent" with Article 11 of the DSU.[590] The United States argues that, even on the assumption that Article 1.1(b) does require the Panel to have conducted a "progressive search", the European Union has failed to establish that the Panel's findings are inconsistent with such a requirement.[591] In the United States' view, "by using the A380 {project-specific risk premium}, the Panel constructed a commercial benchmark that was 'closest to' {the} LA/MSF for the A350XWB – 'a loan to the same borrower that is nearly identical to the investigated loan in terms of timing, structure, maturity, size and currency.'"[592]

5.216. We begin by recalling that a meaningful benefit analysis pursuant to Article 1.1(b) of the SCM Agreement requires WTO panels to carry out a careful and thorough comparison between the financial contribution provided by a government and a market benchmark. Pursuant to Article 14(b) of the SCM Agreement, government loans 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 order to reach an appropriate conclusion as to whether or not a financial contribution in the form of a loan confers a benefit, it is necessary to compare the government loan with a market benchmark. In the absence of an actual comparable commercial loan that is available on the market, a proxy may be used. We reiterate that, in

[582] European Union's appellant's submission, paras. 393-395.
[583] United States' appellee's submission, para. 221 (quoting Panel Report, para. 6.459).
[584] United States' appellee's submission, para. 222.
[585] United States' appellee's submission, para. 228.
[586] United States' appellee's submission, para. 228 (referring to Panel Report, para. 6.434).
[587] United States' appellee's submission, para. 229 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 566 (emphasis original)).
[588] United States' appellee's submission, paras. 231-232. In support of this argument, the United States refers to the "affirmative obligation" of domestic authorities in terms of Article 11.1 of the SCM Agreement, of which a "progressive search" would be one aspect. (Ibid., para. 232)
[589] United States' appellee's submission, para. 233.
[590] United States' appellee's submission, para. 233.
[591] United States' appellee's submission, para. 234.
[592] United States' appellee's submission, para. 234 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486). While the United States accepts that "there is a gap in time between the conferral of the two sets of financing", it emphasizes that, "in all other relevant respects, LA/MSF for the A380 and the A350 XWB were either identical or very close – and certainly closer than was the case for any other commercial financing." (Ibid.)

selecting the comparator – i.e. the benchmark loan – it must be ensured that the government loan and the benchmark loan are "comparable" because they have "as many elements as possible in common". In some cases, this may require a WTO panel to make adjustments to the benchmark loan to reflect differences with the investigated loan in relation to various aspects, such as date of origination, size, maturity, currency, structure, or borrower's credit risk.[593]

5.217. The European Union seeks to support its claim by referring to the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)*, and particularly to the statement that "selecting a benchmark under Article 14(b) involves a progressive search for a comparable commercial loan".[594] We observe that this guidance from the Appellate Body was provided in response to a specific set of circumstances that arose in that dispute. In particular, the Appellate Body addressed a claim about the *rejection* of interest rates in China as benchmarks in a series of countervailing duties investigations conducted by the United States Department of Commerce (USDOC), and *the use of an external proxy benchmark* (i.e. an out-of-country benchmark) to determine whether Chinese government loans conferred a benefit.[595] Thus, the specific context in which the Appellate Body stated that the selection of a benchmark under Article 14(b) involves a "progressive search" for a comparable commercial loan related to a domestic authority's recourse to out-of-country benchmarks in conducting the benefit analysis.[596] As in the case of Article 14(b), Article 14(a) and Article 14(d) both indicate that the search for a benefit benchmark begins in the country where the financial transaction takes place.[597] However, if there are no similar or comparable transactions (including private and governmental prices) in that country or territory that are undistorted or cannot be properly adjusted to serve as benefit benchmarks, it is permissible to search for an appropriate benefit benchmark out-of-country or to construct a proxy.

5.218. The European Union argues that "a benchmark loan must be identified through 'a *progressive search*', which must *begin* by assessing the commercial loan that exhibits as many similarities as possible to the investigated loan, *before* progressing to less similar commercial loans."[598] Given the specific context of the Appellate Body's statements in *US – Anti-Dumping and Countervailing Duties (China)*, to the extent that the European Union is arguing that a panel *necessarily* errs under Article 1.1(b) of the SCM Agreement if it fails to follow a particular, predefined sequence or "progressive search" for a market benchmark, we disagree. Instead of hinging on whether the Panel in the present case failed to follow a particular, predefined sequence or "progressive search" for a market benchmark, our assessment should focus on whether, in identifying the project-specific risk premium, the Panel fulfilled the *substantive* requirement of ensuring that the market benchmark is "comparable" to the A350XWB LA/MSF contracts because it has "as many elements as possible in common with the investigated loan{s}".[599]

5.219. The European Union further argues that, as a consequence of this requirement to conduct a "progressive search" for a benchmark, the Panel should have considered whether the A350XWB risk-sharing supplier contracts were a better basis for the project-specific risk premium than the WRP. According to the European Union, instead of exploring whether the terms of risk-sharing

[593] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 485.

[594] European Union's appellant's submission, para. 373 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486). (additional text in fn 336 thereto omitted)

[595] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 465.

[596] The Appellate Body has also provided similar guidance regarding the provision of equity capital, pursuant to Article 14(a), and the provision of goods or services or purchase of goods by a government under Article 14(d) of the SCM Agreement. For instance, in *US – Softwood Lumber IV*, the Appellate Body first alluded to this possibility in the context of Article 14(d) by stating that "an investigating authority may use a benchmark other than private prices in the country of provision, when it has been established that private prices of the goods in question in that country are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods." (Appellate Body Report, *US – Softwood Lumber IV*, para. 119)

[597] We do not mean to suggest that such a "progressive search" for comparable commercial loans is irrelevant in contexts other than those described in Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*.

[598] European Union's appellant's submission, para. 374. (emphasis original; fn omitted)

[599] European Union's appellant's submission, para. 372 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476 (emphasis added by the European Union); referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345).

supplier contracts for the A350XWB were a better project-specific risk premium than the WRP, "the Panel followed the United States' proposal, and proceeded *immediately* to an examination of the suitability of a single, undifferentiated project risk premium derived from commercial financing from risk-sharing suppliers for *another* LCA project (i.e., the A380)".[600]

5.220. This argument, in our view, mischaracterizes the Panel's actual analysis. The European Union appears to suggest that the Panel simply accepted, without scrutiny or analysis, the United States' proposed project-specific risk premium for the A350XWB project. A review of the Panel's findings reveals the opposite. We recall that the United States presented to the Panel two options for a project-specific risk premium: the JRP and, alternatively, the WRP. After examining the parties' arguments and evidence, the Panel rejected the JRP, which was the United States' preferred premium. Only then did the Panel turn to consider the United States' alternative premium, the WRP. We highlight that the Panel did not simply assume that the WRP would serve as an appropriate project-specific risk premium for the A350XWB. Instead, the Panel decided to conduct an assessment of the relative project-specific risks associated with the A380 and A350XWB projects, focusing on three categories of risk: (i) programme risk; (ii) the price of risk; and (iii) contract risk. The purpose of this comparative analysis was, in the Panel's view, to determine "whether the United States ha{d} demonstrated that the project-specific risks of the A350XWB programme {were} 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".[601] Thus, contrary to the European Union's assertion, the Panel did not simply follow the United States' preferred approach. Rather, the Panel sought to engage carefully with the arguments and evidence presented by the parties regarding the possible risk premia that should be used in constructing the market benchmark.

5.221. We also note that, before the Panel, the European Union did not propose a project-specific risk premium of its own for the A350XWB project, and rejected both of the risk premia advanced by the United States.[602] Thus, the European Union did not claim before the Panel that the project-specific risk premium should be determined on the basis of the A350XWB risk-sharing supplier contracts, as it now claims on appeal.[603] We note that a panel is the first trier of facts in a serious prejudice case under Part III of the SCM Agreement and has a duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU on the basis of the parties' submissions and evidence.[604] In particular, in conducting a benefit analysis, a panel should begin by examining the arguments and evidence presented by the complainant to support its proposed benchmark. A panel should then turn to assess the respondent's arguments and evidence. In assessing the parties' submissions, a panel may need to request further information and make adjustments to the components of the proposed benchmark. While Article 13 of the DSU allows a panel to request further information to enable it to make an objective assessment, a panel may not make the case for either of the parties.[605]

5.222. We reiterate that the European Union did not request the Panel to explore "whether the terms of risk-sharing supplier financing arrangements for the A350XWB shared more elements in common with A350XWB LA/MSF"[606] than with the WRP. We do not consider that the European Union has established its claim of error under Article 1.1(b) of the SCM Agreement given that the Panel properly assessed the arguments and evidence that were put before it by the parties. If the European Union considers that an examination of the terms of risk-sharing supplier financing arrangements was required to ensure a proper determination of the A350XWB project-specific risk premium, it should have pursued this line of argumentation before the Panel, including by providing the A350XWB risk-sharing supplier contracts and other relevant evidence.

[600] European Union's appellant's submission, para. 395. (emphasis original)
[601] Panel Report, para. 6.459.
[602] Panel Report, para. 6.434. In particular, the European Union asserted that the JRP was not used as a project-specific risk premium in the original proceedings, and that the United States had not shown that the WRP was an appropriate risk premium for the A350XWB. (Ibid.)
[603] European Union's appellant's submission, para. 383.
[604] A panel may seek to exercise its powers under Article 13 of the DSU. We also note the special process under Annex V to the SCM Agreement on "Procedures for Developing Information Concerning Serious Prejudice".
[605] Appellate Body Report, *EC – Fasteners (China)*, para. 566.
[606] European Union's appellant's submission, para. 394.

In any event, and as noted by the United States, the Appellate Body's findings from the original proceedings indicate that LA/MSF depresses the rates of return demanded by risk-sharing suppliers because it transfers programme risk from Airbus to the lending governments.[607] As the Appellate Body explained in the original proceedings, "risk-sharing suppliers would be expected to demand a lower rate of return on their participation in an LCA project than they would have demanded in the absence of LA/MSF" and, thus, "deriving the project risk from the rate of return of the risk-sharing suppliers will underestimate the project risk premium that would be demanded by a market lender in the absence of LA/MSF."[608]

5.223. For the foregoing reasons, we disagree with the European Union that "the Panel failed to adopt the most appropriate benchmark, tailored to the risks associated with the A350XWB, based on a 'progressive search' for the benchmark that shared 'as many elements as possible in common with' the A350XWB LA/MSF loans."[609] Consequently, we find that the European Union has not established that the Panel erred in its application of Article 1.1(b) of the SCM Agreement.

5.3.2.2.2 Whether the Panel erred by failing to make adjustments to the benchmark to ensure comparability

5.224. As we see it, in its second argument that the Panel erred under Article 1.1(b) of the SCM Agreement, the European Union does not appear to take issue with the Panel's decision to use the WRP as a basis for the project-specific risk premium. Instead, the European Union contends that, to the extent that an insufficiently tailored benchmark in the form of the WRP was used, the Panel *failed to make adjustments* to the benchmark to ensure comparability. According to the European Union, the Panel applied a single, undifferentiated project risk premium derived from LA/MSF financing for the A380 project to LA/MSF financing for the A350XWB project *without making adjustments* to account for the differences between the two projects in terms of market risk, development risk, and contract risk.[610]

5.225. The European Union asserts that the Panel found that the two projects posed different *market risks*. According to the European Union, the Panel acknowledged that the market risk for the A350XWB project was lower than the market risk for the A380 project.[611] Moreover, the Panel found that the two projects posed different *development risks* by stating that "the development risks associated with the A350XWB 'were *approximately similar* to, if not *slightly higher* than, {those of} the A380'."[612] In addition, the Panel found that the A350XWB project offered "some" risk mitigation that partially offset the development risk, while such risk mitigation was not present for the A380 project. Finally, with respect to *contract risk*, the European Union contends that the Panel's findings reveal differences between the terms of the A350XWB LA/MSF contracts and the A380 LA/MSF contracts.[613] The European Union points out that the Panel failed to make any adjustments to the risk premium to account for these differences in market risk, development risk, and contract risk.[614] Consequently, in the European Union's view, the Panel's failure to account for these acknowledged differences amounts to an error in the application of Article 1.1(b) of the SCM Agreement.[615]

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[607] United States' appellee's submission, para. 235 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 921).

[608] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 921.

[609] European Union's appellant's submission, para. 405 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 476 and 486; referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345).

[610] European Union's appellant's submission, para. 396.

[611] European Union's appellant's submission, para. 397 (referring to Panel Report, para. 6.608).

[612] European Union's appellant's submission, para. 398 (quoting Panel Report, para. 6.608 (emphasis added by the European Union)).

[613] The European Union observes that, for example, risk-reducing terms in the **[BCI]** A350XWB LA/MSF contract were more extensive than in any of the A380 LA/MSF contracts. (European Union's appellant's submission, para. 400)

[614] European Union's appellant's submission, paras. 397-400.

[615] European Union's appellant's submission, para. 403.

5.226. We begin by noting that the passage in the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* that the European Union relies upon in support of this line of argumentation reads:

> {S}electing a benchmark under Article 14(b) involves a progressive search for a comparable commercial loan, starting with the commercial loan that is closest to the investigated loan (a loan to the same borrower that is nearly identical to the investigated loan in terms of timing, structure, maturity, size and currency) and moving to less similar commercial loans while *adjusting* them to ensure comparability with the investigated loan.[616]

5.227. As noted in the previous section of this Report[617], the Appellate Body made this statement in addressing a claim concerning the *rejection* of interest rates within China as benchmarks in a series of countervailing duty investigations conducted by the USDOC. In that context, the Appellate Body provided guidance on the conditions and sequence that domestic investigating authorities should follow before resorting to out-of-country benchmarks and constructed proxies for purposes of determining the appropriate market benchmark to conduct the benefit analysis.

5.228. Given the specific context of the Appellate Body's guidance, we recall that, in the present case, the focus of our assessment should be on whether, in identifying the project-specific risk premium, the Panel fulfilled the *substantive* requirement of ensuring that the market benchmark is "comparable" because it has "*as many elements as possible* in common with the investigated loan".[618] In this sense, we agree with the European Union that, "{i}f a properly-executed progressive search for a benchmark nonetheless results in an imperfect match, with the selection of a commercial loan that reflects *differences* with the investigated loan, *adjustments* must be made to ensure comparability with the investigated loan."[619] Indeed, adjustments may be required in situations where the differences between the government loan and the benchmark loan are such that the benchmark loan is no longer "comparable" to the government loan (e.g. in terms of timing, structure, maturity, size, or currency).[620]

5.229. While we agree that relevant differences between a government loan and the benchmark loan may require adjustments, the European Union seems to *assume* that the fact that the Panel found certain differences in the risks at issue *necessarily means* that adjustments were required. As explained below, we do not consider this to be correct in the present case. As a starting point, in assessing the risk differences between the A350XWB and A380 projects, the Panel explained why, despite certain differences in the categories of risk examined, it did not necessarily follow that adjustments to the WRP were justified. We recall that, in assessing the United States' alternative project-specific risk premium (i.e. the WRP), the Panel set out to examine the risk differences that "may affect the project-specific risk premium". In light of the parties' arguments, the Panel focused its analysis on three main issues, or categories of risk: (i) programme risk; (ii) the price of risk; and (iii) contract risk. The nature of this analysis shows that the Panel was not assessing whether the risks associated with the A350XWB and A380 projects were similar *in the abstract*. Rather, the Panel sought to make an *overall* assessment of the relative risk categories and risk profiles between the A350XWB and A380 projects with one *specific* objective: to determine whether the *overall* project-specific risks between the two projects were sufficiently similar, "such that it would be reasonable to conclude that the WRP could be used as the project-specific risk premium for the A350XWB".[621] Had the Panel intended to carry out such an analysis without the mentioned specific objective, then the existence of differences among the categories of risk may well have merited adjustments. However, as noted, the Panel was scrutinizing whether the project-specific risks of the A350XWB project were sufficiently similar to

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[616] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486. (emphasis added)

[617] See section 5.3.2.2.1 of this Report.

[618] European Union's appellant's submission, para. 372 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476 (emphasis added by the European Union); referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345).

[619] European Union's appellant's submission, para. 377 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486). (emphasis original)

[620] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 485.

[621] Panel Report, para. 6.459.

those of the A380 project such as to warrant use of the WRP to measure the risks associated with the former project while ensuring that it did not make a "false" finding that a benefit existed, where there was none.

5.230. Having said that, we observe that, in the present case, it is not possible to determine *in the abstract* whether the Panel ought to have made adjustments to the WRP to ensure that it had as many elements as possible in common with the A350XWB LA/MSF contracts. Instead, this determination requires examining whether the Panel found *specific* differences in the risk profiles of the A350XWB and A380 projects that would *affect the comparability* of the WRP as the project-specific risk premium. We will undertake this assessment when we address the European Union's criticism of the extensive analysis conducted by the Panel in comparing the risks associated with the A350XWB project with those of the A380 project. Indeed, the European Union challenges under Article 11 of the DSU the Panel's findings regarding the three main categories of risk assessed by the Panel: (i) programme risk; (ii) contract risk; and (iii) the price of risk.[622] Our analysis of the Panel's comparative assessment of the risk differences between the A350XWB and A380 projects is found in section 5.3.2.3 below.

5.231. The European Union also asserts that "the Panel failed to make *any* adjustments to account for the{} differences {in terms of market risk, development risk, and contract risk}, leading to the potential for distortion, imprecision and inaccuracies that risk false positive 'benefit' findings."[623] We recognize that difficulties may arise in situations where a panel looks at different aspects of risks and combines them all into a cumulative or overall finding of "sufficient similarity". In these circumstances, a panel has the obligation to engage in a rigorous and critical analysis of all relevant evidence and arguments. Moreover, in conducting the benefit analysis, a panel must fulfil the *substantive* requirement of ensuring that the market benchmark is "comparable" because it has "as many elements as possible in common with the investigated loan".[624] While we agree with the European Union that the Panel was required to avoid imprecision in its selection of the project-specific risk premium, it is important to bear in mind that the Panel itself also recognized that the European Union's internal rates of return (IRRs) − which were used as a basis for the Panel's benefit analysis − may *overstate* the expected rates of return.[625] In any event, we highlight that the focus of our assessment is whether the Panel met the substantive requirement of conducting a benefit analysis on the basis of *comparable* government and benchmark loans or proxies.

5.232. Furthermore, *to the extent* that the European Union argues that applying a "single, undifferentiated project risk premium"[626] to several families of Airbus aircraft constitutes *per se* legal error under Article 1.1(b), we disagree. In the original proceedings, Professor Whitelaw derived the WRP from the risk-sharing supplier contracts for the A380, and applied this project risk premium also to the A320, A330/A340, A330-200, and A340-500/600 projects *without* making any adjustments.[627] The original panel took issue with the notion of applying a "constant risk premium to *all* LCA projects"[628], but did not *a priori* see a problem with the application of the same risk premium to groups of aircraft. Indeed, the original panel divided the LCA projects into

[622] European Union's appellant's submission, para. 340 (referring to Panel Report, paras. 6.487, 6.492, 6.527, 6.539-6.542, 6.579, 6.595, 6.607-6.610, 6.632 (Table 10), and 6.633).

[623] European Union's appellant's submission, para. 396. (emphasis original)

[624] European Union's appellant's submission, para. 372 (quoting Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 476 (emphasis added by the European Union); referring to Appellate Body Report, *US − Carbon Steel (India)*, para. 4.345).

[625] In assessing other aspects of the benefit analysis, such as the expected rates of return (i.e. the IRRs), the Panel held that it could not "be certain that those expected IRRs {were} correct and {were} not overstated". (Panel Report, para. 6.345) Importantly, however, the Panel considered it preferable to proceed on the basis of the European Union's unvalidated IRRs rather than to use the rates of return advanced by the United States. (Ibid., para. 6.347)

[626] European Union's appellant's submission, para. 396. We note that the European Union argues that:

> the Panel applied the single, undifferentiated project risk premium derived from financing for the A380 project to financing for the A350XWB project, *without making adjustments in light of differences between the two projects*.

(Ibid. (emphasis original))

[627] Original Panel Report, para. 7.470.

[628] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 870. (emphasis added)

three groups: (i) the A300 and A310; (ii) the A320, A330/A340, A330-200, and A340-500/600; and (iii) the A380. The Appellate Body did not fault the original panel for doing so. In fact, the Appellate Body indicated that it was not "inappropriate *per se* for the {original panel} to have arranged the LCA projects into groups and to have determined a range for the project-specific risk premium applicable to the LCA projects within each group".[629] Moreover, provided that the government loan and the benchmark loan or proxy have "as many elements as possible in common"[630], it is possible to design a project-specific risk premium for a project in one group of aircraft (e.g. twin-aisle LCA such as the A350XWB) on the basis of information related to *another* group of aircraft (e.g. VLA such as the A380), when it is established that the risk profiles of both projects are either sufficiently similar or appropriate adjustments are made. Therefore, applying a single, undifferentiated project risk premium derived from the A380 project to financing for the A350XWB project does not constitute *per se* legal error under Article 1.1(b).

5.233. In sum, we find that the European Union has not established that the Panel erred in its application of Article 1.1(b) of the SCM Agreement merely because it applied a single, undifferentiated project risk premium derived from the A380 project to the A350XWB project. Whether such a risk premium could be used "*without making adjustments in light of differences between the two projects*"[631] depended on whether the risk profile of the A380 project was sufficiently similar to the risk profile of the A350XWB project so as to be "comparable". We return to this question in section 5.3.2.3 below, which addresses the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU by finding that the project risk premium developed for the A380 project is a suitable benchmark for the A350XWB project on the basis that the risks posed by the A380 and A350XWB projects are similar.[632]

5.3.2.2.3 Whether the Panel acted inconsistently with Article 11 of the DSU

5.234. The European Union also claims that the Panel acted inconsistently with Article 11 of the DSU by failing to establish a project risk premium for A350XWB LA/MSF based on the risks associated with the A350XWB project. The European Union advances two lines of argumentation in support of its claim. First, the Panel failed to consider alternative, and more appropriate, benchmarks than those proposed by the United States. Second, the Panel inappropriately deviated from the original panel's findings when it adopted a constant, undifferentiated project risk premium not tailored to the risks associated with LA/MSF for the A350XWB.[633] We examine each of these two lines of argumentation below.

5.235. In its first line of argumentation, the European Union alleges that, when accepting the A380 project risk premium as a benchmark for the four A350XWB LA/MSF contracts, the Panel failed to consider alternative, and more appropriate, benchmarks than those proposed by the United States. The European Union maintains that this is inconsistent with the Appellate Body's guidance that a panel's mandate is not limited to assessing the benchmarks proposed by the parties and, instead, includes an obligation to consider alternatives, so as to identify and adopt the most appropriate benchmark.[634]

5.236. In response, the United States disagrees with the European Union that, in accepting the WRP as a benchmark for the four A350XWB LA/MSF contracts, the Panel acted inconsistently with Article 11 of the DSU by failing to consider alternative, and more appropriate, benchmarks. The United States notes that, in support of its argument, the European Union cites the

[629] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 883.
[630] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476.
[631] European Union's appellant's submission, para. 396. (emphasis original)
[632] European Union's appellant's submission, para. 340 (referring to Panel Report, paras. 6.487, 6.492, 6.527, 6.539-6.542, 6.579, 6.595, 6.607-6.610, 6.632 (Table 10), and 6.633).
[633] European Union's appellant's submission, para. 423.
[634] European Union's appellant's submission, para. 410 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 883). The European Union argues that the Panel's failure to engage in a search for the most appropriate benchmark is particularly surprising because the Panel was fully aware that Airbus had secured large amounts of risk-sharing supplier financing for the A350XWB that, in the case of the A380, served as the basis for the project risk premium for A380 LA/MSF. Moreover, the European Union highlights that the Panel failed to seek information about the terms of risk-sharing supplier financing for the A350XWB, despite having exercised its discretion, under Article 13 of the DSU, to seek from the European Union documents memorializing the terms of the A350XWB LA/MSF contracts. (Ibid., para. 414)

Appellate Body's statement in the original proceedings that the original panel had a "duty to assess, based on the evidence on record, whether the application of a constant project risk premium was the most appropriate approach and, to the extent that it was not, to consider alternative approaches".[635] According to the United States, the European Union overlooks the fact that the Appellate Body's statement indicates that the appropriate benchmark must be "based on the evidence on record".[636] For the United States, this means that, in determining the appropriate project-specific risk premium, the Panel had "a duty to consider the range of approaches that were possible based on the evidence before it. However, it did not have a duty to consider approaches that were not possible given the evidence before it, or to add to the record by conducting its own information-gathering exercise".[637] According to the United States, given that the European Union did not submit the risk-sharing supplier contracts for the A350XWB project, the Panel "bore no obligation to explore", using these contracts, in constructing the project-specific risk premium.[638]

5.237. We begin our analysis by noting that the European Union's first line of argumentation under Article 11 of the DSU seems to be largely based on the same ground as its first claim of error in the application of Article 1.1(b) of the SCM Agreement, namely, that the Panel erred by failing to undertake a "progressive search" for a market benchmark. The European Union itself appears to recognize that there is a degree of overlap between its claim of error under Article 1.1(b) and its claim under Article 11 of the DSU.[639] The European Union nevertheless "maintains *both* grounds of appeal to explain why the Panel's failure to consider alternative approaches amounts to inconsistencies with *both* Article 1.1(b) of the SCM Agreement, and Article 11 of the DSU".[640]

5.238. It is well established that, in most cases, an issue "will *either* be one of application of the law to the facts *or* an issue of the objective assessment of facts, and not both".[641] In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that, while "{a} party is free to frame its claim on appeal as it sees fit", "important consequences flow from that choice, including the standard of review that will apply in adjudicating that claim".[642] In that dispute, the Appellate Body further reasoned that, "{w}here there is ambiguity, it will fall on the Appellate Body to determine whether a finding – and a related challenge to it on appeal – is properly characterized as legal or factual, in the circumstances of a specific case".[643]

[635] United States' appellee's submission, paras. 237 (quoting European Union's appellant's submission, para. 410, in turn quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 883).

[636] United States' appellee's submission, paras. 238-239 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 883).

[637] United States' appellee's submission, para. 238.

[638] United States' appellee's submission, para. 239. The United States further questions the significance of the contrast drawn by the European Union between the Panel's decision to exercise its discretion under Article 13 of the DSU to request the European Union to submit the LA/MSF contracts for the A350XWB project, and the Panel's failure to request the European Union to submit the relevant risk-sharing supplier contracts. In the former case, the United States specifically requested the Panel to ask the European Union to submit the LA/MSF contracts, and the Panel partially did so having heard arguments on the matter from both sides. In the latter case, neither party requested the Panel to exercise its discretion under Article 13. In any event, the European Union "had ample opportunity" to submit the relevant contracts. (Ibid., paras. 240-241)

[639] See European Union's appellant's submission, fn 366 to para. 408.

[640] European Union's appellant's submission, fn 366 to para. 408. (emphasis added)

[641] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872. (emphasis original)

[642] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 956. See also Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 177; *Japan – Apples*, para. 136.

[643] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 958.

5.239. As we see it, the basis for the European Union's claim under Article 1.1(b) of the SCM Agreement and its claim under Article 11 of the DSU are, by and large, the same.[644] Thus, the question arises whether the European Union's challenge to the Panel's findings should be analysed either as a claim of error in the application of Article 1.1(b) *or* as a claim of inconsistency with Article 11 of the DSU. In our view, the European Union's critique of the Panel's failure to undertake its benefit inquiry in a particular manner and following a particular sequence of analysis is more appropriately addressed as a matter of application of the legal standard established by Article 1.1(b) of the SCM Agreement. Since we have already addressed above the European Union's claim that the Panel erred under Article 1.1(b)[645], we do not consider it necessary to address further the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU by failing to consider alternative, and more appropriate, benchmarks than those proposed by the United States.

5.240. We now turn to the European Union's second line of argumentation under Article 11 of the DSU. The European Union argues that, in adopting a constant, undifferentiated project risk premium, the Panel "inappropriately deviated" from the findings of the original panel, which called for establishing a risk premium that takes into account the risks involved in "*each specific* LCA project".[646] Despite the original panel's findings, the Panel applied the risk premium established for the A380 LA/MSF contract in the original proceedings to the four A350XWB LA/MSF contracts, without making any adjustments. Thus, in the European Union's view, without any explanation, the Panel adopted the very approach that the original panel rejected. Consequently, the European Union submits that the Panel's deviation from the original panel's approach constitutes a failure to make an objective assessment of the matter, as required by Article 11 of the DSU.[647]

5.241. In response, the United States disagrees with the European Union that the Panel, in adopting a constant, undifferentiated project-specific risk premium, inappropriately deviated from the findings of the original panel. In the United States' view, "{n}o such deviation occurred".[648] The original panel found that it was appropriate – and the Appellate Body upheld its approach on appeal – to use a constant project-specific risk premium for three separate groups of LA/MSF.[649] The United States argues that "the Panel followed the same approach, in effect, grouping the A380 and the A350 XWB into the same category for purposes of the {project-specific risk premium} based on a detailed and lengthy analysis of the relevant facts."[650] Consequently, the United States disagrees with the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU.

5.242. According to the European Union, the findings of the original panel called for establishing a risk premium that takes into account the risks involved in "*each specific* LCA project".[651] We do not agree with the European Union's reading of the original panel's findings and their endorsement by the Appellate Body. While the original panel took issue with the application of "a constant risk premium to *all* LCA projects", including *all* pre-A350 LA/MSF projects[652], and "expressed a

[644] In the context of its claim of error in the application of Article 1.1(b), the European Union asserts that, by focusing on whether the project-specific risk premium developed for the A380 project could be applied to assess the LA/MSF loans for the A350XWB project, the Panel failed to undertake a "progressive search" for a benchmark that had "as many elements as possible in common with" the A350XWB LA/MSF loans, and that was, therefore, most closely tailored to the risks associated with the A350XWB project. In turn, under Article 11 of the DSU, the European Union contends that the Panel acted inconsistently with this provision by limiting its analysis to a review of whether the use of either of the two benchmarks proposed by the United States (the JRP and the WRP) would be reasonable, rather than posing questions to the parties and constructing a risk premium that best reflected the risks associated with the A350XWB project on an independent basis. (European Union's appellant's submission, paras. 380 and 411)

[645] See section 5.3.2.2.1 of this Report.

[646] European Union's appellant's submission, para. 416. (emphasis original)

[647] European Union's appellant's submission, para. 422.

[648] United States' appellee's submission, para. 243.

[649] United States' appellee's submission, para. 243. The first group consisted of two projects (the A300 and A310 projects), the second four projects (the A320, A330/A340, A330-200, and A340-500/600 projects), and the final group of the A380 project alone. (Ibid. (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 882))

[650] United States' appellee's submission, para. 244.

[651] European Union's appellant's submission, para. 416. (emphasis original)

[652] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 870. (emphasis added)

preference for a variable risk premium that took into account the particularities of the specific LCA projects"[653], we do not understand it to have suggested that it was necessary to establish a risk premium that takes into account the risks involved in "*each specific* LCA project".[654] In our view, the approach that the original panel followed is quite different from the European Union's understanding of the original panel report. Indeed, as noted, the original panel divided the LCA projects into three groups: (i) the A300 and A310; (ii) the A320, A330/A340, A330-200, and A340-500/600; and (iii) the A380[655], and determined ranges for the risk premium applicable to each group of LCA projects. In turn, the Appellate Body endorsed this general approach by indicating that "it was {not} inappropriate *per se* for the {original panel} to have arranged the LCA projects into groups and to have determined a range for the project-specific risk premium applicable to the LCA projects within each group".[656] Thus, as we see it, in the original proceedings, the original panel and the Appellate Body did *not* find that it was necessary to identify a *specific* risk premium with respect to *each* of the Airbus LCA projects at issue.

5.243. In addition, we note that, in the context of this claim under Article 11, the European Union also takes issue with the fact that the Panel applied the risk premium established for the A380 in the original proceedings to the four A350XWB LA/MSF contracts, "without making any adjustments".[657] This argument is essentially the same as the European Union's earlier claim of error in the application of Article 1.1(b) of the SCM Agreement that we have examined above.[658] We fail to see any reason why the outcome of this analysis would be different in the context of the present claim under Article 11 of the DSU.

5.244. In light of the above considerations, we disagree with the European Union that the Panel "deviated" from the approach taken by the original panel regarding the identification of the project-specific risk premium, in a manner inconsistent with Article 11 of the DSU.

5.245. To conclude, the European Union advanced two lines of argumentation in support of its claim of inconsistency with Article 11 of the DSU. With regard to the first, given that we have already addressed and rejected the European Union's claim that the Panel erred under Article 1.1(b) of the SCM Agreement by failing to undertake a "progressive search" for a market benchmark[659], we consider it unnecessary to address further the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU by failing to consider alternative, and more appropriate, benchmarks than those proposed by the United States. Regarding the second line of argumentation, we disagree with the European Union's claim that the Panel acted inconsistently with Article 11 because it allegedly deviated from the original panel's findings by adopting a "constant, undifferentiated project risk premium" for the A350XWB.[660] Consequently, we find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU.

5.3.2.3 Whether the Panel acted inconsistently with Article 11 of the DSU in its assessment of the risk differences that may affect the project-specific risk premium

5.246. Having addressed the European Union's claims that the Panel erred in its application of Article 1.1(b) of the SCM Agreement and acted inconsistently with Article 11 of the DSU by failing to establish a project-specific risk premium for the four A350XWB LA/MSF contracts based on the risks associated with the A350XWB project, we turn next to address the European Union's *second* set of claims challenging the Panel's findings. Specifically, the European Union argues that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the three categories of

[653] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 870.
[654] European Union's appellant's submission, para. 416. (emphasis original)
[655] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 882 (referring to Original Panel Report, paras. 7.469, 7.481, and 7.485-7.487).
[656] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 883.
[657] European Union's appellant's submission, para. 421.
[658] We recall that, in section 5.3.2.2.2 of this Report, we reject the European Union's claim that the Panel erred under Article 1.1(b) by applying a single, undifferentiated project risk premium derived from the A380 project to the A350XWB project, *without making adjustments* in light of differences between the two projects. (European Union's appellant's submission, para. 396)
[659] See section 5.3.2.2.1 of this Report.
[660] European Union's appellant's submission, para. 423.

risk examined in relation to the risk profiles of the A380 and A350XWB projects: (i) programme risk; (ii) contract risk; and (iii) the price of risk.[661] The European Union challenges the Panel's analysis regarding these three categories of risk on the basis of multiple claims of inconsistency with Article 11 of the DSU. These claims are all, in one way or another, related to the question of whether the risk profiles of the A350XWB and A380 projects were overall sufficiently similar, or whether any adjustments would have been required to use the WRP as the A350XWB project-specific risk premium.

5.247. In addressing this set of claims under Article 11 of the DSU, we begin our analysis with the European Union's challenge against the Panel's findings in relation to *programme risk*. This will be followed by the European Union's claims regarding the Panel's findings on *contract risk*. Finally, we conclude by examining the challenges against the Panel's analysis of *the price of risk*.

5.3.2.3.1 Programme risk

5.248. The European Union argues that the Panel acted inconsistently with its obligations under Article 11 of the DSU in comparing the programme risks involved in the A350XWB and A380 projects. The European Union observes that programme risk encompasses two different types of risk: "development" risk[662]; and "market" risk.[663] In the European Union's view, the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU, in the context of the analysis of development risk; the analysis of market risk; and the comparison of the development and market risks posed by the A350XWB and A380 projects. We begin by addressing the European Union's claim regarding development risk. We then examine together the claims concerning market risk and the comparison of the development and market risks.

5.3.2.3.1.1 Development risk

5.249. The European Union submits that the Panel committed *three* distinct errors under Article 11 of the DSU in finding that "the A350XWB project involved development risks that were '*at least as high or higher*' than the development risks related to the A380 project."[664]

5.250. First, the European Union notes that "{t}he Panel found that the A380 and A350XWB projects gave rise to distinct development risks, as they 'involved *different* technological challenges'."[665] In particular, the A380 was "an aircraft of unprecedented size", whereas the A350XWB made extensive use of "new materials".[666] However, despite assessing the different technological challenges involved in the A380 and A350XWB projects, the Panel failed to reduce these different development risks to common terms susceptible to comparison, that is, in terms of the price that would be demanded by a commercial lender as a risk premium to bear each of the distinct development risks − the unprecedented size of the A380 and the use of new materials in the A350XWB. Therefore, the European Union maintains that there is *no evidence*, and *no reasoned or adequate explanation*, to support the Panel's conclusion that the development risks faced by both projects, albeit different in nature, would nonetheless be similarly priced from a commercial lender's perspective.[667] The European Union asserts that, as a result of this "missing link" in the Panel's analysis, the record provides no basis for the Panel's finding that the A350XWB project involved development risks that were "*at least as high or higher*" than the development

[661] European Union's appellant's submission, paras. 355 and 424.
[662] According to the European Union, development risk relates to the "likelihood that Airbus will not be able to deliver the aircraft as and when promised", including due to technological risks. (European Union's appellant's submission, para. 440 (quoting Panel Report, para. 6.462))
[663] Market risk is the "risk that the new aircraft will not sell as well as anticipated". (European Union's appellant's submission, para. 440 (quoting Panel Report, para. 6.543))
[664] European Union's appellant's submission, para. 442 (quoting Panel Report, paras. 6.485, 6.487, and 6.539 (emphasis original)).
[665] European Union's appellant's submission, para. 447 (quoting Panel Report, para. 6.487 (emphasis added by the European Union)).
[666] European Union's appellant's submission, para. 447 (quoting Panel Report, paras. 6.466 and 6.482). (emphasis omitted)
[667] European Union's appellant's submission, para. 444.

risks related to the A380 project.[668] Consequently, the European Union argues that, by making this finding regarding the development risks, the Panel acted inconsistently with Article 11 of the DSU.

5.251. The United States maintains that the Panel's findings were based primarily on qualitative rather than quantitative elements.[669] However, "Article 11 requires that the Panel make an objective assessment of the facts − not that it express its intermediate findings quantitatively."[670] Therefore, the United States asserts that the Panel's objectivity cannot be called into question simply because most of the evidence examined by the Panel was qualitative in nature.[671]

5.252. We begin by analysing the thrust of the European Union's claim. As we see it, the European Union's claim is that the Panel *should have* analysed the A380's development risk (resulting from its unprecedented size) and the A350XWB's development risk (resulting from the use of new materials) from the perspective of the price that a commercial lender would have charged to assume each of these distinct risks. The Panel's failure to carry out this specific assessment resulted, in the European Union's view, in a breach of Article 11.

5.253. The European Union's argument appears to be premised on the assumption that the legal standard under Article 1.1(b) of the SCM Agreement and Article 11 of the DSU require the Panel to have examined, for both the A380 and the A350XWB project, the specific issue of the development risks *in terms of the price that a commercial lender would have charged* to assume the specific risks at issue. While we agree that the *main issue* before the Panel was *whether a commercial lender would have imposed similar terms for assuming the risk* associated with each *project* (i.e. the A350XWB and the A380), we do not consider that the Panel was required to reach a "similarity finding" on the basis of "what a commercial lender would have charged" with respect to *each of the individual categories of risk* that the parties had presented. Rather, the Panel was required to provide a reasoned and adequate explanation as to why the risk profiles of the A350XWB and A380 projects were *overall* sufficiently similar such that the WRP could be used − without making adjustments − as a project-specific risk premium for the A350XWB project.

5.254. To the extent that it would have been possible to quantify in the present case what a commercial lender would have charged as a risk premium to assume each of the individual categories of risk examined by the Panel, this type of analysis would have provided a more robust basis for the Panel's ultimate finding regarding the project-specific risk premium to be used for the A350XWB. Nonetheless, and even accepting that the Panel could have explained more clearly how it came to its conclusion, the Panel's evaluation of the various aspects of risk associated with the A350XWB and A380 projects provided a sufficient basis for it to find that "the overall project-specific risks {were} sufficiently similar to allow the risk premium applied for A380 LA/MSF in the original proceeding to be applied to A350XWB LA/MSF."[672] In particular, as examined below, the Panel's analysis demonstrates that it took into account each of the various aspects of risk in its overall analysis and that it did not find any differences that required adjustments to be made to the WRP, either downwards − as argued by the European Union − or upwards, as argued by the United States.

5.255. The Panel likewise did not consider that it was required to examine what a commercial lender would have charged with respect to *each of the individual categories of risk* that the parties had presented. Rather, the Panel was making an *overall* assessment and comparison of the relative risk profiles of the A350XWB and A380 projects. Therefore, instead of seeking to base and quantify its conclusions on any one type of risk *alone*, the Panel decided to undertake a holistic

[668] European Union's appellant's submission, para. 450 (quoting Panel Report, paras. 6.485 and 6.487 (emphasis original)). According to the European Union, the missing link in the Panel's analysis is particularly troubling given that the Panel's benefit findings are highly dependent on accuracy and precision in the benchmarking exercise. Even a small change in the project risk premium could potentially change the results for one or more of the A350XWB LA/MSF loans, from a finding of subsidization to a finding of no subsidization. (Ibid., para. 451)

[669] United States' appellee's submission, para. 253.

[670] United States' appellee's submission, para. 250. The United States points out that, in any event, the Panel did take account of certain quantitative elements, such as the research and development (R&D) costs associated with the two projects. (Ibid., paras. 251 and 253)

[671] United States' appellee's submission, para. 253.

[672] Panel Report, para. 6.608.

assessment of the risk differences between the A350XWB and A380 projects with the specific objective in mind of determining whether the risk profiles were sufficiently similar such that it would be "reasonable" for the Panel to use the WRP as the project-specific risk premium for the A350XWB. In conducting this assessment, the Panel examined the arguments and evidence regarding the categories of risk put forward by the parties − which included programme risk (development and market risks), contract risk, and the price of risk − and came to the conclusion that "the overall project-specific risks {were} sufficiently similar to allow the risk premium applied for A380 LA/MSF in the original proceeding to be applied to A350XWB LA/MSF."[673]

5.256. Moreover, we observe that, before the Panel, the European Union does *not* appear to have argued that the Panel was required to undertake an assessment of the specific risks at issue in terms of "the price that a commercial lender would have charged" to assume *each* of the *specific* risks at issue. Rather, the European Union's argumentation more broadly addressed the differences in the various risks at issue (development risk, market risk, the price of risk, and differences in the terms of the contracts) to support its position that the United States had failed to show that the risks of the A350XWB project were "likely" to be higher than those of the A380 project.[674] Therefore, it appears that the parties' arguments and evidence before the Panel gave rise to an analysis focusing on an *overall* comparison of the risk profiles associated with the A350XWB and A380 projects.

5.257. In any event, in the specific context of development risk, the Panel provided a detailed examination of the parties' arguments and evidence regarding whether the A350XWB project was at least as risky, if not more risky, than the A380 project. The Panel began this assessment by noting that the evidence provided by both parties indicated that there were a number of technological leaps involved with the A350XWB that were primarily associated with the use of new materials and structural concepts employed to make a lighter and more efficient aircraft.[675] In terms of the volume and extensive use of new materials, the Panel observed that the United States had submitted evidence showing that the use of carbon fibre reinforced plastics and other new composites technology in the A350XWB was new and unprecedented.[676] In the Panel's view, 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 A350XWB LA/MSF contracts.[677] The Panel examined further evidence assessing the impact of new materials and structural concepts to the development risk associated with the A350XWB project. For instance, the Panel observed that, "{d}ue to the use of new materials with the A350XWB, other innovations were made in regards to new adaptations and integration"[678], and that "the choice of composites

[673] Panel Report, para. 6.608.

[674] For instance, with respect to development risk, the European Union argued that the "relevant question is whether the development risk of the A350XWB programme relative to the development risk of the A380 programme warrants application to the A350XWB of a project-specific risk premium associated with the A380". (European Union's comments on the United States' response to Panel question No. 90, para. 709) With regard to market risk, the European Union faulted the United States for failing to provide forecasts for the A350XWB and A380 projects and to undertake a comparison of those forecasts, which would have allowed the Panel to assess comparative market risks as between the two projects. (Ibid., para. 685) Finally, with regard to the price of risk, the European Union argued that the United States had failed to provide any basis to support the conclusion that the price of risk is *at least* the same as or *more* expensive than it was at the time the A380 LA/MSF contracts were concluded. (Ibid., para. 716)

[675] Panel Report, para. 6.468 (referring to A350XWB Chief Engineering Statement (Panel 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) (Panel Exhibit EU-128 (BCI/HSBI)); A350XWB Production Statement (Panel Exhibit EU-129 (BCI/HSBI)); Declaration of Larry Schneider, Senior Vice President of Product Development, Boeing Commercial Aircraft, "The Relevance of Prior Commercial Experience to Existing Model Improvements and New Aircraft Developments", 17 October 2012 (Schneider Declaration) (Panel Exhibit USA-354 (BCI)); Declaration of Michael Bair: Products and Competition in the ICA Industry (16 August 2012) (Bair Declaration) (Panel Exhibit USA-339 (BCI))).

[676] Panel Report, para. 6.470. The Panel pointed out that the new composites technology in the A350XWB related to over half of the fuselage and wings, passenger doors, and flap support structures. (Ibid. (referring to "A350XWB − Technology", Airbus website, accessed 3 October 2012 (Panel Exhibit USA-427); European Commission, State aid N 414/2010 − Belgium − Aid to SABCA 'Flap Support Structures' project, (5 October 2011) (Panel Exhibit USA-441), para. 52))

[677] Panel Report, para. 6.470.

[678] Panel Report, para. 6.473.

also had a knock-on effect on the choice (and integration) of systems in the composite fuselage".[679] The Panel also pointed to statements by Airbus indicating that "there were skills and resource challenges associated with the A350XWB's use of new materials and concepts."[680] The Panel additionally observed that "{t}he use of new materials necessitated new testing and gathering of data"[681], and that "the move from aluminium to composite materials … also necessitated many changes and adaptations to production facilities, at the level of component production, sub-assembly and final assembly".[682]

5.258. The Panel then turned to compare the technological challenges associated with the A350XWB project to those associated with the A380 project. The Panel found that "the A380 aircraft also represented a break with previous aircraft", but noted that "this was mainly in terms of its unprecedented *size*."[683] However, the Panel pointed out that, while novel in size and design, the A380 was mainly made of traditional metal and fibreglass, which would not have involved the same unknowns, or necessitated enhanced testing, as the new materials extensively used for the A350XWB.[684] For instance, the Panel observed that "Airbus' engineers specifically contrast{ed} 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'."[685] Moreover, the Panel added that, while several variants were envisaged under the A380 project, the evidence on the Panel record suggested that the parallel development of multiple variants in the A350XWB project was more ambitious.[686] The Panel also pointed out that "the A350XWB was expected to have a higher relative programme *cost* than the A380, due to higher research and development (R&D) costs."[687]

5.259. Having conducted this comparative assessment of the development risks associated with the A350XWB and A380 projects, the Panel found that:

> 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.[688]

5.260. In light of the above considerations, including the nature of the arguments and evidence that were before the Panel, we disagree with the European Union's arguments that there is a

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[679] Panel Report, para. 6.473 (quoting A350XWB Chief Engineering Statement (Panel Exhibit EU-18 (BCI/HSBI)), para. 26).

[680] Panel Report, para. 6.474. By way of example, the Panel notes that:

> a design engineer specialized in a very specific aspect of systems installation for aluminium fuselage structures … 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."

(Ibid. (quoting A350XWB Chief Engineering Statement (Panel Exhibit EU-18 (BCI/HSBI)), para. 26))

[681] Panel Report, para. 6.475.

[682] Panel Report, para. 6.476 (quoting A350XWB Production Statement (Panel Exhibit EU-129 (BCI/HSBI)), para. 11).

[683] Panel Report, para. 6.480 (referring to European Union's comments on the United States' response to Panel question No. 104, para. 810). (emphasis original) The Panel observed that the unprecedented size of the A380 posed various technological challenges, particularly, in terms of aerodynamics, structure, noise and emission limits, and airport infrastructure constraints. (Ibid.)

[684] Panel Report, para. 6.482.

[685] Panel Report, para. 6.482 (quoting A350XWB Chief Engineering Rebuttal (Panel Exhibit EU-128 (BCI/HSBI)), para. 13 (emphasis original)).

[686] Panel Report, para. 6.483 (referring to, *inter alia*, Max Kingsley-Jones, "Paris Air Show: A350 XWB Ready to Rock", *FlightGlobal News*, 5 June 2009 (Panel Exhibit USA-428)).

[687] Panel Report, para. 6.484. (emphasis original)

[688] Panel Report, para. 6.485. (emphasis original; fn omitted) The Panel further stated that, while the A380 and the A350XWB projects involved "different technological challenges", it was 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". (Ibid., para. 6.487 (emphasis original))

"missing link" in the Panel's analysis and that the record provides no basis for the Panel's finding that the A350XWB project involved development risks that were "*at least as high or higher*" than the development risks related to the A380 project.[689] Consequently, we reject the European Union's first argument with regard to its claim that the Panel acted inconsistently with Article 11 of the DSU.

5.261. In its second line of argumentation, the European Union contends that, in finding that the development risks posed by the A380 and A350XWB projects were sufficiently similar, the Panel acted inconsistently with Article 11 of the DSU because this finding was based on internally inconsistent reasoning.[690] According to the European Union, this is because the Panel found: (i) that the development risks involved in the two projects were similar[691]; (ii) that the development risks posed by the A350XWB project were mitigated to some extent at the time the A350XWB LA/MSF contracts were concluded, while the development risks posed by the A380 project were not[692]; and (iii) despite having made these findings, that the development risks assumed by the LA/MSF lenders to the two projects were sufficiently similar.[693]

5.262. In order to determine whether the European Union is correct in asserting that the Panel's analysis was based on internally inconsistent reasoning, we turn to review the Panel's findings. Before the Panel, the European Union disagreed that the development risk was higher for the A350XWB project than for the A380 project. For the European Union, this was because actions pursued by Airbus *mitigated* technology-related risk for the A350XWB.[694] Thus, in addition to examining the parties' arguments comparing the technology-related risks of the A350XWB and A380 projects, the Panel also examined the European Union's arguments regarding two risk-mitigating factors.[695]

5.263. We recall that, with respect to the technology-related risks of the A350XWB and A380 projects, the Panel began by noting that the evidence provided by both parties indicated that there were a number of technological leaps involved with the A350XWB that were primarily associated with the use of new materials and structural concepts employed to make a lighter and more efficient aircraft.[696] As noted above[697], the Panel conducted a comparative assessment of the development risks associated with the A350XWB and A380 projects, which included examining the use of new materials and the extent to which such use would have an impact on the development of each aircraft, and R&D costs. The Panel noted, in particular, that the A350XWB would involve higher R&D costs, and that the new design and use of new materials would necessitate the development of specialized equipment, expertise, and testing.[698] On the basis of this examination, the Panel found that "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."[699]

5.264. Having made this finding, the Panel turned to assess the two main factors that, in the European Union's view, mitigated the A350XWB risks as compared to the A380 risks. According to the European Union, the first risk mitigation factor was that actions pursued by Airbus, such as those taken under the DARE programme, reduced the A350XWB development risks in comparison to the A380 project.[700] The Panel indicated that the DARE development process aimed "to reduce

[689] European Union's appellant's submission, para. 450 (quoting Panel Report, paras. 6.485 and 6.487 (emphasis original)).
[690] European Union's appellant's submission, para. 453.
[691] European Union's appellant's submission, para. 462 (referring to Panel Report, paras. 6.485 and 6.487).
[692] European Union's appellant's submission, para. 462 (referring to Panel Report, para. 6.527).
[693] European Union's appellant's submission, para. 462 (quoting Panel Report, para. 6.608).
[694] Panel Report, para. 6.465.
[695] Panel Report, para. 6.466.
[696] Panel Report, para. 6.468 (referring to A350XWB Chief Engineering Statement (Panel Exhibit EU-18 (BCI/HSBI)); A350XWB Chief Engineering Rebuttal (Panel Exhibit EU-128 (BCI/HSBI)); A350XWB Production Statement (Panel Exhibit EU-129 (BCI/HSBI)); Schneider Declaration (Panel Exhibit USA-354 (BCI)); Bair Declaration (Panel Exhibit USA-339 (BCI))).
[697] See para. 5.257 above.
[698] Panel Report, para. 6.485.
[699] Panel Report, para. 6.485. (emphasis original; fn omitted)
[700] Panel Report, para. 6.466.

the time taken to design and build new aircraft from seven and a half years to less than six".[701] 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 in the process.[702] The Panel also observed that the DARE programme also involved a high *number* of risk-sharing suppliers to whom key components were outsourced, who were geographically widely distributed.[703] The Panel considered that, while certain financial risks of delay or failure to develop aspects of the A350XWB project might have been shifted to suppliers, this would not mitigate the likelihood of failure or delay.[704] In the Panel's view, the existence of a high number of suppliers working on a large share of the project *created* a development risk for Airbus.[705] Therefore, the Panel considered 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."[706] The Panel pointed out that these aspects would have contributed to development risks associated with the A350XWB project and that this degree of risk did not exist with the A380 given that there were fewer suppliers and more of the work was completed by Airbus.[707] For the foregoing reasons, the Panel rejected the European Union's argument by finding that "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."[708]

5.265. Regarding the second risk mitigation factor, the European Union asserted 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 **[BCI]** years into the development process of the A350XWB."[709] The European Union contrasted this with the A380 project: "At the time the A380 financing agreements were concluded, Airbus was **[BCI]** the development process for the programme, with many technological challenges yet to be identified and addressed."[710] The Panel considered that the question of whether technology risk had been mitigated because the A350XWB LA/MSF contracts were signed relatively later, compared to the A380 LA/MSF contracts, had to be examined in light of the materials novelty and the fact that multiple variants were in parallel development.[711] In this regard, the Panel observed that, "as the A350XWB LA/MSF contracts were

[701] Panel Report, para. 6.499 (quoting UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Vol. I: Report and formal minutes, 19 June 2007 (Panel Exhibit USA-562), p. 10).

[702] Panel Report, para. 6.500 (referring to A350XWB Chief Engineering Statement (Panel Exhibit EU-18 (BCI/HSBI)), para. 40 (lines 4-5)).

[703] Panel Report, para. 6.500.

[704] Panel Report, para. 6.501.

[705] Panel Report, para. 6.502.

[706] Panel Report, para. 6.505.

[707] Panel Report, para. 6.505.

[708] Panel Report, para. 6.513. In this regard, the Panel stated:

> {I}t 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.

(Ibid., para. 6.505)

[709] Panel Report, para. 6.514 (quoting European Union's second written submission to the Panel, para. 332, in turn referring to A350XWB Chief Engineering Statement (Panel Exhibit EU-18 (BCI/HSBI)), paras. 13-17 and 33-59).

[710] Panel Report, para. 6.514 (quoting European Union's second written submission to the Panel, para. 332, in turn referring to A350XWB Chief Engineering Statement (Panel Exhibit EU-18 (BCI/HSBI)), paras. 13-17 and 33-59; first written submission to the Panel, paras. 1110-1129).

[711] Panel Report, para. 6.522.

being negotiated, significant development challenges remained."[712] The Panel found that, "when the {A350XWB} 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."[713] For the Panel, this meant that "the picture {was} 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."[714] On this basis, the Panel found 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."[715]

5.266. In light of these considerations, the Panel concluded that "{t}he 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".[716] However, the Panel emphasized 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."[717] Therefore, in the Panel's view, "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."[718]

5.267. Based on our review of the Panel's analysis, we do not consider that the Panel can be faulted for internally inconsistent reasoning, as the European Union's suggests. We recall that the Panel conducted a comparative assessment of the development risks associated with the A350XWB and A380 projects, which included examining the use of new materials and the extent to which such use would have an impact on the development of each aircraft, and R&D costs.[719] The Panel noted, in particular, that the A350XWB would involve higher R&D costs, and that the new design and use of new materials would necessitate the development of specialized equipment, expertise, and testing.[720] On the basis of this examination, the Panel found that "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."[721] The Panel then addressed the European Union's argument that certain factors *mitigated* the A350XWB risks as compared to the A380 risks. As noted, the Panel *disagreed* that the mitigation factors identified by the European Union would have fully offset the increased and better understood risks associated with the DARE programme and high level of outsourcing, and the technology risks associated with new materials and their lower maturity levels at the start of development.[722]

5.268. In light of the Panel's analysis of the nature and extent of the risk-mitigating factors identified by the European Union, we see no incoherence in the Panel's initial assessment of the

[712] Panel Report, para. 6.524. The Panel specified that, "{i}n 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 ha{d} not seen for decades. Between {then} and mid-2011, when final assembly beg{an}, the A350 engineering teams {had to} 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.'" (Ibid. (quoting Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009 (Panel Exhibit USA-428))) The Panel added that "{t}he 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 ha{d} the airframer undertaken such ambitious multi-variant parallel development'." (Ibid. (quoting Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009 (Panel Exhibit USA-428)))

[713] Panel Report, para. 6.525.

[714] Panel Report, para. 6.525.

[715] Panel Report, para. 6.527. (emphasis added)

[716] Panel Report, para. 6.541.

[717] Panel Report, para. 6.541.

[718] Panel Report, para. 6.542. (emphasis added)

[719] See para. 5.257 above.

[720] Panel Report, para. 6.485.

[721] Panel Report, para. 6.485. (emphasis original; fn omitted)

[722] Panel Report, para. 6.542.

development risks associated with the two projects, its subsequent analysis of risk mitigation factors, and its final conclusion that "the development risks associated with the A350XWB were *at least as high as, or sufficiently similar to*, those associated with the A380."[723] Thus, we fail to see any internal inconsistency in the Panel's assessment of development risks, let alone one that would call the Panel's objectivity into question.

5.269. Finally, in its third line of argumentation, the European Union argues that, in the Panel's assessment of development risks, there is an inconsistency between its benefit findings and its subsequent adverse effects findings. The European Union explains that, in support of its finding that A350XWB LA/MSF constitutes a subsidy, the Panel emphasized in the context of benefit how *different* the A350XWB technologies were from those applied on the A380.[724] However, in its assessment of adverse effects, the Panel stressed the extent to which the A350XWB technologies were *derived from* the A380, such that A380 and earlier LA/MSF measures were a substantial cause of the market presence of the A350XWB.[725] Thus, in the European Union's view, in the "benefit" section of its Report, the Panel highlighted the *novelty* of the A350XWB project, whereas, in the "adverse effects" section, the Panel emphasized the *continuity* of the A350XWB project in light of previous LCA projects, and especially the A380 project.[726] In the European Union's view, these inconsistent findings reveal a lack of even-handedness on the part of the Panel.[727] Consequently, the European Union contends that the Panel's treatment of the evidence was not objective and is thus inconsistent with Article 11 of the DSU.[728]

5.270. We begin by noting that, before the Panel, the European Union put forward a very similar argument to the one now raised on appeal. Indeed, the European Union maintained before the Panel that it was difficult to reconcile the United States' arguments concerning the adverse effects of LA/MSF − e.g. the *indirect effects* of the A380 LA/MSF measures on Airbus' ability to launch and develop the A350XWB − with the United States' contention, in the context of the proposed benefit benchmark for the A350XWB, that the A350XWB involved a greater technological risk compared with the A380 and other Airbus LCA. The European Union submitted that "{a} neutral, even-handed review {could not} reconcile these two arguments."[729] In response, the United States asserted 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."[730]

5.271. In the Panel's view, the United States was not arguing 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."[731] The Panel specified that the United States identified both general learning effects in aircraft manufacturing, and also carry-over of specific components that likely benefitted from Airbus' prior LCA experience.[732] On this basis, the Panel did *not* see any logical reason why there could not be incremental improvements from one aircraft to the next (e.g. 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

[723] Panel Report, para. 6.542. (emphasis original)

[724] According to the European Union, the A350XWB was thus considered by the Panel to be "technically very different" from the A380, involving particular technological challenges not previously faced by Airbus, and worthy of a project risk premium at least as sizable as the project risk premium due for A380 LA/MSF. (European Union's appellant's submission, para. 465 (quoting Panel Report, para. 6.487))

[725] European Union's appellant's submission, para. 466. The European Union recalls that, in the section of its Report dealing with the "effects of the subsidies", "the Panel concluded that the A350XWB project '*significantly benefitted from Learning Effects*', in particular from the A380 project." (Ibid., para. 471 (quoting Panel Report, para. 6.1747 (emphasis added by the European Union))) In the European Union's view, "{a}ssuming these findings are correct, these significant learning effects must have a bearing on − and decrease − the development risks involved in the A350XWB project and, accordingly, the project risk premium a market lender would demand as compensation for bearing those risks." (Ibid., para. 471)

[726] European Union's appellant's submission, para. 468.

[727] European Union's appellant's submission, para. 464.

[728] European Union's appellant's submission, para. 473.

[729] Panel Report, para. 6.489 (quoting European Union's comments on the United States' response to Panel questions Nos. 91-107, para. 713).

[730] Panel Report, para. 6.490 (quoting United States' second written submission to the Panel, para. 565; in turn referring to European Union's first written submission to the Panel, para. 1160).

[731] Panel Report, para. 6.491.

[732] Panel Report, para. 6.491.

fuselage and wings), with the enhanced risks such novelty presents. For instance, the Panel noted that Airbus stated that "it 'evolved' its 'step by step gain of composite experience' in previous aircraft and declare{d} … that the degree to which composites were used on the A350XWB aircraft involved very significant novelty."[733] Therefore, the Panel did not consider that the United States' arguments were necessarily contradictory.[734] The Panel thus accepted that there were *incremental* improvements from one aircraft to the next *but found at the same time* that the launch of the A350XWB involved *novelty*. In light of these considerations, we see no lack of even-handedness in this approach, or basis to fault the Panel under Article 11 of the DSU.

5.272. Furthermore, we observe that the Panel's analysis in the "benefit" and "adverse effects" sections of its Report actually appears to reflect a combination of both *continuity* with previous Airbus models (reflecting incremental improvements) and *novelty* (representing "technological jump"). In other words, contrary to the European Union's assertion, we do not consider that, on the one hand, the benefit analysis refers *only* to novelty and, on the other hand, the adverse effects analysis mentions *only* continuity. For instance, in the context of its benefit analysis, the Panel found that, while the A350XWB and A380 were technically very different to what had come before, both types of aircraft built on "certain expertise in aircraft construction and incorporating individual components that had been developed in relation to previous aircraft".[735] Similarly, in its adverse effects analysis, the Panel noted that, "{c}ompared 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"[736], and that "{p}ress reports characterized the A350XWB as a 'major' and 'dramatic' redesign of the Original A350 that would principally compete with the Boeing 777 and the 787".[737] Therefore, in our view, the Panel's reasoning in the "adverse effects" section of its Report accounts for, and is in consonance with, its reasoning in the "benefit" section of its Report.

5.273. Consequently, we are not persuaded by the European Union's third line of argumentation with regard to its claim that the Panel acted inconsistently with Article 11 of the DSU.

5.274. For the foregoing reasons, the European Union has not established that the Panel acted inconsistently with Article 11 of the DSU in its assessment of development risk.

5.3.2.3.1.2 Market risk and comparison of development risk and market risk

5.275. The European Union brings claims of inconsistency with Article 11 of the DSU in relation to the Panel's analysis of market risk and the Panel's comparison of development risk and market risk. These claims are based on the same premise, namely, that the Panel should have focused its assessment on the price that would be charged by a commercial lender for assuming the specific risks at issue. Given the interrelated nature of these claims, we address them together below.

5.276. With regard to market risk[738], the European Union argues that the Panel's findings suffer from flaws similar to those identified with respect to the Panel's analysis of development risk. The European Union maintains that the Panel again failed to state the differences regarding market risks associated with the A380 and the A350XWB projects in terms that are both relevant under Article 1.1(b) of the SCM Agreement and susceptible to comparison (i.e. in terms of the impact that the particular market risks posed by each project would have on the project risk premium that

[733] Panel Report, para. 6.492. (fns omitted)
[734] Panel Report, para. 6.492.
[735] Panel Report, para. 6.487.
[736] Panel Report, para. 6.1546 (referring to Guy Norris, "Airline criticism of Airbus A350 forces airframer to make radical changes to fuselage, wing and engines", *Flight International*, 8 May 2006 (Panel Exhibit USA-26)).
[737] Panel Report, para. 6.1546 (quoting and referring to, respectively, Goldman Sachs Investment Analysis, *A350: Not an option but essential for Airbus' future*, *in our view*, 21 November 2006 (Panel Exhibit USA-30), pp. 20-22; Guy Norris, "Airline criticism of Airbus A350 forces airframer to make radical changes to fuselage, wing and engines", *Flight International*, 8 May 2006 (Panel Exhibit USA-26); Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006 (Panel Exhibit USA-27)).
[738] The European Union observes that "market risk" refers to the "risk that the new aircraft will not sell as well as anticipated". (European Union's appellant's submission, para. 476 (referring to Panel Report, para. 6.543))

would be charged by a commercial lender for assuming that risk).[739] In the European Union's view, given that the Panel identified *no* evidence showing that a commercial lender would price similarly the particular market risks faced by each of the two projects, the Panel identified *no* basis on the record for its finding that, while the market risks experienced by the projects were *different in nature*, they were overall "comparable in importance".[740]

5.277. Similarly, with respect to the Panel's overall comparison of development and market risks, the European Union takes issue with the following Panel finding regarding each component of programme risk:

> 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*.[741]

5.278. In the European Union's view, this finding served as the basis for the Panel's conclusion that the project risks were sufficiently similar to apply the WRP used in the A380 LA/MSF contracts to the A350XWB LA/MSF contracts. As in the case of market risks, the European Union emphasizes that, to reach this finding, the Panel should have assessed whether the development risks and market risks, while different for the A350XWB and A380 projects, would nonetheless lead a market lender to demand the same project risk premium for bearing those different risks.[742]

5.279. We begin by highlighting that the Panel had the obligation to engage in a rigorous and critical analysis of all relevant evidence and arguments to determine whether the four A350XWB LA/MSF contracts confer a benefit. In particular, the Panel was required to avoid imprecision in its selection of the project-specific risk premium and to ensure that it did not make a false finding of benefit when there was none. Moreover, in the present case, the market benchmark chosen for purposes of the benefit comparison was required to be "comparable" to the A350XWB LA/MSF financing at issue.[743]

5.280. As noted above, the European Union's challenges to the Panel's analysis on market risks, and the comparison of development and market risks, share the same premise as its earlier claim against the Panel's findings concerning development risk.[744] The common thread in all these claims is the European Union's contention that the Panel *should have* analysed the risk at issue (development or market) associated with the A350XWB and A380 projects from the perspective of *the price that a commercial lender would have charged to assume each of these risks*. In light of the similar nature of these claims of inconsistency with Article 11, we consider that our earlier reasoning is also applicable in this context.

5.281. As indicated above, the *main issue* before the Panel was *whether a commercial lender would have imposed similar terms for assuming the risk* associated with *each project* (i.e. the A350XWB and the A380). To the extent that it would have been possible to quantify in the present case what a commercial lender would have charged as a risk premium to assume each of the individual categories of risk examined by the Panel, this type of analysis would have provided a more robust basis for the Panel's conclusions. However, the Panel was not required to determine what a commercial lender would have charged with respect to *each of the individual categories of risk* that it examined as long as the risk profiles of the A350XWB and A380 projects were overall sufficiently similar.

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[739] European Union's appellant's submission, para. 478.

[740] European Union's appellant's submission, para. 479 (quoting Panel Report, para. 6.579).

[741] European Union's appellant's submission, para. 484 (quoting Panel Report, para. 6.610 (emphases added by the European Union)).

[742] European Union's appellant's submission, para. 485.

[743] European Union's appellant's submission, para. 372 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476).

[744] The European Union argues that the Panel's findings regarding the second type of programme risk (i.e. market risk) "suffer from flaws similar to those identified ... with respect to development risk". (European Union's appellant's submission, para. 475)

5.282. As in the context of development risks, we highlight that, before the Panel, the European Union does *not* appear to have argued that the Panel was required to undertake an assessment of *market* risks in terms of "the price that a commercial lender would have charged" to assume *this specific* type of risk.[745] Nor does the European Union appear to have argued that the Panel was required to undertake the *comparison* of the specific risks at issue in terms of "the *price that a commercial lender would have charged*".[746] Rather, the European Union's argumentation more broadly addressed the differences in the various risks at issue, including development and market risks, to demonstrate that the United States had failed to show that the risks of the A350XWB project were "likely" to be higher than those of the A380 project.

5.283. In any event, we note that, in assessing programme risk, the Panel provided a detailed examination of the parties' arguments and evidence regarding development risk and market risk. As noted above[747], the Panel conducted a comparative assessment of the development risks associated with the A350XWB and A380 projects, which included examining the use of new materials and the extent to which such use would have an impact on the development of each aircraft, and R&D costs. The Panel noted, in particular, that the A350XWB would involve higher R&D costs, and that the new design and use of new materials would necessitate the development of specialized equipment, expertise, and testing.[748] On the basis of this examination, the Panel found that "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."[749]

5.284. With regard to market risk, the Panel also conducted a comparative assessment of the market risk associated with the A350XWB and A380 projects. The Panel began its analysis with the risk related to market forecasts. In this context, the European Union argued before the Panel that the aerospace industry has considerably more experience in forecasting demand for the middle to large wide-body aircraft market segment than for the VLA market.[750] In light of this argument, the Panel decided to compare the market predictions for the A380 and the A350XWB at the time of the respective LA/MSF contracts. After examining considerable evidence, the Panel noted that, at the time of the A350XWB LA/MSF contracts, there were significant predictions that client airlines, and therefore the market, would be affected by a negative financial and economic environment.[751] The Panel additionally found that downward trends in demand were also evident when the A380 LA/MSF contracts were being concluded.[752] In comparing the two projects, the Panel observed 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."[753] By contrast, the Panel found that, while the A350XWB market demand predictions were likely to be subject to a negative economic environment that would affect Airbus' clients, that negative economic environment was *not* taken into account in the market demand predictions on which the A350XWB LA/MSF contracts appear to have been based.[754] The Panel specified that demand predictions used in the A350XWB Business Case appear to be those prepared for the industrial launch of the A350XWB in 2006 − i.e. predictions that predate the 2007-2009 financial and economic crisis.[755] The Panel considered that a market lender would have taken this into account in establishing a market lending rate.

5.285. The Panel then turned to examine the risk related to conditions of competition within the relevant market segment. In this context, the European Union argued that conditions of

[745] European Union's appellant's submission, para. 448. (emphasis omitted)
[746] European Union's appellant's submission, para. 448. (emphasis original)
[747] See paras. 5.257-5.259 above.
[748] Panel Report, para. 6.485.
[749] Panel Report, para. 6.485. (emphasis original; fn omitted)
[750] Panel Report, para. 6.545 (quoting European Union's second written submission to the Panel, paras. 323-326).
[751] Panel Report, para. 6.565.
[752] Panel Report, para. 6.567.
[753] Panel Report, para. 6.568.
[754] Panel Report, para. 6.570.
[755] Panel Report, para. 6.569 (referring to "Presentation to the EADS Board", **[BCI]** (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) (Panel Exhibit EU-130 (HSBI)), slides 50-51).

competition between Airbus and Boeing were more favourable to Airbus for the A350XWB project than for the A380 project.[756] The Panel was not persuaded by the European Union's argument. On the one hand, the Panel observed that "{t}he 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."[757] On the other hand, the Panel pointed out that the A350XWB family was launched to compete directly in a market segment that already comprised several modern, successful competitor models: the already successful Boeing 777 and the new 787, as well as Airbus' own existing twin-aisle aircraft, the A330 and A340.[758] Therefore, the Panel was of the view that "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 … in the case of the A380."[759] Moreover, the Panel added that "any A350XWB *development* risks would have had serious consequences in relation to market demand in view of the competition in the segment."[760] Therefore, for the Panel, "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."[761]

5.286. On this basis, the Panel reached the following conclusion:

> {T}he 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.[762]

5.287. In light of the above, we consider that the Panel had a sufficient basis for its finding that the A350XWB project involved market risks that, while different in nature from those of the A380 project, were "overall comparable in importance".[763] Thus, the European Union has not established that the Panel acted inconsistently with Article 11 of the DSU because there is allegedly "no evidence to support its finding that a commercial lender would price similarly the differences in development risks and market risks posed by each project".[764] Consequently, we disagree with the European Union that the Panel acted inconsistently with Article 11 of the DSU in its assessment of market risk or in its comparison of development and market risks.

5.3.2.3.1.3 Overall conclusion on programme risk

5.288. The European Union has raised several lines of argumentation under Article 11 of the DSU challenging the Panel's analysis of programme risk. In particular, the European Union has criticized the analysis of development risk, the analysis of market risk, and the comparison of the development and market risks posed by the A350XWB and A380 projects.

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[756] Panel Report, para. 6.571. (fn omitted)

[757] Panel Report, para. 6.572 (referring to Amro Aerospace & Defence Sector Research, "EADS: Results Analysed – A3XX Project Review – Recommendation Upgrade", 13 December 2000 (Panel Exhibit USA-490), pp. 9-10).

[758] Panel Report, para. 6.573 (referring to Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006 (Original Panel Exhibit US-141; Panel Exhibit USA-27); Guy Norris, "Airline criticism of Airbus A350 forces airframer to make radical changes to fuselage, wing and engines", *Flight International*, 8 May 2006 (Panel Exhibit USA-26); Dominic Gates, "Airplane Kingpins tell Airbus: Overhaul A350", *The Seattle Times*, 29 March 2006 (Panel Exhibit USA-24)).

[759] Panel Report, para. 6.576.

[760] Panel Report, para. 6.578. (emphasis added)

[761] Panel Report, para. 6.578.

[762] Panel Report, para. 6.579.

[763] Panel Report, para. 6.579.

[764] European Union's appellant's submission, para. 488.

5.289. The overarching criticism raised by the European Union relates to the Panel's alleged failure to conduct the examination of development risk, market risk, and the comparison of development and market risks in terms of the price that would have been demanded by a commercial lender as a risk premium to assume each of these types of risks. While we agree that the *main issue* before the Panel was *whether a commercial lender would have imposed similar terms for assuming the risk* associated with *each project* (i.e. the A350XWB and the A380), we do not consider that the Panel was required to reach a "similarity finding" on the basis of what "a commercial lender would have charged" with respect to *each of the individual categories of risk* that the parties had presented as long as the risk profiles of the A350XWB and A380 projects were overall sufficiently similar. Therefore, we do not consider that the Panel was required to conduct the kind of analysis suggested by the European Union.

5.290. The European Union has raised two additional lines of argumentation in relation to the Panel's analysis of development risk. First, the European Union maintains that, in finding that the development risks posed by the A380 and A350XWB projects were sufficiently similar, the Panel acted inconsistently with Article 11 of the DSU because this finding was based on internally inconsistent reasoning. Given that the Panel disagreed with the nature and extent of the risk-mitigating factors identified by the European Union, we see *no incoherency* in the Panel's initial assessment of the development risks associated with the two projects, its subsequent analysis of risk mitigation factors and its final conclusion that "the development risks associated with the A350XWB were *at least as high as, or sufficiently similar to*, those associated with the A380."[765] In addition, the European Union has argued that the Panel's benefit findings and its subsequent adverse effects findings reveal a lack of even-handedness on the part of the Panel contrary to Article 11 of the DSU. In particular, the European Union asserts that, in the "benefit" section of its Report, the Panel highlighted the *novelty* of the A350XWB project, whereas, in the "adverse effects" section of its Report, the Panel emphasized the *continuity* of the A350XWB project in light of previous LCA projects, and especially the A380 project.[766] We are not persuaded that the Panel's finding that there were *incremental* improvements from one aircraft to the next, while also finding that the launch of the A350XWB involved *novelty*, reflected a lack of even-handedness contrary to Article 11 of the DSU.

5.291. For the foregoing reasons, we find that the European Union has failed to establish that the Panel acted inconsistently with its obligations under Article 11 of the DSU in its analysis of programme risk, in particular, in its analysis of development risk, market risk, and in its comparison of the development and market risks.

5.3.2.3.2 Contract risk

5.292. The European Union argues that, in rejecting its argument that there are differences arising from the terms of certain of the A350XWB LA/MSF contracts compared to the A380 LA/MSF contracts, the Panel committed *two* distinct errors under Article 11 of the DSU. First, the European Union contends that the Panel failed to compare properly the risk-reducing terms of the A350XWB LA/MSF contracts to the risk-reducing terms of the *A380 LA/MSF contracts*. Second, according to the European Union, the Panel failed to compare the terms of the A350XWB LA/MSF contracts to the terms of the *A380 risk-sharing supplier contracts*, which were used in the original proceedings to derive the risk premium for the A380 LA/MSF contracts (i.e. the WRP).[767] We address each of these claims below.

5.3.2.3.2.1 Whether the Panel failed to compare properly the terms of the A350XWB LA/MSF contracts to the terms of the A380 LA/MSF contracts

5.293. The European Union contends that the Panel's comparison of the four A350XWB LA/MSF contracts with the A380 LA/MSF contracts does not comply with the requirements of Article 11 of the DSU because such comparison lacks a sufficient evidentiary basis. In particular, the European Union requests us "to reverse the Panel's findings, at paragraphs 6.595 and 6.609 of its Report, that 'the A350XWB LA/MSF contracts containing such 'risk-reducing' terms are

[765] Panel Report, para. 6.542. (emphasis original)
[766] European Union's appellant's submission, para. 468.
[767] European Union's appellant's submission, para. 492.

no less risky than at least **[BCI]** for A380 LA/MSF that also contained similar terms in the original proceeding', such that there was '*no reason* why the same risk premium {could not} also apply to the A350XWB LA/MSF measures'".[768] The European Union provides *three* main arguments in support of its claim.

5.294. First, according to the European Union, "the evidence shows that *no* A380 contract contained risk-reducing terms as extensive as those included in the **[BCI]** A350XWB contract."[769] The European Union elaborates:

> Under the **[BCI]** A350XWB LA/MSF contract, **[BCI]**. No such mechanism was present in any of the A380 LA/MSF contracts. The **[BCI]** A380 contract included a mechanism that **[BCI]**.[770]

5.295. The European Union contends that the evidence shows that, as a result of more extensive risk-reducing terms, **[BCI]** of the A350XWB LA/MSF contracts "**[BCI]** than any of the A380 LA/MSF contracts", including the **[BCI]** A380 LA/MSF contract.[771] Therefore, in the European Union's view, the Panel lacked a sufficient evidentiary basis to find that "similar" risk-reducing terms were present in certain A350XWB LA/MSF contracts, compared to the **[BCI]** A380 LA/MSF contract.[772]

5.296. In order to assess the European Union's claim, we describe below key aspects of the Panel's analysis. Before the Panel, the European Union argued 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."[773] The European Union focused its argumentation on a comparison between the **[BCI]** and the **[BCI]** by arguing that, "{f}or example, the **[BCI]**, whereas the **[BCI]**".[774] In response, the United States asserted that "**[BCI]**."[775] The United States added that "there is no basis for the European Union to conclude that the existence of **[BCI]** 'may justify a significantly lower risk premium for the A350XWB financing agreements, as a whole, than for the A380 financing agreements, as a whole'".[776] Consequently, in the United States' view, "in respect of '**[BCI]**', the A380 LA/MSF contracts and the A350XWB LA/MSF contracts are, as a whole, **[BCI]**."[777]

5.297. In light of these arguments, the Panel acknowledged that, "under the **[BCI]** LA/MSF contracts for the A350XWB, **[BCI]** in the event that deliveries are not made (unless **[BCI]**)".[778] At the same time, the Panel pointed out that, in the original proceedings, "**[BCI]**, which would likewise constitute 'risk-reducing' terms, existed with respect to **[BCI]** LA/MSF at issue in that proceeding".[779] We highlight that, on this basis, the Panel held that "{a}t least **[BCI]** of the A380 contracts considered in the original proceeding – **[BCI]** – contained a mechanism that *similarly 'protected' returns*."[780]

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[768] European Union's appellant's submission, para. 505 (quoting Panel Report, paras. 6.595 and 6.609 (emphasis added by the European Union)).

[769] European Union's appellant's submission, para. 496 (referring to Panel Report, para. 6.594 and fn 1065 thereto, paras. 6.602 and 6.606). (emphasis original)

[770] European Union's appellant's submission, para. 497 (referring to Panel Report, paras. 6.602 and 6.606). (emphases original; additional text in fn 453 thereto omitted)

[771] European Union's appellant's submission, para. 496. (emphasis original)

[772] European Union's appellant's submission, para. 498.

[773] Panel Report, para. 6.590 (referring to European Union's second written submission to the Panel, paras. 339-340; response to Panel question No. 100, paras. 404-405).

[774] Panel Report, para. 6.591 (quoting European Union's second written submission to the Panel, para. 340; referring to European Union's response to Panel question No. 100, para. 405).

[775] Panel Report, para. 6.592 (referring to United States' comments on the European Union's response to Panel question No. 100, paras. 276-280).

[776] Panel Report, para. 6.592 (quoting European Union's response to Panel question No. 100, para. 405).

[777] Panel Report, para. 6.592 (quoting United States' comments on the European Union's response to Panel question No. 100, para. 280).

[778] Panel Report, para. 6.594. (fn omitted)

[779] Panel Report, para. 6.595.

[780] Panel Report, para. 6.595. (emphasis added)

5.298. At this point, we point out that the Panel used broad language when comparing the **[BCI]** A350XWB and **[BCI]** A380 LA/MSF contracts. Contrary to the European Union's characterization of the Panel's findings, the Panel did not find that the **[BCI]** "*contained risk-reducing terms as extensive as* those included in the **[BCI]** A350XWB contract".[781] Rather, the Panel made the broader finding that "the **[BCI]** A380 contract – contained a mechanism that *similarly 'protected' returns*."[782] Having made this comparative assessment, the Panel noted that "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."[783] On this basis, the Panel did not "consider that such features in this proceeding should in and of {themselves} render the WRP inapplicable".[784]

5.299. Having examined key aspects of the Panel's analysis, we highlight that the European Union *fails* to point to any specific error regarding the objectivity of the Panel's assessment, a requirement that an appellant must fulfil to make out a claim successfully under Article 11 of the DSU.[785] The European Union simply states that "the Panel lacked a sufficient evidentiary basis to find that 'similar' risk-reducing terms were present in certain A350XWB {LA/MSF} contracts, compared to the **[BCI]** A380 {LA/MSF} contract."[786] However, a determination as to whether the Panel had enough evidence on the record to support its findings depends on how one understands the finding that risk-reducing terms present in certain A350XWB LA/MSF contracts and the **[BCI]** A380 LA/MSF contract similarly "protected" returns.[787] On appeal, the European Union attributes a very specific meaning to the notion of "similar risk reducing terms", namely, one in which both contracts establish that "**[BCI]**."[788] In contrast, in comparing the contracts at issue, the Panel did not focus on contract terms as specific as the ones referred to by the European Union. Rather, given the existence of a clause concerning "**[BCI]**", which in the Panel's view would likewise constitute "risk-reducing" terms, the Panel concluded that "the **[BCI]** A380 {LA/MSF} contract – contained a mechanism that *similarly 'protected' returns*."[789] As will be elaborated below, the Panel's approach to comparing the risk-reducing terms in the relevant LA/MSF contracts may well be a reflection of the arguments advanced by the parties during the Panel proceedings.

5.300. On appeal, the European Union attaches significant weight to the fact that:

> {u}nder the **[BCI]** A350XWB LA/MSF contract, **[BCI]**. No such mechanism was present in any of the A380 LA/MSF contracts. The **[BCI]** A380 contract included a mechanism that **[BCI]**.[790]

5.301. While, in principle, this may seem like a valid distinction, we highlight that these subtle nuances regarding the terms of the contracts on which the European Union is currently basing its claim of inconsistency under Article 11 do *not* seem to have been sufficiently developed before the Panel. For instance, whereas the European Union did argue that the **[BCI]** A350XWB LA/MSF contract's clause on **[BCI]** should be taken into account when assessing the differences between the A350XWB LA/MSF contracts and the A380 LA/MSF contracts[791], the European Union did not compare the **[BCI]** A350XWB LA/MSF contract with the **[BCI]** A380 LA/MSF contract, which contrasts with its position on appeal. Rather, before the Panel, the European Union made a comparison between **[BCI]**.[792] Moreover, it appears that, before the Panel, the European Union did

[781] European Union's appellant's submission, para. 496. (emphasis added; fn omitted)
[782] Panel Report, para. 6.595. (emphasis added)
[783] Panel Report, para. 6.595 (referring to Original Panel Report, para. 7.481; Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 923).
[784] Panel Report, para. 6.595.
[785] Appellate Body Report, *EC – Fasteners (China)*, para. 442.
[786] European Union's appellant's submission, para. 498.
[787] Panel Report, para. 6.595.
[788] European Union's appellant's submission, para. 497. (emphasis original)
[789] Panel Report, para. 6.595. (emphasis added)
[790] European Union's appellant's submission, para. 497 (referring to Panel Report, paras. 6.602 and 6.606). (emphases original; additional text in fn 453 thereto omitted)
[791] European Union's second written submission to the Panel, paras. 339-342; response to Panel question No. 100, paras. 401-407.
[792] European Union's second written submission to the Panel, para. 340; response to Panel question No. 100, para. 405.

not make the distinction between **[BCI]** and **[BCI]**, as it now does on appeal.[793] The European Union's arguments were more general in nature. For instance, the European Union maintained that a "rigorous assessment of the provisions of the financing agreements overall" may "justify a significantly lower risk premium for the A350XWB financing agreements, as a whole, than for the A380 financing agreements, as a whole".[794]

5.302. A claim that a panel has failed to conduct an objective assessment of the matter before it is "a very serious allegation"[795], and the Appellate Body will not "interfere lightly" with a panel's fact-finding authority.[796] We do not consider that the European Union has successfully established that the Panel's assessment lacks objectivity. To establish that the Panel acted inconsistently with Article 11, the European Union must demonstrate that the Panel exceeded the bounds of its discretion as the trier of facts, including in its treatment of the evidence.[797] We consider that the European Union has not done so in the present case, particularly given that the Panel examined in detail the limited argumentation and evidence put forward by the parties, as discussed above.

5.303. For the foregoing reasons, we do not consider that the European Union has made out its Article 11 claim by arguing that "the Panel lacked a sufficient evidentiary basis to find that 'similar' risk-reducing terms were present in certain A350XWB {LA/MSF} contracts, compared to the **[BCI]** A380 {LA/MSF} contract."[798]

5.304. In its second line of argumentation, the European Union contends that the Panel's reasoning ignores the undisputed fact that a higher number of A350XWB LA/MSF contracts contain certain risk-reducing terms than do the A380 LA/MSF contracts. According to the European Union, it is undisputed that **[BCI]** A350XWB LA/MSF contracts contain certain risk-reducing terms (the **[BCI]** contracts).[799] Together, these contracts account for approximately **[BCI]**% of all LA/MSF for the A350XWB project.[800] In contrast, under the A380 project, it is undisputed that only **[BCI]** of the LA/MSF **[BCI]** contained certain risk-reducing terms (the **[BCI]**), which accounted for approximately **[BCI]**% of all LA/MSF for the A380.[801] In the European Union's view, the fact that significantly more LA/MSF for the A350XWB project is provided through contracts containing risk-reducing terms implies that, relative to the A380 project, it has become more important to take into account risk-reducing terms when establishing the risk premium for the A350XWB.[802] The European Union contends that the Panel acted inconsistently with Article 11 because it failed to take this objective factor into account.

5.305. Having reviewed the Panel record, we observe that the European Union does *not* appear to have argued before the Panel that the fact that significantly more A350XWB LA/MSF is provided through contracts containing risk-reducing terms implies that, relative to the A380 project, it is more important to take into account risk-reducing terms when establishing the risk premium for the A350XWB, as the European Union now contends on appeal. It may possibly be correct that, relative to the A380, more LA/MSF for the A350XWB project is provided through contracts containing risk-reducing terms. However, we do not consider that the European Union has established its claim of inconsistency with Article 11, given that the Panel properly assessed the arguments and evidence that the parties had presented. In any event, even assuming that more A350XWB LA/MSF may have been provided through contracts containing risk-reducing terms than was the case in the context of the A380 project, we understand the Panel to have taken this into account in its overall consideration of whether the *overall* project-specific risks between the

[793] European Union's appellant's submission, para. 497.
[794] European Union's response to Panel question No. 100, para. 405.
[795] Appellate Body Reports, *China – Rare Earths*, para. 5.227 (quoting Appellate Body Report, *EC – Poultry*, para. 133).
[796] Appellate Body Reports, *EC – Sardines*, para. 299 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 151); *US – Carbon Steel*, para. 142.
[797] Appellate Body Report, *US – Wheat Gluten*, para. 151.
[798] European Union's appellant's submission, para. 498.
[799] European Union's appellant's submission, para. 500 (referring to Panel Report, para. 6.598).
[800] The European Union adds that **[BCI]** A350XWB LA/MSF contract did not contain risk-reducing terms. (European Union's appellant's submission, para. 500)
[801] European Union's appellant's submission, para. 501. The European Union notes that the **[BCI]** other LA/MSF **[BCI]** (the **[BCI]**), which accounted for approximately **[BCI]**% of all LA/MSF, did not contain risk-reducing terms. (Ibid.)
[802] European Union's appellant's submission, para. 502.

two projects were sufficiently similar, "such that it would be reasonable to conclude that the WRP could be used as the project-specific risk premium for the A350XWB."[803]

5.306. In its third line of argumentation, the European Union argues that, in its comparison of the risk-reducing terms in the LA/MSF contracts for the A350XWB and A380 projects, the Panel ignored the *relative* importance of these risk-reducing terms *in light of the particular risks to which each project was considered to be exposed*. According to the European Union, the Panel failed to consider that, in comparison with the A380 LA/MSF contracts, the lenders' (slightly) higher exposure to "development risk" under the A350XWB LA/MSF contracts is reduced precisely as a result of the risk-reducing terms in those A350XWB LA/MSF contracts. Thus, for the European Union, the risk-reducing terms in the A350XWB LA/MSF contracts are more consequential than the risk-reducing terms in the A380 LA/MSF contracts.[804]

5.307. Again, we note that the European Union did *not* argue before the Panel that the risk-reducing terms in the A350XWB LA/MSF contracts are more consequential than those in the A380 LA/MSF contracts because the lenders' (slightly) higher exposure to "development risk" under the A350XWB LA/MSF contracts is reduced precisely as a result of the risk-reducing terms. We do not consider that the European Union has established its claim of inconsistency with Article 11 given that the Panel properly assessed the arguments and evidence that were put before it by the parties.[805]

5.308. For the foregoing reasons, we find that the European Union has failed to establish that the Panel's comparison of the A350XWB LA/MSF contracts with the A380 LA/MSF contracts lacks a sufficient evidentiary basis in a manner inconsistent with the requirements of Article 11 of the DSU.

5.3.2.3.2.2 Whether the Panel failed to compare the terms of the A350XWB LA/MSF contracts to the terms of the A380 risk-sharing supplier contracts

5.309. The European Union submits that the Panel also acted inconsistently with Article 11 of the DSU by failing to compare the terms of the A350XWB LA/MSF contracts to the terms of the A380 risk-sharing supplier contracts, which were used in the original proceedings to derive the project risk premium for the A380 LA/MSF contracts (i.e. the WRP). According to the European Union, the problem with the Panel's approach is that, without a proper examination of the terms of the A380 risk-sharing supplier contracts, the Panel could not have known whether they were "dissimilar" to the terms of the A350XWB LA/MSF contracts.[806] The European Union highlights that, since the A380 risk-sharing supplier contracts do not form part of the record, the Panel evidently failed to compare the terms of the A350XWB LA/MSF contracts to those of the A380 risk-sharing supplier contracts.[807]

5.310. The United States disagrees with the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU.[808] According to the United States, the Panel assessed whether the relevant risks for the A350XWB project were comparable to those for the A380 project. In doing so, it was unnecessary for the Panel to re-examine the basis for the A380 risk premium from the original panel proceedings.[809]

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[803] Panel Report, para. 6.459.
[804] European Union's appellant's submission, paras. 503-504.
[805] Appellate Body Report, *US – Wheat Gluten*, para. 151.
[806] European Union's appellant's submission, para. 514. In the European Union's view, the Panel appears implicitly to have assumed that the similarity between the A350XWB LA/MSF contracts and the A380 risk-sharing supplier contracts could be inferred from the fact that the A350XWB LA/MSF contracts were sufficiently similar to the terms of the A380 LA/MSF contracts and the fact that the A380 LA/MSF contracts were sufficiently similar to the terms of the A380 risk-sharing supplier contracts. (Ibid., para. 511)
[807] European Union's appellant's submission, paras. 508 and 511.
[808] United States' appellee's submission, para. 259. The United States asserts that "{i}t is unclear why the {European Union} believes this outcome suggests some lack of objectivity on the Panel's part." Indeed, the United States further notes, the European Union itself "struggles to identify the supposed error". (Ibid. (fn omitted))
[809] United States' appellee's submission, para. 260.

5.311. Based on our review of the Panel record, it appears that, before the Panel, the European Union did *not* request the Panel to compare the A350XWB LA/MSF contracts with the A380 risk-sharing supplier contracts. Moreover, as acknowledged by the European Union itself, "the A380 {risk-sharing supplier} contracts do not form part of the record."[810] The European Union did not provide these A380 risk-sharing supplier contracts to the Panel. It appears that, even though in the original proceedings Professor Whitelaw derived the WRP from the A380 risk-sharing supplier contracts[811], the European Union had only submitted *one* of these contracts to the original panel.[812] Had the European Union considered that this inquiry was required to ensure the proper determination of the A350XWB project-specific risk premium, it should have pursued this line of argumentation before the Panel, including by providing the necessary evidence. The European Union did not do so. In light of this fact, we do not consider that the Panel's analysis would reflect a lack of objectivity contrary to Article 11.

5.312. For the foregoing reasons, we find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU by failing to compare the terms of the A350XWB LA/MSF contracts to the terms of the A380 risk-sharing supplier contracts.

5.3.2.3.3 The price of risk

5.313. The European Union argues that, given its analysis of the price of risk[813], the Panel acted inconsistently with Article 11 of the DSU in finding that "the overall project-specific risks {were} sufficiently similar to allow the risk premium applied for A380 LA/MSF in the original proceeding to be applied to A350XWB LA/MSF."[814] First, the European Union submits that the Panel's finding that the risks associated with the A350XWB and A380 projects were overall sufficiently similar was based on *incoherent reasoning*. This is because, with respect to the price of risk, the Panel found that the United States "did not discharge its evidentiary burden"[815], such that the United States had not established that the price of risk in the context of the A380 project was sufficiently similar to the price of risk in the context of the A350XWB project. According to the European Union, "{t}his finding simply does not support, and is left by the Panel unreconciled with, the Panel's finding, in the very next sentence of its Report, that the {overall} risks posed by the two projects '{were} sufficiently similar'."[816] Second, the European Union asserts that the Panel's overall finding of "sufficient similarity" in relation to the A350XWB and A380 projects does *not* have an *evidentiary basis*.[817] The European Union considers that, given the Panel's own factual finding that the United States had failed to demonstrate the similarity of the price of risk at the time of the provision of A380 and A350XWB LA/MSF, "there was no basis for the Panel to find that the A380 and A350XWB risks {were} '*sufficiently similar*' for the A380-based project risk premium to apply to the A350XWB."[818]

5.314. In response, the United States maintains that the European Union "mischaracterizes" the Panel's findings by stating that the Panel found that the United States had not demonstrated the similarity of the price of risk between the two LCA projects. Rather, according to the United States,

[810] European Union's appellant's submission, para. 508.
[811] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 100.
[812] Indeed, the original panel stated that "the one contract that the European Communities has submitted shows that there is at least one major difference between the repayment terms under this contract and LA/MSF which we believe reduces its relative level of risk". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 100 (quoting Original Panel Report, para. 7.480)) This contract is found in Original Panel Exhibit EC-117 and is HSBI.
[813] The Panel defines "price of risk" by reference to "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". (Panel Report, para. 6.460)
[814] European Union's appellant's submission, para. 434 (quoting Panel Report, para. 6.608 (emphasis added by the European Union omitted)).
[815] European Union's appellant's submission, para. 436 (quoting Panel Report, para. 6.608).
[816] European Union's appellant's submission, para. 436 (quoting Panel Report, para. 6.608).
[817] European Union's appellant's submission, para. 437.
[818] European Union's appellant's submission, para. 437 (quoting Panel Report, paras. 6.608 and 6.610 (emphasis added by the European Union)).

the Panel found that the risks for the A380 and A350XWB projects were overall sufficiently similar on the basis of types of risk other than price risk.[819]

5.315. As we see it, both lines of argumentation brought by the European Union are based on very similar grounds. In essence, the European Union is challenging under Article 11 the Panel's ultimate finding that the risks associated with the A350XWB and A380 projects were overall sufficiently similar given that the Panel did not make a finding that the individual category of "price of risk" was "similar" at the time of the provision of LA/MSF to the A350XWB and A380 projects, respectively. In its first line of argumentation, the European Union takes issue with the Panel's ultimate finding of "sufficient similarity" by contending that such finding was based on *incoherent reasoning*. In the European Union's view, this is evidenced in that the Panel found, on the one hand, that the United States "did not discharge its evidentiary burden"[820] with respect to the price of risk and, on the other hand, "that the risks posed by the two projects '{were} sufficiently similar'."[821] In its second line of argumentation, the European Union contends that the Panel's ultimate finding of "sufficient similarity" does not have an *evidentiary* basis. In particular, the European Union asserts that, given the Panel's own factual finding that the United States "had failed to demonstrate the similarity of the price of risk" at the time of the provision of A380 and A350XWB LA/MSF, "there was no basis for the Panel to find that the A380 and A350XWB risks {were} '*sufficiently similar*' for the A380-based project risk premium to apply to the A350XWB."[822] Since both lines of argumentation are based on essentially the same grounds, we address them together below.

5.316. We recall that, in this part of its benefit analysis, the Panel understood the main question before it to be "whether the United States ha{d} demonstrated that the project-specific risks of the A350XWB programme {were} 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."[823] The parties' arguments before the Panel concerning the differences in the risk profiles of the A380 and A350XWB projects focused on the following issues: (i) programme risk; (ii) contract risk; and (iii) the price of risk.[824]

5.317. Turning to examine the Panel's findings regarding the price of risk, we begin by noting that the Panel did not make a finding that the category of "price of risk" was similar in relation to the A350XWB and A380 projects. In this regard, the European Union correctly indicates that the Panel's actual finding was that, "{w}ith respect to the price of risk … {it was} unable to accept the United States' arguments because it did not discharge its evidentiary burden."[825] However, the European Union *fails to mention* other important aspects of the Panel's analysis related to this conclusion. In particular, the European Union overlooks the legal question that the Panel set out to examine, namely, "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."[826] The Panel examined this issue in addressing the United States' argument 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'."[827] In particular, the United States argued before the Panel that, "at the time of the A350XWB {LA/MSF} contracts, the effects of the 2008 global financial and

[819] United States' appellee's submission, para. 249 (referring to Panel Report, para. 6.608). The United States also points out that, in reaching this conclusion, the Panel considered and rejected arguments made by the United States and the European Union "that the financial environment at the time of the conclusion of the A350 XWB {project} would have altered the project-specific risk". (Ibid. (referring to Panel Report, paras. 6.580 and 6.583-6.584))

[820] European Union's appellant's submission, para. 436 (quoting Panel Report, para. 6.608).

[821] European Union's appellant's submission, para. 436 (quoting Panel Report, para. 6.608).

[822] European Union's appellant's submission, para. 437 (quoting Panel Report, paras. 6.608 and 6.610 (emphasis added by the European Union)).

[823] Panel Report, para. 6.459.

[824] Panel Report, para. 6.460.

[825] Panel Report, para. 6.608.

[826] Panel Report, para. 6.580.

[827] Panel Report, para. 6.581 (quoting Jordan Report (Panel Exhibit USA-475 (BCI/HSBI)), para. 22 (emphasis added)).

economic crisis continued to linger and constrain the availability of credit, which would have affected lending conditions for the A350XWB project."[828]

5.318. In addressing this argument by the United States, the Panel agreed with the European Union that "the high yield spread between investment-grade and below-investment grade debt in **[BCI]** 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 **[BCI]**."[829] The Panel then elaborated that "{t}he peak in the spread at the time of the A350XWB LA/MSF contracts provides information about how risk was priced at that point, but d{id} not enable {it} to judge whether the spread was more marked than that existing at the time of the A380 LA/MSF contracts."[830] On the basis of the above considerations, the Panel concluded that, "{g}iven the United States ha{d} not provided the yield spreads that would allow {it} to make a full evaluation of the merits of its submission, {it was} 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."[831]

5.319. On appeal, the European Union contends that the Panel found that "the United States had *not* established that the price of risk in the context of the A380 project was sufficiently similar to the price of risk in the context of the A350XWB project."[832] However, the Panel did *not* find that, with respect to the price of risk, the United States had failed to establish "sufficient similarity" between the A350XWB and A380 projects. Rather, the Panel addressed and *dismissed* the United States' argument that, due to the financial environment existing at the time of the conclusion of the A350XWB LA/MSF, the price of risk was *higher* because "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."[833] In other words, the Panel's analysis was mainly devoted to rejecting the United States' contention that the project-specific risk premium applicable to the A350XWB LA/MSF should be *higher*.

5.320. On the basis of the actual findings made by the Panel, we fail to see any incoherence between, on the one hand, the Panel's rejection of the United States' argument that the project-specific risk premium applicable to the A350XWB LA/MSF should be *higher* because LA/MSF for the A350XWB was finalized at a time when lending conditions were historically tight and, on the other hand, the Panel's ultimate conclusion that "the overall project-specific risks {were} sufficiently similar to allow the risk premium applied for A380 LA/MSF in the original proceeding to be applied to A350XWB LA/MSF."[834] In other words, the fact that the Panel rejected the United States' argument that project-specific risk premium applicable to the A350XWB LA/MSF should be *higher* in the context of its analysis of price of risk does not undermine the Panel's ultimate conclusion that the overall project-specific risks were sufficiently similar. This understanding contradicts the European Union's assertion that the Panel's findings regarding the price of risk do not support the Panel's ultimate conclusion that the risks of the A350XWB

[828] Panel Report, para. 6.581 (referring to United States' comments on the European Union's response to Panel question No. 100, para. 277). The United States substantiated its position in the following manner:

> The United States submit{ted} 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 A350XWB are undoubtedly much higher than {those} 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". The United States point{ed} to Dr Jordan's statements that this yield spread remained high in **[BCI]** when the LA/MSF agreements were finalised, relative to pre-2007 ("pre-crisis") levels. Specifically, the United States note{d} 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 **[BCI]**.

(Ibid. (fns omitted))

[829] Panel Report, para. 6.585.
[830] Panel Report, para. 6.585.
[831] Panel Report, para. 6.588.
[832] European Union's appellant's submission, para. 436. (emphasis original)
[833] Panel Report, para. 6.588.
[834] Panel Report, para. 6.608.

and A380 projects were sufficiently similar. We therefore see *no* incoherence in the Panel's reasoning, let alone one that rises to the level of an inconsistency with Article 11 of the DSU.

5.321. Similarly, the above misgivings regarding the European Union's understanding of the Panel's analysis are also relevant in relation to the European Union's second line of argumentation that the Panel's ultimate finding of "sufficient similarity" does not enjoy an *evidentiary* basis. As noted, contrary to the European Union's assertion, the Panel never found that the United States "had failed to demonstrate the similarity of the price of risk".[835] Rather, the Panel's analysis focused on dismissing the United States' argument that, due to the financial environment existing at the time of the conclusion of the A350XWB LA/MSF, the "price of risk" was *higher* because "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".[836] Moreover, we recall that, the Panel did *not* actually seek to make *individual* findings of "similarity" between the A350XWB and A380 projects with respect to each of the three risk categories it examined. Rather, the Panel sought to make an *overall* assessment of the relative risks between the A350XWB and A380 projects to determine whether "the project-specific risks of the A350XWB programme {were} *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.*"[837] Given the focus of the Panel's analysis in relation to the price of risk and the nature of the Panel's overall assessment, we disagree that, as a result of the Panel's findings in that context, there is no evidentiary basis for the Panel's ultimate conclusion that "the overall project-specific risks {were} sufficiently similar to allow the risk premium applied for A380 LA/MSF in the original proceeding to be applied to A350XWB LA/MSF."[838]

5.322. For the foregoing reasons, we find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU in its analysis of the price of risk.

5.3.2.3.4 Overall conclusion on the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the risk differences that may affect the project-specific risk premium

5.323. The European Union has brought multiple claims of inconsistency with Article 11 of the DSU, challenging the Panel's assessment of three aspects of risk related to the risk profiles of the A380 and A350XWB projects: (i) programme risk; (ii) contract risk; and (iii) the price of risk.

5.324. In the context of programme risk, we find that the European Union has failed to establish that the Panel acted inconsistently with its obligations under Article 11 of the DSU in its analysis of development risk, market risk, or in its comparison of the development and market risks. With regard to contract risk, we find that the European Union has failed to establish that the Panel's comparison of the A350XWB and A380 LA/MSF contracts lacks a sufficient evidentiary basis in a manner inconsistent with the requirements of Article 11 of the DSU. We also find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU by failing to compare the terms of the A350XWB LA/MSF contracts to the terms of the A380 risk-sharing supplier contracts. Finally, we find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU in its analysis of the price of risk.

5.3.2.4 Whether the Panel erroneously adopted a single, undifferentiated project risk premium to benchmark all four of the A350XWB LA/MSF contracts

5.325. In this section, we address the *third* and final set of claims brought by the European Union against the Panel's findings related to the project-specific risk premium. In this context, the European Union argues that the Panel erroneously adopted a single, undifferentiated project risk premium (i.e. the WRP) as a benchmark for all four of the A350XWB LA/MSF contracts. According to the European Union, the terms of the four A350XWB LA/MSF contracts are similar in some ways, but also differ in other ways. Thus, the European Union asserts that, in adopting a single,

[835] European Union's appellant's submission, para. 437.
[836] Panel Report, para. 6.588.
[837] Panel Report, para. 6.459. (emphasis added)
[838] Panel Report, para. 6.608.

undifferentiated project-specific risk premium that did not account for the differing allocation of risk flowing from the differing contract terms, the Panel erred in its application of Article 1.1(b) of the SCM Agreement, and also failed to make an objective assessment of the matter as required by Article 11 of the DSU.[839] We address each of these claims in turn.

5.3.2.4.1 Whether the Panel erred in its application of Article 1.1(b) of the SCM Agreement by adopting a single, undifferentiated project risk premium to benchmark all four of the A350XWB LA/MSF contracts

5.326. The European Union observes that Article 1.1(b) of the SCM Agreement requires the selection of a benchmark loan that has as many elements as possible in common with the investigated loan, with adjustments made in every instance to account for any differences.[840] In light of this legal standard, the European Union points out that the Panel's own factual findings reveal that there are important differences in the terms of the government loans at issue that affect the risk profile – and hence the market price – of each loan.[841] For the European Union, the four A350XWB LA/MSF contracts themselves are not similar in terms of their risk profiles. Consequently, a market benchmark that matches the risk profile of one A350XWB LA/MSF contract might not match the risk profile of another, at least without adjustments to account for differences that impact the market price of each A350XWB LA/MSF contract.[842]

5.327. According to the European Union, the Panel acknowledged that differences in risk profiles among the four A350XWB LA/MSF contracts exist, and that these differences could affect the risk premium demanded by a market lender. However, the Panel decided that these differences could be ignored because the original panel had allegedly ignored differences in the risk profiles of the A380 LA/MSF contracts at issue in the original proceedings. In the European Union's view, in applying a single, undifferentiated project risk premium, the Panel failed even to consider, let alone adjust for, differences among the risk profiles of the four A350XWB LA/MSF contracts that could affect their market price, which amounts to an erroneous application of Article 1.1(b).[843]

5.328. The United States rejects the European Union's claim that the Panel erred under Article 1.1(b) by adopting a single project-specific risk premium as a benchmark for all four of the A350XWB LA/MSF contracts. According to the United States, the European Union's claim is premised on an incorrect understanding of the legal standard. Article 14(b) of the SCM Agreement requires that the benchmark be "comparable", rather than "identical" or "as close as possible", to the government loan at issue. For the United States, given that the European Union has not substantiated that the benchmark adopted by the Panel is not "comparable" to any of the four instances of LA/MSF for the A350XWB, this claim of error must fail.[844]

5.329. The European Union's claim of error appears to be based on the assumption that the mere fact that the Panel applied the "single, undifferentiated project risk premium" *without making adjustments* necessarily constitutes error in the application of Article 1.1(b).[845] We recall that the fact that the Panel did not make any such adjustments does not, in and of itself, constitute legal error under Article 1.1(b).[846] Indeed, contrary to the European Union's suggestion, it is not possible to determine *in the abstract* whether the Panel ought to have made *adjustments* to the WRP to ensure that it had as many elements as possible in common with each of the four A350XWB LA/MSF contracts.

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[839] European Union's appellant's submission, paras. 517-518.
[840] European Union's appellant's submission, para. 522.
[841] By way of example, the European Union observes that "**[BCI]** A350XWB LA/MSF **[BCI]** protected the government against **[BCI]** (*i.e.*, the **[BCI]** LA/MSF contract), whereas other A350XWB LA/MSF contracts provided no such protection (*i.e.*, the **[BCI]** LA/MSF contract)." (European Union's appellant's submission, para. 519 (referring to Panel Report, paras. 6.594 and 6.598))
[842] European Union's appellant's submission, para. 519.
[843] European Union's appellant's submission, paras. 521-522.
[844] United States' appellee's submission, para. 262. The United States also notes that the original panel used a uniform project-specific risk premium for all four instances of LA/MSF for the A380, even though they exhibited variations similar to those at issue for the A350XWB. (Ibid.)
[845] European Union's appellant's submission, para. 522.
[846] See para. 5.229 above.

5.330. As we see it, the key premise underlying the European Union's claim is that the Panel acknowledged that "differences in risk profiles {among} the A350XWB LA/MSF contracts exist" and that "these differences *could affect the risk premium*".[847] In order to examine this premise, we analyse below relevant aspects of the Panel Report.

5.331. In response to arguments by the European Union, the Panel actually examined whether the four A350XWB LA/MSF contracts should have different risk premia. In particular, the European Union argued before the Panel that "the four individual A350XWB {LA/MSF} contracts involve different amounts of risk because the **[BCI]** contracts protect against risks related to **[BCI]**, whereas the **[BCI]** contract does not."[848]

5.332. As noted by the European Union, the Panel did "recognise that there are some differences {among} the risk profiles of the four A350XWB {LA/MSF} contracts".[849] However, the Panel went on to examine and to explain why, despite some differences among the risk profiles of the four A350XWB LA/MSF contracts, it would not be necessary to apply two or more project-specific risk premia. The Panel noted, for example, that in the original proceedings there were also differences among the four A380 LA/MSF contracts for which the same premium was used (i.e. the WRP). In particular, the Panel explained that, although in the original proceedings **[BCI]**, which would constitute "risk-reducing" terms, existed in at least **[BCI]** for A380 LA/MSF, Professor Whitelaw's risk premium was nevertheless applied in those proceedings as a *minimum* premium for all contracts.[850]

5.333. Moreover, the Panel provided *additional* reasons why the differences among the terms of the four A350XWB LA/MSF contracts at issue would not, in this case, "justify the application of, at least, two different risk premiums for those agreements".[851] In particular, the Panel noted that, "for the **[BCI]** contract, the contractual terms that the European Union has identified as 'risk reducing' apply in circumstances involving **[BCI]**. That is, if foreseen development risks, such as technology risks, were to eventuate, it appears that the 'risk reducing' terms may not apply."[852] Furthermore, the Panel found it difficult to accept the European Union's argument that "the **[BCI]**."[853] In the Panel's view, "**[BCI]**."[854] Based on its analysis, the Panel was 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."[855]

5.334. Moreover, we observe that, while the European Union argued before the Panel that there were differences among the risk profiles of the A350XWB LA/MSF contracts, it appears that the European Union did not elaborate on the *adjustments* that it considered would be required to account for such differences.

5.335. Pursuant to the legal standard under Article 1.1(b) of the SCM Agreement, a panel is required to determine whether, in light of the differences that are found to exist in a given case between the government loan and the benchmark loan, adjustments are needed to ensure that the loans at issue are "comparable".[856] Given the Panel's analysis and the arguments that were put before it, we find that the European Union has not established that the Panel erred under Article 1.1(b) of the SCM Agreement by applying a "single, undifferentiated project risk premium"

[847] European Union's appellant's submission, para. 521. (emphasis added; fn omitted)
[848] Panel Report, para. 6.598.
[849] Panel Report, para. 6.604.
[850] Panel Report, para. 6.604.
[851] Panel Report, para. 6.596. (fn omitted)
[852] Panel Report, para. 6.602.
[853] Panel Report, para. 6.603. (fn omitted)
[854] Panel Report, para. 6.603.
[855] Panel Report, para. 6.607. (emphasis added)
[856] In this regard, we observe that, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body held:

> {A} certain degree of flexibility also applies under Article 14(b) in the selection of benchmarks, so that such selection can ensure a meaningful comparison for the determination of benefit. At the same time, when an investigating authority resorts to a benchmark loan in another currency or to a proxy, it must ensure that such benchmark is adjusted so that it approximates the "comparable commercial loan".

(Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 489)

without making adjustments for differences among the risk profiles of the A350XWB LA/MSF contracts.[857]

5.3.2.4.2 Whether the Panel acted inconsistently with Article 11 of the DSU by adopting a single, undifferentiated project risk premium to benchmark all four of the A350XWB LA/MSF contracts

5.336. The European Union argues that the Panel acted inconsistently with Article 11 of the DSU by applying a "single, undifferentiated project risk premium" to all four of the A350XWB LA/MSF contracts. In particular, the European Union maintains that there is an inconsistency between, on the one hand, the Panel's approach to the identification of the first component of the market benchmark for the A350XWB (i.e. the corporate borrowing rate), for which the Panel adopted a *differentiated* rate for the four A350XWB LA/MSF contracts and, on the other hand, the Panel's subsequent identification of the second component of the market benchmark (i.e. the risk premium), for which the Panel adopted an *undifferentiated* rate for the four A350XWB LA/MSF contracts.[858] The European Union observes that, although the Panel found relevant differences among the four A350XWB LA/MSF contracts with regard to both components of the market benchmark, the Panel's approach to addressing these differences was inconsistent, contrary to Article 11 of the DSU.[859]

5.337. The United States rejects the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU. The United States maintains that the Panel had good reason to use an undifferentiated project-specific risk premium for the four A350XWB LA/MSF contracts: the original panel had also used a single project-specific risk premium for the A380 LA/MSF contracts, "even though **[BCI]** A380 LA/MSF contract contained similar terms as the so-called 'risk-reducing' terms in the **[BCI]** A350XWB LA/MSF contracts".[860] Moreover, the United States argues that the Panel was justified in its adoption of a contract-specific approach to the corporate borrowing rate because such approach ensured that the benchmarking exercise was based on information pre-dating the finalization of the terms and conditions of each of the LA/MSF contracts.[861]

5.338. We begin by examining the reasons provided by the Panel for its approach to examining the two components of the market benchmark. With regard to the use of an undifferentiated project-specific risk premium for the four A350XWB LA/MSF contracts, the Panel reasoned why, despite some differences among the risk profiles of the four A350XWB LA/MSF contracts, it would not be appropriate to apply two or more project-specific risk premia. In particular, the Panel rejected the European Union's contention that different risk premia should apply on the basis of guidance from the original proceedings and the limited extent of some of the "risk-reducing" terms referred to by the European Union. The Panel therefore *disagreed* with the view 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."[862] As noted above, we do not consider the Panel to have erred in reaching this conclusion.

5.339. As to the adoption of a "contract-specific approach" in determining the corporate borrowing rate, we recall that the Panel decided not to follow Professor Whitelaw's averaging approach proposed by the European Union.[863] The Panel took issue with the fact that "Professor Whitelaw's averaging approach would result in the application of corporate borrowing rates derived over time

[857] European Union's appellant's submission, para. 522.
[858] European Union's appellant's submission, para. 525.
[859] European Union's appellant's submission, para. 529.
[860] United States' appellee's submission, para. 263 (referring to Panel Report, para. 6.609).
[861] United States' appellee's submission, para. 263.
[862] Panel Report, para. 6.607. (emphasis added)
[863] Professor Whitelaw's average (i.e. his proposed corporate borrowing rate) was obtained by averaging the EADS bond's yield to maturity over **[BCI]** months. He took as his starting point **[BCI]** (the date of the French A350XWB *Convention*), and his end point was **[BCI]**, the date of the UK A350XWB LA/MSF contract **[BCI]**. (Panel Report, para. 6.378) Professor Whitelaw indicated that the average YTM on the bond was computed for the **[BCI]** 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 A350XWB LA/MSF contract. (Ibid. (referring to Whitelaw Response to Jordan (Panel Exhibit EU-121 (BCI/HSBI)), fn 12 to para. 12))

periods that are *different* for the four {A350XWB} LA/MSF contracts"[864], and would incorporate data from *after* the conclusion of three of the four contracts.[865] In rejecting Professor Whitelaw's averaging approach, the Panel observed that such approach would go against the Appellate Body's guidance of comparing the LA/MSF measures and the benchmark loan on an *ex ante* basis. Indeed, the Appellate Body has indicated that, instead of conducting an *ex post* analysis, a panel is required to determine whether a benefit has been conferred on the basis of an *ex ante* examination of "how the loan is structured and how risk is factored in".[866]

5.340. We further note that, after rejecting Professor Whitelaw's averaging approach, the Panel opted for relying on "the yields from a consistent time-period up to the date of the conclusion of the individual contract, as calculated by Dr Jordan".[867] As noted by the Panel, the individual contracts were **[BCI]**[868] **[BCI]**.[869] As we see it, since the Panel sought to rely on "the yields from a consistent time-period up to the date of the conclusion of the individual contract"[870] in conducting an *ex ante* examination, there is a clear explanation to support the Panel's decision of using a *different* corporate borrowing rate for each of the four LA/MSF contracts.

5.341. Based on our analysis of the Panel Report and the Panel record, we see no error in the Panel's decision to adopt, on the one hand, an undifferentiated project-specific risk premium for the four A350XWB LA/MSF contracts and, on the other hand, a contract-specific approach to the corporate borrowing rate. In particular, we fail to see any inconsistency in the Panel's reasoning in this regard, let alone one that would call the Panel's objectivity into question.

5.342. For the foregoing reasons, we find that the European Union has failed to establish that, by applying a single, undifferentiated project risk premium to all four of the A350XWB LA/MSF contracts, the Panel acted inconsistently with Article 11 of the DSU.

5.3.2.5 Conclusion on the Panel's findings regarding the project-specific risk premium

5.343. The European Union argues that the Panel erred in the identification of the project-specific risk premium component of the market benchmark utilized to determine whether the French, German, Spanish, and UK A350XWB LA/MSF contracts conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement. In particular, the European Union contends that the Panel erred in using the project-specific risk premium developed in the original proceedings for the A380 project as the risk premium to benchmark the four A350XWB LA/MSF contracts. The European Union has brought multiple challenges under Article 1.1(b) of the SCM Agreement and Article 11 of the DSU against various aspects of the Panel's analysis.

5.344. We disagree with the *three* sets of claims of error raised by the European Union in relation to the Panel's analysis of the project-specific risk premium.

5.345. First, we disagree that the Panel erred in its application of Article 1.1(b) by failing to assess "whether a benchmark comprising, *inter alia*, a project risk premium *tailored to the risks of financing the A350XWB project itself*, was available and could be used to assess whether the A350XWB LA/MSF loans conferred 'benefits'."[871] We also disagree that the Panel erred in its application of Article 1.1(b) of the SCM Agreement by applying a single, undifferentiated project

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[864] Panel Report, para. 6.386 (referring to Jordan Reply (Panel Exhibit USA-505 (BCI/HSBI)), para. 27). (emphasis added) By way of example, the Panel explained that:

> 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 **[BCI]** earlier (according to Professor Whitelaw). The market rate for the French loan agreement, however, would *not* be judged against market rates from **[BCI]** prior to its conclusion, when the bond yields were even higher and would have likewise distorted the rates upwards.

(Ibid. (emphasis original))

[865] Panel Report, para. 6.387.

[866] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 836.

[867] Panel Report, para. 6.388.

[868] **[BCI]**

[869] Panel Report, Table 6 at para. 6.382.

[870] Panel Report, para. 6.388.

[871] European Union's appellant's submission, para. 369. (emphasis original)

risk premium derived from the A380 project to the A350XWB project without making adjustments. Moreover, since we have already addressed and rejected the European Union's claim that the Panel erred under Article 1.1(b) by failing to undertake a "progressive search" for a market benchmark[872], we consider it unnecessary to address further the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU by failing to consider alternative, and more appropriate, benchmarks than those proposed by the United States. In addition, we disagree with the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU because it allegedly deviated from the original panel's findings when it adopted a constant, undifferentiated project risk premium not tailored to the risks associated with LA/MSF for the A350XWB.[873]

5.346. Second, we disagree with the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU in its examination of the risk profiles of the A380 and A350XWB projects, including in its assessment of: (i) programme risk; (ii) contract risk; and (iii) the price of risk. Contrary to the European Union's view, the Panel did not simply assume that the WRP would serve as an appropriate project-specific risk premium for the A350XWB. Instead, the Panel assessed the relative project-specific risks associated with the A380 and A350XWB projects. The purpose of this comparative analysis was, in the Panel's view, to determine "whether the United States ha{d} demonstrated that the project-specific risks of the A350XWB programme {were} 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".[874] Thus, the Panel sought to engage carefully with the arguments and evidence presented by the parties regarding the possible risk premia that should be used in constructing the market benchmark. Regarding the Panel's analysis of programme risk, we find that the European Union has failed to establish that the Panel acted inconsistently with its obligations under Article 11 of the DSU in its analysis of development risk, market risk, or in its comparison of the development and market risks. With regard to contract risk, we find that the European Union has failed to establish that the Panel's comparison of the A350XWB and A380 LA/MSF contracts lacks a sufficient evidentiary basis in a manner inconsistent with the requirements of Article 11 of the DSU. We also find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU by failing to compare the terms of the A350XWB LA/MSF contracts to the terms of the A380 risk-sharing supplier contracts. Finally, we find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU in its analysis of the price of risk.

5.347. Finally, we disagree with the third set of claims against the Panel's findings related to the project-specific risk premium. In particular, we reject the European Union's claims that, in adopting a single, undifferentiated project-specific risk premium for each of the four A350XWB LA/MSF contracts, the Panel erred in its application of Article 1.1(b) of the SCM Agreement, and also failed to make an objective assessment of the matter as required by Article 11 of the DSU.[875] The Panel recognized that there were some differences among the risk profiles of the four A350XWB LA/MSF contracts.[876] However, based on its analysis, the Panel was not persuaded that the terms of those contracts rendered them significantly different so as to require the application of two or more different project-specific risk premia in this proceeding. Given the Panel's analysis and the arguments that were put before it, we find that the European Union has not established that the Panel erred under Article 1.1(b) of the SCM Agreement by applying a "single, undifferentiated project risk premium" without making adjustments for differences among the risk profiles of the A350XWB LA/MSF contracts.[877] Moreover, contrary to the European Union's claim under Article 11 of the DSU, we see no error in the Panel's decision to adopt, on the one hand, an undifferentiated project-specific risk premium for the four A350XWB LA/MSF contracts and, on the other hand, a contract-specific approach to the corporate borrowing rate. Thus, we find that the European Union has failed to establish that, by applying a single, undifferentiated project risk premium to all four of the A350XWB LA/MSF contracts, the Panel acted inconsistently with Article 11 of the DSU.

[872] See section 5.3.2.2.1 of this Report.
[873] European Union's appellant's submission, para. 423.
[874] Panel Report, para. 6.459.
[875] European Union's appellant's submission, paras. 517-518.
[876] Panel Report, para. 6.604.
[877] European Union's appellant's submission, para. 522.

5.348. For the foregoing reasons, we uphold the Panel's finding, in paragraphs 6.487 and 6.542 of its Report, that the development risks associated with the A350XWB were *at least as high as, or sufficiently similar to*, those associated with the A380; the Panel's findings, in paragraphs 6.579 and 6.608 of its Report, that the market risks experienced by the A380 and A350XWB were overall comparable in importance and that the A350XWB market risks would not have been much lower than the A380 market risks; the Panel's finding, in paragraphs 6.595 and 6.609 of its Report, that the A350XWB LA/MSF contracts containing such "risk-reducing" terms are no less risky than at least **[BCI]** for A380 LA/MSF that also contained similar terms in the original proceedings; the Panel's findings, in paragraphs 6.607 and 6.609 of its Report, that it was not persuaded that the differences in certain terms affecting the risk profiles of the individual A350XWB LA/MSF contracts would require the application of two or more different project-specific risk premia; and, consequently, the Panel's finding, in paragraphs 6.608 and 6.610 of its Report, that the overall project-specific risks of the A380 and A350XWB projects were sufficiently similar to allow the risk premium applied to the A380 LA/MSF in the original proceedings to be applied to the A350XWB LA/MSF.

5.3.3 Overall conclusions on the Panel's findings regarding "benefit" under Article 1.1(b) of the SCM Agreement

5.349. The European Union has appealed the Panel's findings concerning the assessment of whether the French, German, Spanish, and UK A350XWB LA/MSF contracts confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement. In particular, the European Union has claimed that the Panel erred under Article 1.1(b) of the SCM Agreement and Article 11 of the DSU in its analysis of the two components of the market benchmark rate of return: (i) the calculation of a corporate borrowing rate that Airbus would have had to pay to a commercial lender to borrow money; and (ii) the calculation of a project-specific risk premium that represents the additional rate of return that a commercial lender would have required for offering financing to Airbus on the particular terms of the relevant A350XWB LA/MSF contracts.[878]

5.350. We have rejected the European Union's claims against the Panel's benefit analysis. For this reason, we uphold the Panel's findings, in paragraphs 6.632 (including Table 10) and 6.633 of its Report, that Airbus paid a lower interest rate for the A350XWB LA/MSF than would have been available to it on the market and that, consequently, a benefit has thereby been conferred within the meaning of Article 1.1(b) of the SCM Agreement. Consequently, we also uphold the Panel's findings, in paragraphs 6.656 and 7.1.c.i. of its Report, that the French, German, Spanish, and UK A350XWB LA/MSF contracts each constitute a subsidy within the meaning of Article 1.1 of the SCM Agreement and, thus, that the United States has demonstrated that the French, German, Spanish, and UK A350XWB LA/MSF contracts are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement. Finally, the quantitative implications of the Panel's findings that we have just upheld above are the following, as set out in Table 10 at paragraph 6.632 of the Panel Report:

[878] Panel Report, para. 6.350.

Table 4: Approximate difference between rates of return and market benchmark rate

EU member State	Expected Internal Rate of Return (IRR) of LA/MSF contracts	Corporate borrowing rate as reflected by yield on EADS bond[879]	Normal market fees	WRP	Amount by which benchmark exceeds IRR
	A	B	C	D	(B+C+D)-A
France	**[BCI]**	**[BCI]** to **[BCI]**	**[BCI]**	WRP	(**[BCI]**+WRP)-**[BCI]** to (**[BCI]**+WRP)-**[BCI]**
Germany	**[BCI]**	**[BCI]** to **[BCI]**	**[BCI]**	WRP	(**[BCI]**+WRP)-**[BCI]** to (**[BCI]**+WRP)-**[BCI]**
Spain	**[BCI]**	**[BCI]** to **[BCI]**[880]	**[BCI]**	WRP	(**[BCI]**+WRP)-**[BCI]** to (**[BCI]**+WRP)-**[BCI]**
United Kingdom	**[BCI]**	**[BCI]** to **[BCI]**	**[BCI]**	WRP	(**[BCI]**+WRP)-**[BCI]** to (**[BCI]**+WRP)-**[BCI]**

5.4 Article 7.8 of the SCM Agreement

5.4.1 Introduction

5.351. Before the Panel, the European Union argued that it had no obligation to adopt compliance measures with respect to subsidies that had ceased to exist prior to the DSB's adoption of the panel and Appellate Body recommendations and rulings in the original proceedings in *EC and certain member States – Large Civil Aircraft* on 1 June 2011.[881] The Panel rejected the European Union's argument, finding that:

> 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.[882]

[879] We recall that, while the Panel determined the corporate borrowing rate in the form of a range of average yields, it rightly gave more prominence to the one-month average yield of the EADS bond in its determination of the corporate borrowing rate. See para. 5.140 above.

[880] As noted, the European Union identifies a clerical error made by the Panel in Tables 7 and 10 of its Report in relation to the one-month average yield prior to the Spanish A350XWB *Convenio*. In particular, the European Union points that "Table 6 of the Panel Report shows, for Spain, the one-month average yield prior to the date of the contract was **[BCI]**, and not **[BCI]** as inscribed in Table 10 (and Table 7)." (European Union's appellant's submission, fn 286 to Table 2 at para. 322 (referring to Panel Report, Table 7 at para. 6.430 and Table 10 at para. 6.632) (emphasis original)) The European Union is correct in pointing out that the correct figure in relation to the one-month average yield prior to the Spanish A350XWB *Convenio* is **[BCI]** found in Table 6 of the Panel Report, rather than **[BCI]**, which is the clerical error found in Tables 7 and 10 of the Panel Report. In response to questioning at the oral hearing, the United States agreed that **[BCI]** is a clerical error. Consequently, for purposes of the present Report, we proceed on the basis of the correct figure mentioned by the Panel in Table 6: **[BCI]**.

[881] Panel Report, para. 6.794.

[882] Panel Report, para. 6.822. (emphasis original)

5.352. The Panel therefore considered that compliance under Article 7.8 of the SCM Agreement can be achieved *only* if "an implementing Member no longer causes adverse effects through the use of subsidies, within the meaning of Article 5 of the SCM Agreement."[883] According to the Panel, "the *passive* 'expiry' events the European Union relie{d} upon as *the sole basis* to demonstrate that it ha{d} 'withdrawn' the relevant subsidies for the purpose of Article 7.8 {could not} 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."[884] Based on its analysis, while the Panel agreed with the European Union that most of the pre-A380 LA/MSF subsidies[885] *had expired* before the adoption of the recommendations and rulings of the DSB in the original proceedings, it found that the European Union nonetheless remained under an obligation to withdraw such expired subsidies by removing their adverse effects.[886]

5.353. The European Union requests us to reverse the Panel's findings on the ground that the Panel erred in its interpretation of Article 7.8 by requiring that an implementing Member "remove the adverse effects" of past subsidies *irrespective* of whether such subsidies continued to exist in the implementation period.[887] In the event that we reverse the Panel's interpretation of Article 7.8 and seek to complete the legal analysis, the United States argues that the Panel erred in finding that the French, German, and Spanish LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, and A330/A340, and the UK LA/MSF subsidies for the A320 and A330/A340[888] had "expired" prior to the beginning of the implementation period in this dispute.[889] For its part, the European Union conditionally appeals the Panel's rejection of its argument that the French and Spanish LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, and A330/A340, and the UK LA/MSF subsidies for the A320 and A330/A340 came to an end when Airbus completed repayment of the relevant financial contributions.[890] We will address the participants' claims on appeal in turn below, beginning with the European Union's challenge to the Panel's interpretation of Article 7.8 of the SCM Agreement.

5.4.2 Whether the Panel erred in its interpretation of Article 7.8 of the SCM Agreement

5.4.2.1 Claims and arguments on appeal

5.354. The European Union claims that the Panel erred in interpreting Article 7.8 of the SCM Agreement to require an implementing Member to "remove the adverse effects" of past subsidies *irrespective* of whether such subsidies continued to exist in the implementation period.[891] The European Union submits that Article 7.8 provides an implementing Member with the option either to "remove the adverse effects" *or* to "withdraw the subsidy", and that withdrawal of a WTO-inconsistent measure, through expiry of that measure or otherwise, constitutes compliance.[892] The European Union contends that the Panel's interpretation of Article 7.8 was driven not by the customary rules of interpretation in Article 31 of the Vienna Convention on the

[883] Panel Report, para. 6.1085.
[884] Panel Report, para. 6.1102. (emphasis original)
[885] The Panel found that all pre-A380 LA/MSF subsidies had expired prior to the implementation period, save the LA/MSF subsidies for the A330-200 and A340-500/600. (Panel Report, para. 6.879 and fn 1547 thereto) As discussed in below, we note that the Panel did not make findings specifically relating to the effects of these two subsidies. (See fn 2030 and para. 5.719 of this Report)
[886] Panel Report, paras. 6.1078-6.1103. The Panel found that the lives of most pre-380 LA/MSF subsidies expired prior to 1 June 2011, but considered that this "cannot *alone* support a 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." (Ibid., para. 6.1102 (emphasis original)) On this basis, the Panel found that "the European Union ha{d} 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." (Ibid., fn 1848 to para. 6.1104 (emphasis original))
[887] See European Union's appellant's submission, para. 11 (quoting Panel Report, para. 6.822).
[888] Panel Report, paras. 6.872-6.879.
[889] United States' appellee's submission, para. 8. For the condition underlying the appeal, see section 5.4.3 below.
[890] European Union's appellant's submission, para. 191. For the condition underlying the appeal, see section 5.4.4 below.
[891] See European Union's appellant's submission, para. 11 (quoting Panel Report, para. 6.822).
[892] European Union's appellant's submission, para. 30.

Law of Treaties[893], but instead "by its desire to avoid a particular outcome that it considered would make its findings in the original proceedings 'purely declaratory' in nature".[894] The European Union argues, however, that the Panel's concern was not warranted, because it is not uncommon for temporarily lingering market effects of a WTO-inconsistent measure to persist following withdrawal of the measure.[895] The European Union highlights that, under the Panel's interpretation, temporarily lingering effects of a subsidy found to cause adverse effects must be removed even if the subsidy itself had been withdrawn, whereas for all other policy instruments withdrawal would suffice to achieve compliance regardless of any lingering effects in the market place.[896] In the European Union's view, this would raise significant systemic concerns, because actionable subsidies would face a "uniquely exacting compliance obligation" not present with regard to any other measure, including prohibited subsidies.[897] The European Union further contends that the Panel committed the following specific errors. First, the Panel's interpretation is not rooted in the terms of Article 7.8, nor supported by its context. Moreover, the Panel's interpretation collapses the substantive obligations under Article 5 of the SCM Agreement and the implementation obligations under Article 7.8, thereby depriving the terms of Article 7.8 of independent meaning.[898] The European Union adds that the Panel's interpretation is inconsistent with the design and structure of the SCM Agreement, and frustrates its object and purpose.[899]

5.355. By contrast, the United States maintains that the Panel correctly interpreted Article 7.8 in finding that an implementing Member has an ongoing compliance obligation under this provision with respect to adverse effects caused through the use of subsidies that have ceased to exist.[900] The United States further submits that the Panel rightly recognized that the effects-based nature of the obligation imposed by Article 5 of the SCM Agreement was critical to an understanding of the remedy contained in Article 7.8 of this Agreement.[901] According to the United States, the European Union's reading of Article 7.8 would allow Members to structure subsidies so that they cause adverse effects well beyond the end of the life of the subsidy, and then claim that they were in compliance with Article 7.8 after the relevant subsidy has come to an end. In the United States' view, this would allow a Member to use subsidies in the specific circumstances in which Article 5 seeks to prevent their use, contrary to the object and purpose of the SCM Agreement.[902]

5.356. In its third participant's submission, Brazil supports the Panel's finding that Article 7.8 of the SCM Agreement should be interpreted to require an implementing Member to come into conformity with its obligations under Article 5 of the SCM Agreement.[903] Referring to the reasoning of the Appellate Body and the panel in the original proceedings[904], Brazil submits that an implementing Member may "withdraw" a subsidy found to have caused adverse effects "by taking affirmative action to modify the subsidy" or by allowing it "to expire, provided such modified or expired subsidies are no longer a genuine and substantial cause of adverse effects during the implementation period".[905]

5.357. Canada, in contrast, maintains that the Panel's interpretation of Article 7.8 is "deeply flawed".[906] For Canada, the plain language of Article 7.8 indicates that the existence of a subsidy is a prerequisite for a compliance obligation to exist under this provision, and that compliance can be achieved by removing the relevant subsidy. According to Canada, the context provided by Articles 4.7, 5, and 7.9 of the SCM Agreement, the restrictions on the application of countervailing duties under Part V of the SCM Agreement, and the general rules under the DSU,

[893] Done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331.
[894] European Union's appellant's submission, para. 109 (quoting Panel Report, paras. 6.840 and 6.1094).
[895] European Union's appellant's submission, para. 113.
[896] European Union's appellant's submission, para. 123.
[897] European Union's appellant's submission, para. 122.
[898] European Union's appellant's submission, paras. 126-181.
[899] European Union's appellant's submission, paras. 175-186.
[900] United States' appellee's submission, para. 37.
[901] United States' appellee's submission, para. 106.
[902] United States' appellee's submission, para. 139.
[903] Brazil's third participant's submission, para. 7.
[904] Brazil's third participant's submission, para. 10.
[905] Brazil's third participant's submission, para. 14. (fn omitted)
[906] Canada's third participant's submission, para. 22.

all confirm that only a subsidy in existence during the implementation period is subject to a compliance obligation under Article 7.8. In Canada's view, the Panel erred in its interpretation of Article 7.8 by disregarding the express language of this provision, and by improperly relying on Article 5 of the SCM Agreement and various provisions of the DSU to support its reading of Article 7.8. In so doing, the Panel created significant uncertainty as to the obligations that an implementing Member has with respect of subsidies that no longer exist.[907]

5.358. Along the same lines, China emphasizes that the Panel's interpretation of Article 7.8 fails to give effective meaning to the treaty language in its relevant context and in light of the object and purpose of this Agreement, and is not supported by WTO case law. In China's view, by requiring that the implementing Member achieve compliance with Article 5 by removing adverse effects regardless of whether a subsidy continues to exist, the Panel effectively eliminated the option to withdraw the subsidy in Article 7.8.[908] China contends that none of the provisions of the DSU referred to by the Panel support the view that a Member that has withdrawn a WTO-inconsistent measure is subject to an additional obligation to remove any lingering effects of that measure. Finally, China argues that the WTO disputes cited by the Panel do not lend support to its interpretation of Article 7.8 because they do not provide the answer to the core issue in this dispute, namely, whether the implementing Member has an obligation to remove adverse effects with respect to subsidies that are no longer granted or maintained.[909]

5.359. For its part, Japan contends that the withdrawal of a subsidy would require that the benefit be extinguished. According to Japan, the existence of a benefit to the recipient of a subsidy is crucial for the subsidy to cause adverse effects. Thus, for Japan, the adverse effects of a subsidy cease once the benefit has been removed and the recipient is no longer able to lower the price of products through the use of the subsidy.[910]

5.360. Having recalled the arguments of the participants and third participants, we turn to examine the interpretative issue raised by the European Union in this appeal, namely, whether an implementing Member has a compliance obligation under Article 7.8 of the SCM Agreement with respect to subsidies that had ceased to exist prior to the beginning of the implementation period.

5.4.2.2 Interpretation of Article 7.8 of the SCM Agreement

5.361. Our analysis commences with the text of Article 7.8 of the SCM Agreement, construed within its context and in light of the object and purpose of the SCM Agreement. Article 7.8 states:

> Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, *the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy*.[911]

5.362. Article 7.8 consists of two clauses. The introductory clause refers to circumstances where a subsidy is found, in an adopted panel or Appellate Body report, to have "resulted in adverse effects to the interests of another Member". The second clause then specifies that, in such a situation, "the Member granting or maintaining such subsidy" may come into compliance with its obligations under the SCM Agreement in one of two alternative ways: (i) it may either "take appropriate steps to remove the adverse effects"; or (ii) it may "withdraw the subsidy".[912] The use of the word "or" in the context of the second clause of Article 7.8 suggests that the Member concerned may implement the recommendations and rulings of the DSB under Part III of the SCM Agreement by choosing either of these alternative pathways to achieving compliance.

[907] Canada's third participant's submission, para. 74.
[908] China's third participant's submission, para. 20.
[909] China's third participant's submission, paras. 11-55.
[910] Japan's third participant's submission, paras. 11 and 14.
[911] Emphasis added.
[912] See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236.

5.363. Regarding the reference in Article 7.8 to "granting or maintaining" a subsidy, we note the European Union's position that these words should be understood in the present continuous tense. According to the European Union, this language in Article 7.8 suggests that "an implementing Member has exhausted its compliance obligations under Article 7.8 with regard to any subsidy that is no longer being granted or maintained, for example because that subsidy has expired."[913] The United States, by contrast, argues that the words "granting or maintaining" in Article 7.8 can *also* be understood as present participles that relate to the act of "granting or maintaining" a subsidy found to have occurred in the original proceedings, rather than as meaning that such action must be shown to continue into the implementation period.[914]

5.364. As noted, Article 7.8 of the SCM Agreement expressly refers to the "granting or maintaining" of a subsidy found to have caused adverse effects to the interests of another Member. As we see it, these terms indicate that Article 7.8 reflects an obligation to cease any conduct amounting to the "granting or maintaining" of subsidies that cause adverse effects.[915] This is true regardless of whether the words "granting or maintaining" in Article 7.8 are understood in the present continuous tense, or as present participles qualifying the term "Member". Indeed, Article 7.8 sets out an obligation "of a continuous nature, extending beyond subsidies granted in the past".[916] Moreover, the *object* of the action of "granting or maintaining" is the "subsidy" that causes adverse effects. In the light of this language in Article 7.8, we find it difficult to see how a Member could be said to be "granting or maintaining" a *subsidy* giving rise to a compliance obligation if that subsidy has expired and therefore no longer *exists*.

5.365. The Panel appears to have acknowledged as much when it stated that "a Member cannot be said to be 'granting or maintaining' a subsidy that no longer exists".[917] The Panel added that "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 exist{ed}* at the time of the DSB's adoption of the adverse effects findings."[918] However, without further analysis of Article 7.8, the Panel expressed the view that compliance under this provision can be achieved *only* if the "implementing Member no longer causes adverse effects through the use of subsidies"[919] – *regardless* of whether those subsidies had expired due to the passage of time. The Panel added that "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" and may therefore "be insufficient to establish that the 'withdrawal' ... has been achieved".[920] On this basis, the Panel interpreted the option to "withdraw the subsidy" in Article 7.8 "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".[921] The Panel thus understood "withdrawal" to require, *in each case*, that the implementing Member "remove the adverse effects" of any past subsidies, regardless of whether such subsidies had expired. As detailed below, we have several concerns with the interpretative analysis carried out by the Panel.

5.366. Regarding the ordinary meaning of the word "withdraw", we note that the relevant dictionary definitions of this term include: "{d}raw back or remove (a thing) from its place or position"; "{t}ake back or away (something bestowed or enjoyed)"; "{c}ease *to do*, refrain *from* doing".[922] This suggests that withdrawal of a subsidy, under Article 7.8 of the SCM Agreement,

[913] European Union's appellant's submission, para. 38.
[914] United States' appellee's submission, para. 55.
[915] We note in this regard the Appellate Body's statement that "Article 5 reflects the notion that it is the causing, through the use of any subsidy, of adverse effects, rather than the granting of the subsidy that is the situation that is addressed by that provision." The Appellate Body added that "Part III {of the SCM Agreement} generally is concerned with a situation that continues over time, rather than with specific acts." (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 681 (fn omitted))
[916] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 237.
[917] Panel Report, para. 6.802.
[918] Panel Report, para. 6.802. (emphasis original)
[919] Panel Report, para. 6.1085.
[920] Panel Report, para. 6.1088.
[921] Panel Report, para. 6.1098. (emphasis original)
[922] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3652.

concerns the taking away of that subsidy, and thus that a Member "granting or maintaining" a subsidy cease such conduct. In order to withdraw a subsidy, an implementing Member may be able to take action to align the terms of the subsidy with a market benchmark, or to otherwise modify the terms of the subsidy such that it no longer qualifies as a subsidy. The Panel reasoned in this regard that it should be possible to find that an implementing Member has "withdrawn" – i.e. "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."[923] However, it is not clear to us how an implementing Member could modify the terms and conditions of subsidies that no longer exist. Moreover, while the pathway identified by the Panel – i.e. modification of the terms or conditions of a subsidy in a way that ensures it no longer causes adverse effects – may provide one way for an implementing Member to come into compliance with its obligations under Article 7.8, we do not see how it would effectively differ from the other compliance option provided for under this provision: the option of taking "appropriate steps to remove the adverse effects".

5.367. This second option for compliance under Article 7.8 refers to an approach where an implementing Member may come into conformity with its obligations under this provision "*without* taking any specific action *in relation to the subsidy* found to cause adverse effects".[924] As noted by the Panel, an implementing Member might choose, for example, to adopt "WTO-consistent regulatory, policy or other initiatives that would alter the effects of a subsidy in the marketplace".[925] It is also conceivable that such "steps" could encompass actions in relation to the subsidy itself, such as those described above.

5.368. That said, the compliance options under Article 7.8 carry distinct meaning, as is made clear by the use of word "or" in Article 7.8. Indeed, the Appellate Body has emphasized that a panel must "assess whether the Member concerned has taken *one* of the actions foreseen in Article 7.8".[926] A Member is not required to "take appropriate steps to remove the adverse effects" of a subsidy *and* to "withdraw" the same subsidy. Rather, either of these actions can achieve compliance. We therefore find it troubling that the Panel's reading of Article 7.8 appears to reduce and collapse these two implementation options into a single option that is concerned with the removal of any adverse effects caused by any subsidies.

5.369. In order to justify its reading of Article 7.8 of the SCM Agreement, the Panel referred to "the context and object and purpose of Article 7.8".[927] In this regard, we note that the title of Article 7 of the SCM Agreement is "Remedies", which situates Article 7.8 within a broader range of provisions applicable to disputes regarding actionable subsidies that have been found to be inconsistent with Articles 5 and 6 of this Agreement. Moreover, Article 7.8 refers expressly to "adverse effects … within the meaning of Article 5", which states that "{n}o Member should cause, *through the use of any subsidy* referred to in paragraphs 1 and 2 of Article 1, *adverse effects* to the interests of other Members".[928]

5.370. As we see it, Article 5 and Article 7.8 of the SCM Agreement concern two related but distinct inquiries: while the former seeks to establish the existence of adverse effects and the causal link between *any* subsidy and the adverse effects found to exist, the latter specifies the *compliance actions to be taken* by a Member granting or maintaining *a subsidy* found to have caused or to cause adverse effects. The Panel's analysis of Article 5 appears to blur the distinction between these two provisions and, as the European Union suggests, to "collapse{} the substantive obligations under Article 5 and the implementation obligations under Article 7.8".[929] We note in particular that, in its analysis of the compliance obligations that an implementing Member has under Article 7.8, the Panel relied heavily on what it characterized as the "effects-based nature" of

[923] Panel Report, para. 6.1098. (italics original; underlining added)
[924] Panel Report, para. 6.1099. (emphasis original)
[925] Panel Report, para. 6.1099.
[926] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 235. (emphasis added)
[927] Panel Report, para. 6.803.
[928] Emphasis added.
[929] European Union's appellant's submission, para. 164.

Article 5 of the SCM Agreement.[930] The Panel referred in particular to the following passage of the Appellate Body report in *EC and certain member States – Large Civil Aircraft*:

> 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*.[931]

5.371. This passage recognizes that a subsidy and its effects need not be contemporaneous.[932] Contrary to what the Panel appears to have assumed, it does not follow from this that the effects of a subsidy can be detached from the subsidy itself such that these effects could be subject to a separate compliance obligation under Article 7.8. When a subsidy has expired such that it is no longer in existence, we cannot see how a compliance obligation could still apply to lingering effects of such a past subsidy. Rather, what is relevant for Article 5, as well as for Article 7.8, is the *causing* of adverse effects through the use of the subsidy. While 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"[933], the *source* of the inconsistency under Article 5 is nonetheless the *subsidy* that causes adverse effects. The option to "withdraw the subsidy" under Article 7.8 contemplates action in relation to the subsidy found to have caused adverse effects. To the extent that the underlying subsidy has ceased to exist, there is no additional requirement, under Article 7.8, to remove any lingering effects that may flow from that subsidy. We therefore disagree with the Panel that it follows from the so-called "effects-based nature" of the discipline of Article 5 that an implementing Member would have a compliance obligation under Article 7.8 regardless of whether the subsidy continues to exist.[934]

5.372. The United States contends that Article 7.8 is "a *means* by which to achieve the objective of full compliance with Article 5"[935], and that the Panel was correct in recognizing that Article 5 provides critical context for interpreting Article 7.8. According to the United States, the European Union's interpretation of Article 7.8 "divorce{s}" this provision from Article 5[936], and would mean that a Member that is causing adverse effects through the use of a subsidy "has different substantive obligations at different stages of a proceeding".[937] Specifically, in original proceedings, Article 5 would require a Member not to cause adverse effects through the use of any subsidies, including expired subsidies, but, in compliance proceedings, Article 7.8 would apply in isolation, and a Member that causes adverse effects through the use of expired subsidies would have no WTO obligation.

5.373. As discussed, Article 5 is concerned with the causing of adverse effects through the "use" of subsidies. An analysis under Article 5 seeks to determine whether a Member has caused adverse effects to the interests of another Member through the use of such subsidies. For purposes of such a finding, the Appellate Body has made clear that a finding of "present" subsidization is not necessary to establish that a subsidy has caused such adverse effects.[938] In contrast, Article 7.8 is

[930] Panel Report, para. 6.820.

[931] Panel Report, para. 6.820 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 712 (original italics omitted; emphasis added by the Panel)).

[932] Although there may be a time lag between the provision of a subsidy and its effects, the Appellate Body emphasized 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." (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 713)

[933] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 712.

[934] Panel Report, para. 6.822. (emphasis omitted)

[935] United States' appellee's submission, para. 114. (emphasis original)

[936] United States' appellee's submission, para. 112.

[937] United States' appellee's submission, para. 115.

[938] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 712. The Appellate Body found that "the requirement {under Articles 5 and 6 of the SCM Agreement} that the effects of subsidies be felt in the reference period, does not mean that the subsidies, and in particular the benefit conferred, must also be present during that period". (Ibid.)

concerned with the continued existence of "such subsid{ies}". This difference between Article 5 and Article 7.8 does not mean that a Member "has different substantive obligations at different stages of a proceeding".[939] Rather, a Member is always under the obligation to ensure that it does not grant or maintain subsidies that cause adverse effects, within the meaning of Article 5 of the SCM Agreement. However, a finding of inconsistency under Article 5 need not always trigger the obligation to "take appropriate steps to remove the adverse effects or … withdraw the subsidy" as stipulated in Article 7.8. This is because, by its terms, Article 7.8 is concerned only with *subsidies* that the Member is "granting or maintaining" in the implementation period. In assessing conformity under this provision, a panel's analysis should focus on the subsidies that continue to exist in the post-implementation period. Depending on the particularities of a given case, it may be relevant for the panel to consider the effects of past subsidies under Articles 5 and 6; however, not in order to determine whether *they* cause "adverse effects" in the post-implementation period, but rather as part of a matrix of analysis that seeks to identify the effects of subsidies that have not been withdrawn, and in respect of which the implementing Member continues to have a compliance obligation under Article 7.8.

5.374. Referring to the Appellate Body report in *US – Upland Cotton (Article 21.5 – Brazil)*, the Panel emphasized 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."[940] The Panel's reliance on this statement by the Appellate Body is misplaced. The Appellate Body was not suggesting that an implementing Member has a compliance obligation with respect to a subsidy or subsidies that no longer exist. Rather, the Appellate Body noted that the obligation under Article 7.8 would extend to recurring annual payments "maintained" by the respondent beyond the original reference period.[941] The Appellate Body's reasoning in that dispute highlights the *prospective nature* of remedies in WTO dispute settlement, as well as the fact that, ultimately, the source of inconsistency is the "granting or maintaining" of subsidies that cause adverse effects. It is in respect of such "granting or maintaining" that the findings made by an original panel require cessation. Under our reading of Article 7.8, a complaining Member therefore can obtain relief in the form of a prospective remedy.

5.375. Referring to a statement by the Appellate Body in *China – Raw Materials*, the Panel expressed the view that a panel could be expected to make recommendations with respect to expired measures "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."[942] The Panel also referred to the panel's recommendation in *EC – Commercial Vessels* that the European Union bring a measure that had formally expired into conformity with its obligations under the DSU to the extent that the measure was still operational.[943] We see nothing objectionable *per se* in these statements by the Panel. Indeed, in *China – Raw Materials*, the Appellate Body noted that a recommendation by a panel "is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations that arise after the adoption of a panel and/or Appellate Body report by the DSB."[944] As noted, Article 7.8 of the SCM Agreement requires the cessation of ongoing conduct consisting of the "granting or maintaining" of subsidies that are causing adverse effects. It does not follow from the fact that the findings and recommendations by a panel seek to put an end to "*ongoing* infringements"[945], that withdrawal of a subsidy under the SCM Agreement can be found to have occurred *only* to the extent that the subsidy no longer causes adverse effects.

[939] United States' appellee's submission, para. 115.

[940] Panel Report, para. 6.819.

[941] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 237. The Appellate Body highlighted that effective compliance under Article 7.8 would not permit a situation in which "the adverse effects of subsequent payments would simply replace the adverse effects that the implementing Member was under an obligation to remove." (Ibid. See also paras. 238, 241, and 245)

[942] Panel Report, para. 6.833. (emphasis original) See also para. 6.831 (referring to Appellate Body Reports, *China – Raw Materials*, paras. 263-265).

[943] Panel Report, para. 6.835.

[944] Appellate Body Reports, *China – Raw Materials*, para. 260.

[945] Panel Report, para. 6.833. (emphasis original)

5.376. Our reading of Article 7.8 also finds support in the relevant provisions under Part II of the SCM Agreement, entitled "Prohibited Subsidies", comprising Articles 3 and 4. Article 3.1 provides that subsidies contingent upon export performance (Article 3.1(a)) or upon the use of domestic over imported goods (Article 3.1(b)) "shall be prohibited". Article 3.2 further provides that "{a} Member shall neither grant nor maintain subsidies referred to" in Article 3.1. Article 4, like Article 7 of the SCM Agreement, is entitled "Remedies", and sets out the rules for dispute settlement involving prohibited subsidies referred to in Article 3. Article 4.7 provides that, "{i}f the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay". Article 4.7 does not require removal of the effects of such subsidies. Rather, withdrawal under Article 4.7 seeks to eliminate the source of the inconsistency, namely, the condition that is prohibited under Article 3.1(a) or 3.1(b). Similarly, Article 7.8 addresses the source of the infringement found to exist, and requires cessation of conduct consisting of the granting or maintaining of subsidies that cause adverse effects. It would be incongruous, in our view, if elimination of the source of the inconsistency were sufficient to comply with an implementing Member's obligations in the context of Article 4.7, but not in the context of Article 7.8.

5.377. It is also useful in this regard to consider the rules that apply to the imposition of countervailing duties under Part V of the SCM Agreement. While serious prejudice can only be addressed through countermeasures imposed under Part III, subsidies that cause injury to the domestic industry can be addressed *either* through countermeasures imposed under Part III *or* through countervailing duties under Part V.

5.378. With regard to the imposition of countervailing duties, Article 19.1 of the SCM Agreement stipulates that countervailing duties may be imposed on subsidized imports "unless the subsidy or subsidies are withdrawn." Hence, under Part V of the SCM Agreement, remedial action is contemplated with respect to subsidies that cause injury to the domestic industry. As we see it, the same is true in the context of Part III of the SCM Agreement, where the inconsistency to be remedied relates to *subsidies* that constitute a genuine and substantial cause of adverse effects during the implementation period.[946] Thus, the inconsistency does not relate to only the effects, as the Panel seems to have suggested, but rather to the *action of using subsidies* in a way that causes adverse effects.

5.379. Looking beyond the SCM Agreement to context provided by other covered agreements, we note that 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" that are identified in Article 1.2 and Appendix 2 of the DSU, which prevail over the general DSU rules and procedures to the extent that they "*cannot* be read as *complementing* each other".[947] In this regard, we are concerned with the Panel's decision to resort to context provided by various provisions of the DSU without considering properly the contextual relevance of provisions in other parts of the SCM Agreement. This is especially so because, as a "special or additional rule{}" on dispute settlement in the SCM Agreement, Article 7.8 must be properly understood in the particular context of disputes involving subsidies.

5.380. We recall that "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".[948] This suggests that, in WTO dispute settlement, the source of an infringement of an obligation under the covered agreements is the measure itself. Moreover, where a measure is found to be inconsistent with a covered agreement, the first sentence of Article 19.1 of the DSU provides that a panel or the Appellate Body shall recommend that the Member concerned "bring the measure into conformity with that agreement".[949] These provisions, read together, suggest that it is *the measure* that lies at the heart of WTO dispute settlement, and that conformity with the covered agreements may be achieved through "the withdrawal of the

[946] See Canada's third participant's submission, para. 60; China's third participant's submission, paras. 32-36.
[947] Appellate Body Report, *Guatemala – Cement I*, para. 65. (emphasis original)
[948] Article 3.7 of the DSU.
[949] Footnote omitted.

measures concerned". Indeed, referring to Articles 19.1 and 21.1 of the DSU, the Panel recognized that the source of the infringement is the WTO-inconsistent measure itself.[950]

5.381. In the specific context of the SCM Agreement, Article 7.8 provides special or additional rules on how conformity with this Agreement may be achieved. As noted, withdrawal of the measure need not be the only way to comply, as the subsidizing Member could also come into compliance by taking appropriate steps to "remove the adverse effects" while maintaining the subsidy. At the same time, withdrawal of the subsidy itself remains a remedy against the infringement, as it leads to fulfilment of the first objective of the dispute settlement mechanism set out in Article 3.7 of the DSU − i.e. withdrawal of the measure concerned. This further supports our understanding that, where the relevant measure − the subsidy found to have caused adverse effects − has ceased to exist, a Member is no longer obligated under Article 7.8 of the SCM Agreement to take further steps to remove the adverse effects caused by the subsidy. In this respect, we share Canada's view that "{a} requirement to remove the adverse effects of an actionable subsidy that no longer exists would transform this flexibility in achieving compliance into an additional, affirmative obligation not seen elsewhere in the covered agreements."[951]

5.382. The Appellate Body has stated that the object and purpose of the SCM Agreement is to "strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures"[952], and that the SCM Agreement "reflects a delicate balance between the Members that sought to impose more *disciplines on the use of subsidies* and those that sought to impose more *disciplines on the application of countervailing measures*".[953] As discussed above, the Panel's reading of Article 7.8 would effectively mean that countermeasures could be imposed under Part III of the SCM Agreement to counteract "injury to the domestic industry", within the meaning of Article 5(a) of the SCM Agreement, *regardless* of whether the subsidy at issue has been withdrawn. At the same time, countervailing duties cannot be imposed, in the context of Part V of the SCM Agreement, to the extent that the underlying subsidy has been withdrawn.[954] Moreover, as discussed, the Panel considered that the removal of the subsidy at issue would constitute compliance in the context of subsidies prohibited under Part II, but not in the context of Part III of the SCM Agreement, where removal of the effect of the subsidy would in each case be required regardless of whether the Member concerned would still be granting it. In our view, such an approach to different disciplines that apply under the SCM Agreement lacks coherence, and is, in this sense, incompatible with its object and purpose. Moreover, the Panel's reading of Article 7.8 would appear to result in considerable uncertainty as to the responsibility of Members with respect to subsidies that no longer exist. Indeed, the effects of subsidies may well persist even after the subsidies themselves have ceased to exist. For example, they may "result in the protection, creation, or growth of industries that would otherwise be less competitive".[955] Yet, Article 7.8 does not speak to such effects in isolation; rather, it requires cessation of any ongoing conduct consisting of the "granting or maintaining" of subsidies found to cause adverse effects.[956] Thus, while expired subsidies can give rise to adverse effects, there is no requirement under Article 7.8 to remove these effects.

5.383. In light of the foregoing, we find that the obligation to "take appropriate steps to remove the adverse effects or … withdraw the subsidy" concerns the subsidies that continue to be "grant{ed} or maintain{ed}" by the implementing Member at the end of the implementation period. An implementing Member cannot be required to withdraw a subsidy that has ceased to exist. Nor do we see a basis, under Article 7.8 of the SCM Agreement, to require that an implementing Member "take appropriate steps to remove the adverse effects" of subsidies that no longer exist. Accordingly, we reverse the Panel's interpretation of Article 7.8 of the SCM Agreement whereby an implementing Member would be required to "withdraw" or

[950] Panel Report, para. 6.807.
[951] Canada's third participant's submission, para. 70.
[952] Appellate Body Report, *US − Softwood Lumber IV*, para. 64.
[953] Appellate Body Report, *US − Countervailing Duty Investigation on DRAMS*, para. 115. (emphasis added)
[954] Article 19.1 of the SCM Agreement specifies that countervailing duties may be imposed, under certain conditions, "unless the subsidy or subsidies are withdrawn".
[955] European Union's response to Panel question No. 46(a), para. 122.
[956] See Appellate Body Reports, *US − Upland Cotton (Article 21.5 − Brazil)*, fn 494 to para. 243; *US − Zeroing (EC) (Article 21.5 − EC)*, para. 299.

"remove the adverse effects" of past subsidies *irrespective* of whether such subsidies have expired prior to the end of the relevant implementation period.[957] It follows from our finding that, in the present dispute, the European Union has no compliance obligation with respect to subsidies that expired before 1 December 2011.

5.4.3 Whether the Panel erred in finding that the *ex ante* "lives" of certain LA/MSF subsidies had expired – conditional appeal by the United States

5.384. This brings us to the United States' conditional appeal of the Panel's finding that the *ex ante* "lives" of several challenged LA/MSF subsidies had expired by 1 December 2011 and that they had therefore ceased to exist.[958] In particular, the United States requests us to reverse the Panel's finding that the *ex ante* "lives" of the following pre-A380 LA/MSF subsidies had expired before 1 December 2011: the French, German, and Spanish LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, and A330/A340, and the UK LA/MSF subsidies for the A320 and A330/A340.[959] In the event that we reverse these findings, the United States further requests that we determine that the French, German, Spanish, and UK LA/MSF subsidies for the A320 and A330/A340 had *not* expired before the end of the implementation period on 1 December 2011.[960] Moreover, in the event that we find that the expiry of a subsidy *after* the end of the implementation period constitutes withdrawal within the meaning of Article 7.8 of the SCM Agreement, the United States also appeals the Panel's finding that the LA/MSF for the A330-200 and A340-500/600 expired in, respectively, **[BCI]** and **[BCI]**.[961]

5.385. In addressing the issues raised by the United States in its conditional appeal, we recall briefly the Appellate Body's findings regarding the concept of the "life" of a subsidy. In the original proceedings, the European Union claimed that Articles 1, 5, and 6 of the SCM Agreement require a demonstration of a "continuing" or "present" benefit during the reference period chosen for a serious prejudice analysis. The Appellate Body noted that this claim concerned the issue of "how an assessment of the benefit conferred under Article 1.1(b) of the SCM Agreement relates to the adverse effects analysis that must be conducted by a panel pursuant to Articles 5 and 6".[962] Upon examining the text of Article 1.1 of the SCM Agreement and its relevant context, the Appellate Body stated:

> The ordinary meaning of Article 1.1, read in the light of Article 14 of the SCM Agreement, confirms … that a benefit analysis under Article 1.1(b) is forward-looking and focuses on future projections. 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

[957] Panel Report, para. 6.822.
[958] United States' other appellant's submission, para. 8.
[959] United States' other appellant's submission, para. 8 (referring to Panel Report, paras. 6.794 and 7.1.d.ii-iii).
[960] United States' other appellant's submission, paras. 8, 17, and 18.
[961] United States' other appellant's submission, fn 15 to para. 8, and fn 35 to para. 17. The United States submits that, "if the Appellate Body were to find that the passive 'expiry' of LA/MSF for the A340-500/600 {after 1 December 2011} constitutes 'withdrawal' for purposes of Article 7.8 of the SCM Agreement, the United States conditionally appeals the Panel's finding that that tranche of LA/MSF expired in **[BCI]**". (Ibid., fn 15 to para. 8 (referring to Panel Report, Table 11 and para. 7.1.d.iii)) In footnote 1547 to paragraph 6.879, and in paragraph 7.1.d.iii of its Report, however, the Panel found that the *ex ante* "lives" of the LA/MSF subsidies for *both* the A330-200 *and* the A340-500/600 had expired *after* the end of the implementation period. In light of this Panel finding, and the United States' clarification at the oral hearing, we understand that the United States' appeal of the Panel's finding on the *ex ante* "life" of the A330-200 LA/MSF, like its appeal relating to the A340-500/600 LA/MSF, is also subject to the additional condition that we find that expiry *after* the end of the implementation period constitutes withdrawal for purposes of Article 7.8 of the SCM Agreement.
[962] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 701. (emphasis omitted)

> 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.[963]

5.386. The Appellate Body further considered that "the fact that a subsidy is 'deemed to exist' under Article 1.1 once there is a financial contribution that confers a benefit does not mean that a subsidy does not continue to exist after the act of granting the financial contribution."[964] The Appellate Body added that the *ex ante* "life" of a subsidy, as projected at the time of its grant, may be affected by subsequent "intervening events". As the Appellate Body explained:

> 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.[965]

5.387. Thus, the Appellate Body considered that a panel's analysis of the adverse effects must take into account "how the subsidy has *materialized over time*".[966] These findings of the Appellate Body set out the conceptual framework for understanding the "life" of a subsidy. Under this framework, it is relevant "to examine *the trajectory of the life* of a subsidy" from both an *ex ante* perspective and from the perspective of intervening events.[967] The *ex ante* analysis concerns "how the subsidy is affected … by the depreciation of the subsidy that was projected" *at the time it was granted*, and the analysis of intervening events involves the evaluation of 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.[968] Furthermore, in its examination of the claims of serious prejudice under Article 5 of the SCM Agreement, the Appellate Body identified certain factors that may be relevant to assessing the "trajectory of the life of a subsidy":

> {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. …
>
> 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.[969]

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[963] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 707. (italics original and omitted; underlining added; fn omitted)

[964] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 708.

[965] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 709. (original emphasis omitted; emphasis added)

[966] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 710. (emphasis added)

[967] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 714. (emphasis added)

[968] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 710.

[969] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1236 and 1241, respectively. (italics and fn omitted)

5.388. The Appellate Body thus noted that the allocation of a subsidy over the anticipated marketing life of an aircraft project may constitute one way of assessing the expected duration of a subsidy, and that subsequent events, such as "removal" of the subsidy, may also be relevant for assessing whether the "life" of a subsidy has ended.

5.389. In these compliance proceedings, the Panel began its review of the United States' claim that the European Union had failed to withdraw the LA/MSF subsidies at issue by considering the European Union's argument that the *ex ante* "lives" of several challenged subsidies had expired due to the amortization of benefit. Referring to the Amortization Report[970] issued by PricewaterhouseCoopers (PwC Amortization Report), the European Union had advanced before the Panel two ways of determining the "lives" of the challenged LA/MSF subsidies: (i) by amortizing them over the period it was anticipated Airbus would take to repay fully the loaned principal plus interest (Loan Life approach); or (ii) by looking at the expected marketing life of each of the financed LCA projects (Marketing Life approach). The Panel observed that both approaches proposed were based on the actual terms of the LA/MSF contracts, read alone or in conjunction with the expected delivery schedules.[971] The Panel added that, although the United States "appear{ed} to accept that the *ex ante* lives of the LA/MSF subsidies {would} be dictated by the extent to which the contracting parties expected Airbus to continue to have outstanding repayment obligations"[972], the United States nonetheless maintained that such 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. To the Panel, therefore, the United States' approach did not concern the expectations of the subsidizing governments at the time they agreed to the terms of the LA/MSF, and it thus rejected the United States' approach.

5.390. The Panel went on to examine the two approaches proposed by the European Union. The Panel recalled that the Appellate Body's discussion of the *ex ante* "life" of a subsidy in the original proceedings tended to focus on the *projected uses* to which a subsidy has been put, rather than the expected duration of a financial contribution. The Panel thus expressed doubts as to whether the Loan Life approach "would be the most appropriate methodology for determining the 'projected value' of the subsidies provided under the LA/MSF agreements", given this approach's apparent focus on the expectations surrounding the *mere duration* of the existence of a "financial contribution".[973] In the Panel's view, "it would be at least equally appropriate to equate the *ex ante* lives of the relevant LA/MSF subsidies with the anticipated marketing lives of the relevant LCA".[974] Nonetheless, the Panel found it unnecessary 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.[975] This is because, for the Panel, it was "apparent {from the PwC Amortization Report} 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".[976] The Panel therefore found, in paragraph 6.879 of its Report, that:

> the European Union ha{d} 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.[977]

[970] 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 (Panel Exhibit EU-5 (BCI/HSBI)).
[971] Panel Report, para. 6.874.
[972] Panel Report, para. 6.874.
[973] Panel Report, para. 6.878.
[974] Panel Report, para. 6.878.
[975] Panel Report, para. 6.879.
[976] Panel Report, para. 6.879.
[977] Italics original; underlining added; fn omitted.

The Panel also noted in a footnote that the European Union had established that the *ex ante* "lives" of the French LA/MSF for the A330-200 and the French and Spanish LA/MSF for the A340-500/600 expired in, respectively, **[BCI]** and **[BCI]**.[978]

5.391. After reaching its findings on the *ex ante* expiry of the subsidies, the Panel proceeded to examine the arguments concerning alleged "intervening events" that affected the *ex ante* "lives" of certain LA/MSF subsidies. In the Panel's view, an intervening event is "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*."[979] The Panel rejected the European Union's argument that the alleged "extraction" of subsidies, and alleged "extinction" of benefit through partial privatization and sales of shares and ownership, were, in the circumstances of this case, "intervening events" that brought the lives of certain pre-A350XWB subsidies to an end.[980] The Panel also rejected the United States' claim that the *ex ante* "lives" of the LA/MSF subsidies for the A300 and A310 increased because of the launch of the A330/A340[981], and that the *ex ante* "life" of the LA/MSF for the A340 ended due to the termination of the A340-500/600 project in 2011.[982] Finally, the Panel reviewed and rejected the European Union's argument that the actual repayment of the LA/MSF loans with interest brought these loans to an end.[983] Based on its analysis, the Panel concluded, in paragraph 6.1076 of its Report:

> {W}e 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.[984]

5.392. The Panel's findings in paragraphs 6.879 and 6.1076, quoted above, suggest that the Panel examined the issue of "expiry" from two angles − both from an *ex ante* perspective and in light of alleged intervening events that occurred after the grant of the subsidy. In paragraph 6.879, the Panel used the word "expired" to refer to the *passage of the time period* over which the subsidies were *projected* to be amortized, without regard to any alleged "intervening events" or actual repayment. In other words, the "expiry" refers to the fact that the expected duration of the subsidies − *projected* at the time they were granted − had lapsed. The use of the word "expired" in paragraph 6.879 therefore does not speak to the question of whether the "life" of the subsidies *actually* ended. Subsequently, in paragraph 6.1076, the Panel again used the word "expired" after having examined the alleged intervening events and alleged repayment of loans, that is, after reviewing relevant arguments and evidence concerning what actually happened once the subsidies were granted. We understand the Panel to have found, therefore, that the relevant subsidies came to an end by reason of the *amortization of benefit*, in the absence of any intervening event that would have changed how those subsidies materialized over time relative to the expectations held at the time they were granted.

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[978] Panel Report, fn 1547 to para. 6.879. The Panel reached this finding on the basis of the Loan Life approach. (See Panel Report, Table 11: PwC *ex ante* "Lives" analysis to LA/MSF) We note that, under the Marketing Life approach, the LA/MSF subsidy for the A330-200 would have expired by **[BCI]** − that is, before the end of the implementation period − and the LA/MSF subsidy for the A340-500/600 would have expired by **[BCI]**. (Ibid.)

[979] Panel Report, para. 6.911. (emphasis added)

[980] Panel Report, paras. 6.918-6.1055.

[981] Panel Report, paras. 6.1056-6.1059. The United States argued before the Panel that, because Airbus envisioned the A330 and A340 as derivatives of the A300, the "lives" of the A300 and A310 LA/MSF subsidies continue with the A330 and A340. The Panel disagreed, finding that there was "simply no evidence before {it} to suggest that the 'projected value' of the A300 and A310 LA/MSF subsidies was affected by the launch of the A330/A340", and that "the United States conflate{d} the 'lives' of those subsidies with their 'indirect effects'". (Ibid., para. 6.1059) The United States has not appealed these findings of the Panel. With respect to the Panel's analysis of the "indirect effects" of LA/MSF subsidies, see section 5.6.3 of this Report.

[982] Panel Report, paras. 6.1060-6.1064. The Panel's findings regarding the termination of the A340-500/600 are further discussed in paragraphs 5.398-5.399 below.

[983] Panel Report, paras. 6.1069-6.1074.

[984] Panel Report, para. 6.1076. (italics original; underlining added)

5.393. The United States has appealed the Panel's finding in paragraph 6.879 of its Report, as well as the Panel's final conclusion regarding the expiry of the LA/MSF subsidies at issue in section 7 of its Report.[985] The United States, however, has not specifically challenged the Panel's examination of the alleged intervening events. Rather, its appeal focuses on the Panel's *ex ante* analysis, that is, the periods of time over which the benefit of the pre-A380 LA/MSF subsidies were *projected* to materialize. The United States maintains that, in finding that the *ex ante* "lives" of the relevant pre-A380 LA/MSF passively expired before 1 December 2011, the Panel erroneously viewed the *ex ante* "lives" of the LA/MSF subsidies at issue as extending over a *fixed number* of years. However, the United States argues, "{n}either the SCM Agreement nor reasoning of the Appellate Body suggests that the *ex ante* life of a subsidy must always be a fixed number."[986]

5.394. We recognize that, depending on the circumstances of a case, it may not always be feasible to determine, *ex ante*, a *fixed number* of years over which the benefit of a subsidy is expected to flow. For example, it is conceivable that the circumstances of a case may allow for only an estimate of *the range of years* in which the benefit is expected to last. Nonetheless, as the Appellate Body emphasized in the original proceedings, "{a}t 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."[987] Furthermore, the Appellate Body stated that it had "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".[988] We do not share the United States' view that the Panel, by relying on the anticipated marketing lives of the relevant LCA, erroneously viewed the *ex ante* "lives" of the LA/MSF subsidies at issue as extending over a fixed number of years.[989] Rather, the Panel's approach is appropriate in light of the Appellate Body's guidance that a subsidy has a *finite* "life", as well as the evidence before the Panel regarding how the *ex ante* "lives" of the LA/MSF subsidies at issue should be ascertained, including the PwC Amortization Report. Contrary to the United States' argument, such an approach is not a "speculative" exercise that "the parties themselves did not undertake".[990]

5.395. Moreover, while the United States maintains that the *ex ante* "lives" of the subsidies need not be a fixed number[991], its argument does not offer a proper basis on which such "lives" may be determined. The United States contends that the use of the LA/MSF loans "suggests that the parties expected the benefit of LA/MSF *to last throughout the life of the subsidized aircraft programs*".[992] In other words, according to the United States, the "lives" of the subsidies should last as long as the commercial life of the funded aircraft project.[993] In our view, the duration of the funded aircraft project depends on the success of the project, and such success, while it might be pertinent for assessing the *effects* of the subsidy, does not bear upon the question of how the subsidy is anticipated to materialize. To us, the United States' argument conflates the *effects* of the subsidy – i.e. its "product" effects[994] – with the *benefit* of the subsidy.[995]

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[985] United States' other appellant's submission, para. 17 (referring to Panel Report, paras. 6.879 and 7.1.d.ii-iii).

[986] United States' other appellant's submission, para. 10.

[987] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 709. (emphasis added)

[988] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1241. (fn omitted)

[989] United States' other appellant's submission, para. 10.

[990] United States' other appellant's submission, para. 13.

[991] United States' other appellant's submission, para. 10.

[992] United States' other appellant's submission, para. 15. (emphasis added)

[993] This argument of the United States on appeal echoes its view before the Panel that "the life of a subsidy creating a new product must be *measured by the life of the product it creates*". (United States' second written submission to the Panel, para. 161 (emphasis added))

[994] As further discussed in section 5.6.3 of this Report, the Panel referred to the "product effects" of the LA/MSF subsidies as the effects of the LA/MSF subsidies in bringing about either: (i) the existence and market presence of Airbus; or (ii) the ability of Airbus to offer a full range of competitive LCA products. (See e.g. Panel Report, para. 6.1480) The Panel explained that such "product" effects may be further categorized as "direct effects" and "indirect effects", depending on whether the effects relate to the LCA specifically funded by an LA/MSF subsidy (direct) or subsequent LCA (indirect). (Ibid., para. 6.1492) The United States argued that the "direct effects" of an LA/MSF subsidy will decline significantly with the termination of the specifically-funded LCA project, and the "indirect effects" of an LA/MSF subsidy will persist as long as the subsequent, benefitting LCA remain in production. (Ibid., para. 6.1493)

[995] See Panel Report, para. 6.875.

5.396. The United States further argues that the Panel failed to engage with "the central legal point" of the United States' argument, namely, "for contingent financing, the grantor and recipient would expect the benefit to continue as long as payments were due, or for the life of any forgiveness if the program failed prior to full repayment."[996] By "contingent financing", the United States refers to the fact that "the grantor expects the benefit to flow over a period whose length is defined to be contingent on some other *variable event*, such as a large civil aircraft program selling a particular number of aircraft, that triggers an obligation to repay the principal and accrued interest".[997] The United States adds that, if, at the time of the grant, the benefit "is expected to convert to loan forgiveness upon the satisfaction of a particular condition (e.g., the premature failure of an aircraft program), then the life of the subsidy should be measured accordingly."[998]

5.397. As the Appellate Body made clear in the original proceedings, "a benefit analysis under Article 1.1(b) is forward-looking and focuses on future projections."[999] The Appellate Body also stated that "{t}he 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."[1000] Thus, the evaluation of how long the benefit under Article 1.1(b) of the SCM Agreement might be "*expected*" to flow is based on projections made at the time of the granting of the subsidy. We do not see the existence of a "variable event" in a loan agreement as permitting departure from this *ex ante* approach for determining the expected "life" of a subsidy pursuant to Article 1.1(b) of the SCM Agreement.[1001]

5.398. By arguing that the anticipated "life" of a subsidy depends on certain "variable event{s}", such as the timing of delivery and payment, or potential failure of the project before full repayment, the United States' approach does not comport with an *ex ante* analysis of the projected duration of benefit. Rather, its argument concerns how the *actual performance* of a subsidy affects the "life" of that subsidy and, as such, is more pertinent to an examination of any alleged intervening events that may have affected the anticipated "life" of the subsidy. Indeed, before the Panel, the United States referred to debt forgiveness as a result of the termination of a project as an "intervening event" that extended the anticipated "life" of the LA/MSF subsidy for the A340-500/600. Specifically, the United States argued that, had the LA/MSF for the A340-500/600 not been terminated in 2011, the subsidy would have continued to be provided through the below-market repayments outstanding at the time. The termination of the A340-500/600 project, according to the United States, turned that subsidy into "a grant to Airbus equivalent to the amount of outstanding debt" on the loans under the French and Spanish LA/MSF contracts for the A340-500/600.[1002] The United States further argued that, as a result of the debt forgiveness, the life of the LA/MSF was extended by the average life of a generic aircraft project, that is, until approximately 2028.[1003]

5.399. The Panel rejected the view that the termination of the A340-500/600 project was an intervening event that extended the "life" of the LA/MSF subsidy.[1004] In so doing, the Panel explained that the termination of the A340 project was "not an event that can be said to have

[996] United States' other appellant's submission, para. 12.
[997] United States' other appellant's submission, para. 10. (emphasis added)
[998] United States' other appellant's submission, fn 17 to para. 10.
[999] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 707. (fn omitted)
[1000] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 707. (emphasis original)
[1001] See European Union's appellee's submission, para. 50.
[1002] Panel Report, para. 6.1060.
[1003] Panel Report, para. 6.1060.
[1004] In the Panel's view, the possible termination of the A340 project before full repayment was an inherent feature of the LA/MSF contracts themselves. The Panel stated:

> {I}t 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 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 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.

(Panel Report, para. 6.1063)

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'."[1005] The Panel added 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."[1006] The Panel also noted that "the fact that the repayment terms of the relevant LA/MSF agreements were unsecured and success-dependent reveal{ed} 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."[1007] For the Panel, this implied 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."[1008] The Panel added that it was "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."[1009] For the Panel, it followed from this "that the possibility of the termination of the A340 programme before full repayment … must have been contemplated 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."[1010] The United States has not appealed this reasoning by the Panel, and we see no reason why it would not apply equally to the arguments that the United States makes on appeal regarding the "contingent" nature of the LA/MSF financing, including the fact that the four member States may have expected the lives of LA/MSF subsidies to depend on a "*variable event*, such as a large civil aircraft program selling a particular number of aircraft, that triggers an obligation to repay the principal and accrued interest".[1011] As we see it, such "variable events" are an inherent feature of the LA/MSF financing, which the four member State governments can be expected to have included in their anticipated scenarios for the use of the LA/MSF subsidies. Such uncertainties involved in the LA/MSF financing are, as we understand it, already reflected in the project-specific risk premium calculated, by the original panel and by the Panel in these compliance proceedings, in the context of the benefit analysis for each of the underlying LA/MSF subsidies. We therefore disagree with the United States that the Panel failed to engage with the arguments that the United States made in this regard.

5.400. Moving on, we recall that an *ex ante* analysis regarding the benefit of a subsidy serves as *the starting point* of the analysis to determine whether a subsidy continues to exist at the end of the implementation period. For such a determination, it is also necessary to conduct an analysis regarding "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."[1012] Thus, an examination of the *ex ante* "life" of a subsidy, based on the expectation *at the time the subsidy was granted*, should be complemented by an evaluation of subsequent *intervening events* that were alleged to have occurred after the grant of the subsidy so as to determine whether the subsidy *materialized* as expected.

5.401. Having made findings on the projected expiry of the subsidies, the Panel went on to examine the arguments concerning the alleged intervening events that affected the actual duration of certain LA/MSF subsidies. Based on its analysis, the Panel concluded 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'".[1013] In our view, the Panel's ultimate conclusion regarding the *actual* duration of these subsidies was based on a proper analysis of both the projected duration of the subsidies and the alleged intervening events after the granting of the subsidies. This is consistent with the

[1005] Panel Report, para. 6.1062.
[1006] Panel Report, para. 6.1063. (emphasis original)
[1007] Panel Report, para. 6.1063.
[1008] Panel Report, para. 6.1063.
[1009] Panel Report, para. 6.1063.
[1010] Panel Report, para. 6.1063.
[1011] United States' other appellant's submission, para. 10. (emphasis added)
[1012] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 709.
[1013] Panel Report, para. 6.1076. (italics original; underlining added)

Appellate Body's approach in the original proceedings, whereby the assessment of the "life" of a subsidy should encompass both an *ex ante* analysis and an evaluation of intervening events.

5.402. For these reasons, we uphold the Panel's finding, in paragraphs 6.879, 6.1076, and 7.1.d.ii of its Report, that 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, and A330/A340, and the UK LA/MSF subsidies for the A320 and A330/A340, expired before 1 June 2011.

5.403. The United States also appeals the Panel's finding that the European Union had demonstrated that the *ex ante* "lives" of the French LA/MSF subsidy for the A330-200 and the French and Spanish LA/MSF subsidies for the A340-500/600 expired in, respectively, **[BCI]** and **[BCI]**.[1014] This aspect of the United States' appeal is premised on the condition that we find that the passive expiry of these subsidies *after* 1 December 2011 meets the requirement to "withdraw the subsidy" within the meaning of Article 7.8 of the SCM Agreement.[1015] We recall that, following the adoption of the panel and Appellate Body reports in the original proceedings on 1 June 2011, the European Union, pursuant to Article 7.9 of the SCM Agreement, had six months to "take appropriate steps to remove the adverse effects" or to "withdraw the subsidy". On 1 December 2011, the European Union informed the DSB, in its Compliance Communication, that it had taken the appropriate steps to bring its measures "fully into conformity with its WTO obligations".[1016] Subsequently, the Panel was established to examine the United States' claim that "the actions and events listed in the {European Union's Compliance Communication} do not withdraw the subsidies or remove their adverse effects for purposes of Article 7.8 of the SCM Agreement".[1017]

5.404. In examining whether the European Union complied with its obligation under Article 7.8 of the SCM Agreement, the relevant question before the Panel was whether the European Union had brought itself into compliance *by the end of the implementation period*, that is, before 1 December 2011. For purposes of *these compliance proceedings*, therefore, the expiry of the subsidies *subsequent to* 1 December 2011 does not bear *directly* on the question that the Panel was called upon to examine, namely, whether compliance had been achieved by the end of the implementation period. In these circumstances, we see no need further to address this aspect of the United States' appeal.

5.4.4 Whether the Panel erred in its finding regarding the repayment of financial contribution – conditional appeal by the European Union

5.405. The European Union conditionally appeals the Panel's finding that "repayment of a financial contribution does not bring the life of a subsidy to an end".[1018] The European Union requests, in particular, that we find that the "lives" of the following subsidies came to an end due to the "repayment" of the underlying LA/MSF loans on their subsidized terms: the French LA/MSF for the A310-300 and A330-200, the French and Spanish LA/MSF for the A300B/B2/B4 and A300-600, and the French, Spanish, and UK LA/MSF for the A320 and A330/A340.[1019]

5.406. We have upheld the Panel's finding that almost all pre-A380 LA/MSF subsidies, including the ones referred to above, expired before the beginning of the implementation period in this dispute, that is, before 1 June 2011.[1020] We have also found that the European Union has

[1014] Panel Report, fn 1547 to para. 6.879, and para. 7.1.d.iii.
[1015] United States' other appellant's submission, fn 15 to para. 8, and fn 35 to para. 17.
[1016] Panel Report, para. 6.6 (quoting Compliance Communication).
[1017] WT/DS316/19, p. 3.
[1018] European Union's appellant's submission, para. 197 (referring to Panel Report, paras. 6.1072-6.1074). See also para. 190.
[1019] European Union's appellant's submission, paras. 214-215.
[1020] The Panel found that the LA/MSF subsidies for the A330-200 and the A340-500/600 expired in, respectively, **[BCI]** and **[BCI]**, that is, after the end of the implementation period. (Panel Report, fn 1547 to para. 6.879) The Panel found that the market presence of the A340 came to an end before the beginning of the post-implementation period when Airbus terminated the A340 programme in November 2011. (Ibid., fn 2188 to para. 6.1293) As discussed in sections 5.6.3 and 5.6.4 of this Report, we note that the Panel did not make findings specifically relating to the effects of these two subsidies.

no further compliance obligation, under Article 7.8 of the SCM Agreement, with respect to such expired subsidies. We see no reason, in order to resolve this dispute, to make additional findings on whether the French LA/MSF for the A310-300, the French and Spanish LA/MSF for the A300B/B2/B4 and A300-600, and the French, Spanish, and UK LA/MSF for the A320 and A330/A340 *also* came to an end due to the actual repayment of the loans with interests.[1021]

5.5 European Union's consequential appeal under Article 7.8 of the SCM Agreement

5.407. The European Union maintains that, due to the Panel's error in its interpretation of Article 7.8 of the SCM Agreement, the Panel's findings regarding the adverse effects caused by the challenged subsidies must also be reversed. According to the European Union, this is because the Panel failed to recognize that an expired subsidy "could no longer be used to ground a finding of non-compliance, including on the basis that it causes present adverse effects after the end of the implementation period".[1022] The European Union also argues that, pursuant to a proper interpretation of Article 7.8, an analysis of adverse effects must be based on a "re-constituted basket of subsidies" from which the expired subsidies are excluded[1023], and that the Panel failed to conduct such an analysis.[1024] On this basis, the European Union requests us to reverse a series of intermediate findings made in the context of the Panel's adverse effects analysis[1025], as well as its final conclusion that the challenged LA/MSF subsidies continue to be a "genuine and substantial" cause of serious prejudice within the meaning of Articles 5(c), 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement.[1026] Furthermore, the European Union requests us to reverse the Panel's conclusion that the non-LA/MSF subsidies at issue (including capital contributions[1027] and certain regional development grants) are a "genuine" cause of such serious prejudice and can be "cumulated" with the effects of the challenged LA/MSF subsidies.[1028]

5.408. For its part, the United States contends that the European Union's consequential appeal should be rejected. The United States highlights that these compliance proceedings involve findings that a group of subsidies collectively caused current adverse effects with respect to a number of models of aircraft. Even assuming *arguendo* that the expiry of some of the subsidies within that group satisfied a Member's obligation under Article 7.8 *with respect to the expired subsidies*, "there would remain a question of how to evaluate the {European Union's} obligation under Article 7.8 with respect to the rest of the group of subsidies."[1029] In the United States' view, an analysis of the existing subsidies in these compliance proceedings should account for the "aggravating effects of the expired subsidies" and "could not simply pretend that those effects were related to WTO-consistent behavior."[1030] The United States emphasizes in this regard that,

[1021] In this regard, we recall the Panel's finding that the French LA/MSF for the A330-200 expired in **[BCI]**. (Panel Report, fn 1547 to para. 6.879) However, the Panel made *no* finding regarding whether Airbus had "repaid" that subsidy prior to the end of the implementation period. (Ibid., para. 6.1074) In the absence of any factual findings by the Panel, we are unable to rule on whether the French LA/MSF for the A330-200 came to an end through "repayment", as the European Union argues on appeal.

[1022] European Union's appellant's submission, para. 187. See also paras. 188-189.

[1023] European Union's appellant's submission, paras. 1076 and 1088. The European Union further argues that the effects of those expired subsidies should be taken into account as non-attribution factors for purposes of analysing the effects of the re-constituted basket of subsidies (i.e. the "basket" that contains only the existing subsidies). (Ibid., para. 1097)

[1024] European Union's appellant's submission, para. 187.

[1025] European Union's appellant's submission, para. 189 (referring to Panel Report, paras. 6.1451-6.1452, 6.1463, 6.1534, 6.1774, and 7.1.d.xii-xiii).

[1026] European Union's appellant's submission, para. 189 (referring to Panel Report, paras. 6.1798, 6.1817, and 7.1.d.xiv-xvi).

[1027] The Panel found that the European Union had demonstrated that the *ex ante* "lives" of the capital contribution subsidies had "expired" before 1 December 2011, and therefore, before the end of the implementation period. (Panel Report, para. 6.907) This finding of the Panel has not been appealed.

[1028] European Union's appellant's submission, para. 189 (referring to Panel Report, paras. 6.1838, 6.1846, 6.1847, and 7.1.d.xvii). Furthermore, recalling the Panel's finding that the non-LA/MSF subsidies "complemented and supplemented" the effects of the LA/MSF subsidies, the European Union contends that the basis for this finding "would fall away" following a reversal of the Panel's findings regarding the adverse effects of the LA/MSF subsidies. (European Union's appellant's submission, paras. 1060 (quoting Panel Report, para. 6.1847) and 1061).

[1029] United States' appellee's submission, para. 158.

[1030] United States' appellee's submission, para. 158. The United States notes that, during proceedings before the Panel, the European Union argued that the WTO-inconsistent effects of expired subsidies became

because "the current adverse effects of those expired subsidies are inconsistent with {the European Union's} obligations under Article 5", a compliance panel "would properly aggregate any expired subsidies that continued to cause adverse effects".[1031] This, in the United States' view, would "especially be the case if those expired subsidies put the recipients of the subsidy in a position where subsequent subsidies had more pronounced effects".[1032]

5.409. We note that Article 21.5 of the DSU identifies the task of a panel operating pursuant to this provision, namely to examine whether the DSB recommendations and rulings from the original dispute have been implemented consistently with the covered agreements. Proceedings under Article 21.5 do not occur in isolation, but are part of a "continuum of events".[1033] It is for this reason that a compliance panel assessing whether an implementing Member has complied with its obligations under Article 7.8 must take due account of the reasoning and findings from the original proceedings.[1034]

5.410. Having said that, we recall that Article 7.8 of the SCM Agreement is concerned with the "granting or maintaining" of subsidies that cause adverse effects, and requires cessation of such conduct. To the extent that the underlying subsidy has ceased to exist, there is no additional requirement, under this provision, to remove any lingering effects that may flow from that subsidy.[1035] The pertinent question for purposes of these compliance proceedings is, therefore, whether the United States has established that the subsidies existing in the post-implementation period (i.e. after 1 December 2011) cause adverse effects. An evaluation of the effects of such subsidies may be informed, in part, by findings from the original proceedings concerning the effects of the LA/MSF subsidies, including the expired subsidies, on Airbus' ability to launch LCA products at issue in the original proceedings as and when it did.[1036] Those findings describe the design, structure, and operation of the expired subsidies and how they "impacted Airbus' operations until the end of 2006."[1037] Therefore, we do not preclude that the expired subsidies may be relevant for our review of the Panel's findings as part of a matrix of analysis that seeks to understand the effects of the subsidies existing in the post-implementation period.

5.411. In light of the foregoing, we disagree with the European Union that it *necessarily* follows from the manner in which the Panel characterized the scope of the compliance obligation under Article 7.8 of the SCM Agreement that the Panel's findings of adverse effects must be reversed for each of the specific country and product markets with respect to which the United States brought its claims.[1038] We note that the Panel's adverse effects analysis led to its final conclusion that "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

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WTO-consistent for purposes of a compliance proceeding. According to the United States, the European Union asserted that in its adverse effects analysis, the Panel would have to separate and distinguish the effects of expired subsidies from the effects of existing subsidies, and base its analysis of adverse effects on only the existing subsidies. (Ibid., fn 217 to para. 158 (referring to European Union's first written submission to the Panel, para. 1099)) The United States further contends that, although the European Union "has not explicitly made such an argument {on appeal}, it is a logical consequence of the {European Union's} position, and demonstrates the absurdity of that position". (Ibid., fn 217 to para. 158)

[1031] United States' appellee's submission, para. 160.

[1032] United States' appellee's submission, para. 160. We also note the United States' argument before the Panel that the expired LA/MSF subsidies "still ha{ve} *current effects* on competition because of the enduring effects of LA/MSF and a continuing pattern of subsidizing one Airbus LCA program after another, and providing Airbus with new LA/MSF". (United States' first written submission to the Panel, para. 325 (emphasis original))

[1033] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 102-103; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121.

[1034] See Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136. We note, however, that in Article 21.5 proceedings the burden is on the complainant to show a WTO-inconsistency at the end of the implementation period in respect of the "measure taken to comply". In this regard, the Panel also recognized the importance of not "simply transpos{ing}" findings in the original proceedings to the present proceedings. (Panel Report, para. 6.1462)

[1035] See section 5.4.2 of this Report.

[1036] As further explained in section 5.6 of this Report, the Panel referred to such effects as the "product effects" of LA/MSF subsidies. (See Panel Report, paras. 6.1492, 6.1536, and 6.1777)

[1037] Panel Report, para. 6.1461.

[1038] European Union's appellant's submission, paras. 187-189.

subsidy'."[1039] In our view, whether the Panel had a sufficient basis for this ultimate conclusion is a question that can only be answered following a careful review of the Panel's reasoning and analysis, in particular its analysis relating to the adverse effects of the *existing* LA/MSF subsidies that are maintained or granted in the post-implementation period. Thus, we do not dismiss the totality of the Panel's adverse effects analysis solely on the basis of its interpretation of Article 7.8 of the SCM Agreement. Rather, we do not preclude that the pertinent question in these compliance proceedings − i.e. whether the subsidies existing in the post-implementation period cause adverse effects − may still be answered on the basis of the Panel's analysis of the existing subsidies. A consideration of expired subsidies is relevant for this purpose insofar as it sheds light on whether LA/MSF subsidies granted or maintained by the European Union in the post-implementation period cause adverse effects.

5.412. With these considerations in mind, we turn to review the Panel's analysis in reaching its ultimate conclusion on adverse effects. As further explained below, our review will focus on the Panel's findings regarding the effects of the subsidies that the European Union continued to grant or maintain in the post-implementation period, including, in particular, the LA/MSF subsidies for the Airbus A380 and the A350XWB, which have not expired.[1040]

5.6 Articles 5, 6, and 7.8 of the SCM Agreement – adverse effects

5.413. Having found that the United States had established that the European Union has failed to "withdraw the subsidy" within the meaning of Article 7.8 of the SCM Agreement[1041], the Panel went on to examine the United States' claim that the European Union had failed to "take appropriate steps to remove the adverse effects", as required under this provision. The Panel considered the question before it to be "whether … 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".[1042] At the outset, having rejected the European Union's claim that it has withdrawn certain LA/MSF subsidies within the meaning of Article 7.8 of the SCM Agreement as a result of their expiry[1043], the Panel dismissed the European Union's contention that it should exclude from the adverse effects analysis those challenged subsidies that had expired.[1044] Thus, under the Panel's adverse effects analysis, the reference to the "challenged" LA/MSF subsidies covers *all* of the LA/MSF subsidies granted by the European Union to date, including those the Panel found to have expired, as well as those existing in the post-implementation period.[1045]

5.414. The Panel began by addressing two "threshold" issues.[1046] First, the Panel dismissed the European Union's argument 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 that its product allegedly being displaced or impeded is a "non-subsidized like product".[1047] Second, the Panel disagreed with the European Union's contention that the United States had failed to establish the existence of the three alleged LCA product markets for purposes of its complaint[1048], finding instead that the markets identified by

[1039] Panel Report, para. 7.2.

[1040] See paras. 5.554-5.557 below. We also recall the Panel's finding that the LA/MSF subsidies for the A330-200 and A340-500/600 had expired, respectively, **[BCI]**, that is, after the end of the implementation period. (Panel Report, fn 1547 to para. 6.879, and fn 1600 to para. 6.907) We note that these aircraft were derivatives of, respectively, the A330 and A340. (Original Panel Report, para. 7.1622) As further discussed in sections 5.6.3 and 5.6.4 of this Report, we note that the Panel did not make findings specifically related to the effects of these two subsidies, and we focus our analysis on the subsidies with respect to which the Panel made findings, namely, the A380 and A350XWB LA/MSF subsidies.

[1041] Panel Report, para. 6.1102.

[1042] Panel Report, para. 6.1104. (emphasis original)

[1043] Panel Report, para. 6.1107 (referring to section 6.6.2 of the Panel Report). See also section 5.6.3.1 of this Report.

[1044] Panel Report, paras. 6.1106-6.1107. See also paras. 6.1449-6.1450.

[1045] See e.g. Panel Report, paras. 6.1104 and 6.1440. As further discussed below, our review of the Panel's adverse effects analysis is focused on the Panel's findings regarding a subset of these challenged subsidies, namely, those existing in the post-implementation period.

[1046] Panel Report, para. 6.1107.

[1047] Panel Report, paras. 6.1114 and 6.1154.

[1048] The three product markets are: the single-aisle LCA market for the Airbus A320neo and A320ceo, and the Boeing 737MAX and 737NG LCA families; the twin-aisle LCA market for the Airbus A330 and A350XWB

the United States represented the three segments within which most competitive interactions between the relevant aircraft would commonly take place.[1049]

5.415. Turning to the present-day effects of the challenged LA/MSF subsidies in the three relevant product market segments[1050], the Panel sought to determine whether the challenged LA/MSF subsidies, as an aggregated group[1051], are a "genuine and substantial" cause of serious prejudice to the United States' interests within the meaning of Article 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement. The Panel divided its analysis into three parts.

5.416. The first two parts concern the "product effects" of LA/MSF subsidies, that is, the effects of such subsidies *on the ability of Airbus to launch and bring to market* particular Airbus LCA models as and when it did.[1052] First, the Panel examined the "product effects" of the pre-A350XWB LA/MSF subsidies on the A320, A330, and A380, and found that the 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.[1053] Second, having analysed the "product effects" of *all of the* challenged LA/MSF subsidies on the A350XWB, the Panel found that these subsidies, with the exception of LA/MSF for the A300 and A310, are a genuine and substantial cause of the current market presence of the A350XWB family of Airbus LCA.[1054]

5.417. Third, examining the impact of the "product effects" of the challenged LA/MSF subsidies in the relevant product markets, the Panel found that all of the orders of Airbus LCA identified by the United States in the post-implementation period represented "significant" lost sales to the US LCA industry.[1055] Thus, the Panel concluded that the "product effects" of the challenged LA/MSF subsidies are a genuine and substantial cause of:

> significant lost sales in the global markets for single-aisle, twin-aisle and {VLA}, 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 … .[1056]

The Panel further found that, in the absence of the LA/MSF subsidies, the volume of deliveries and market shares that would have been achieved in the US LCA industry would have been higher than its actual level in all relevant product markets.[1057] Thus, the Panel concluded that the "product effects" of the challenged LA/MSF subsidies are a "genuine and substantial" cause of:

> displacement and/or impedance of the imports of a like product of the United States into the markets for single-aisle, twin-aisle and {VLA} in the European Union, within the meaning of Article 6.3(a) of the SCM Agreement, constituting serious prejudice to

and the Boeing 767, 777, and 787 LCA families; and the VLA market for the Airbus A380 and the Boeing 747 families. (Panel Report, para. 6.1411)

[1049] Panel Report, para. 6.1416.

[1050] Panel Report, para. 6.1417. Before examining this issue, the Panel reviewed the preliminary question regarding the reference period, and considered that the United States would succeed in its non-compliance claims only if it could establish the existence of *present* serious prejudice under Article 6.3(a), (b), and (c) of the SCM Agreement in the post-implementation period (i.e. after 1 December 2011). (Ibid., paras. 6.1441-6.1444)

[1051] As further discussed in paragraphs 5.563 and 5.593 below, like the original panel, the Panel undertook an aggregated assessment of the effects of all LA/MSF subsidies due to their similar "design, structure and operation". (Panel Report, para. 6.1448) The Panel further noted that, in aggregating the effects of the subsidies, the original panel examined "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". (Ibid. (fn omitted))

[1052] Panel Report, paras. 6.1492, 6.1536, and 6.1777. See also paras. 6.1448, 6.1464, and 6.1480. As further discussed below, the Panel found that "product effects" of LA/MSF consisted of "direct effects" and "indirect effects", depending on whether the effects concern Airbus' ability to launch the particular model of LCA specifically funded by a LA/MSF subsidy (direct), or other models of LCA (indirect). (See Panel Report, para. 6.1492. See also paras. 5.563 and 5.593-5.594 below)

[1053] Panel Report, para. 6.1534. See also para. 7.1.d.xii.

[1054] Panel Report, para. 6.1778. See also para. 7.1.d.xiii.

[1055] Panel Report, para. 6.1798.

[1056] Panel Report, para. 7.1.d.xvi.

[1057] Panel Report, para. 6.1817.

> the interests of the United States within the meaning of Article 5(c) of the SCM Agreement[1058]; {and}
>
> 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 {VLA} 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.[1059]

5.418. The European Union appeals the Panel's findings with respect to both "threshold" issues, alleging that the Panel failed to take into account the existence of subsidization of United States LCA products[1060], and erred in its identification of the relevant product markets for purposes of its adverse effects analysis.[1061] The European Union also alleges that the Panel erred in reaching its findings on: (i) the "product effects" of the pre-A350XWB LA/MSF subsidies on the A320, A330, and A380[1062]; (ii) the "product effects" of the LA/MSF subsidies for the A380 and A350XWB on the A350XWB[1063]; and (iii) the causal link between the relevant subsidies, on the one hand, and lost sales and "displacement and/or impedance" in specific country and product markets, on the other hand.[1064] We address these allegations of error in turn.

5.6.1 Non-subsidized like product

5.419. We turn next to examine the European Union's appeal regarding the relevance of the term "non-subsidized like product" in Article 6.4 of the SCM Agreement for purposes of assessing claims of serious prejudice brought under Article 6.3(b) of the SCM Agreement. According to the European Union, the Panel erred in finding that: (i) there was no "new matter" before it[1065]; and (ii) there were, in any event, no "cogent reasons" for the Panel to depart from the findings made by the original panel regarding the relationship between Article 6.3(b) and Article 6.4 of the SCM Agreement.[1066] Moreover, the European Union submits that the Panel failed to make an objective assessment of the matter before it, contrary to its duty under Article 11 of the DSU.[1067]

5.420. Before the Panel, the European Union advanced two main lines of argumentation in this regard. First, the European Union argued that the SCM Agreement establishes a remedy under Article 6.3(b) *only* in situations where the complaining Member has demonstrated that its like product is non-subsidized. According to the European Union, the United States was therefore required to establish that Boeing LCA (the like product at issue) were "non-subsidized" in order to make out its claims of serious prejudice under this provision.[1068] The European Union referred to this as its "clean hands" argument.[1069] In addition, the European Union claimed that subsidization of the like product had, "in any event, to be taken into account in the assessment of causation, in an appropriately balanced way, guided by the Appellate Body's intervening clarifications of the relationship between Articles 6.3(b) and Article 6.4".[1070] The European Union referred to this second argument as its "causation" argument[1071], explaining on appeal that this was its main

[1058] Panel Report, para. 7.1.d.xiv.
[1059] Panel Report, para. 7.1.d.xv. In light of these findings, the Panel made "no determination of the United States' claim of *threat* of displacement and impedance in the market for single-aisle LCA in the European Union, given that the United States requested the Panel to consider this claim only if {it} rejected its claims of *present* serious prejudice". (Ibid., para. 6.1818 (emphasis original; fn omitted). See also para. 7.1.d.xix)
[1060] European Union's appellant's submission, paras. 641-750.
[1061] European Union's appellant's submission, paras. 533-640.
[1062] European Union's appellant's submission, paras. 832-884.
[1063] European Union's appellant's submission, paras. 885-913.
[1064] European Union's appellant's submission, paras. 914-958 and 966-1056.
[1065] European Union's appellant's submission, paras. 700 and 717.
[1066] European Union's appellant's submission, para. 724.
[1067] European Union's appellant's submission, para. 724.
[1068] Panel Report, para. 6.114.
[1069] European Union's appellant's submission, para. 645.
[1070] European Union's appellant's submission, para. 714. (emphasis and fn omitted) See also European Union's second written submission to the Panel, paras. 706-727.
[1071] European Union's appellant's submission, para. 645.

argument[1072] regarding the relevance of Article 6.4 in this dispute. According to the European Union, the Panel erred in declining to rule on these arguments based on its view that the "matter" had been decided by the original panel and there were no "cogent reasons" to "re-open" the matter and decide otherwise.[1073]

5.421. We begin by providing a brief summary of the relevant findings in the original proceedings, before we turn to the parties' arguments before the Panel and the Panel's findings in these compliance proceedings. Thereafter, we set out the arguments raised by the participants on appeal, beginning by reviewing the approach that the Panel took to the questions raised by the European Union.

5.6.1.1 Findings in the original proceedings

5.422. Before the original panel, the European Communities had claimed that displacement or impedance under "Article 6.3(b) can be demonstrated only if the complaining Member does not provide a subsidy within the meaning of Article 1 of the SCM Agreement in respect of the like product exported".[1074] The original panel considered that the European Communities' argument relied upon the assumption that Article 6.4 of the SCM Agreement sets out an "exclusive mechanism for demonstrating displacement or impedance of exports to a third country market under Article 6.3(b)".[1075] It therefore proceeded to examine whether this was the case, or whether, to the contrary, displacement and impedance under Article 6.3(b) could be demonstrated without reference to Article 6.4.

5.423. Recalling the panel's finding in *Indonesia – Autos*[1076], the original panel found that "Article 6.4 describes a particular situation" where "the like product of the complaining Member is not subsidized" and where an increase in the market share of the subsidized product would "suffice{} to make a prima facie case of displacement or impedance under Article 6.3(b)".[1077] However, the original panel noted that, while the United States had made a claim under Article 6.3(b) of the SCM Agreement, to which Article 6.4 of that Agreement refers, it did "not purport to rely on the *special rule* set out in Article 6.4, but rather, assert{ed} that it ha{d} demonstrated that displacement or impedance of its exports {in} third country markets {was} the effect of the subsidies in dispute."[1078] The original panel considered that its reading of Article 6.4 led "to the conclusion that if the circumstances set out in Article 6.4 are satisfied, a further assessment of whether the changes in market share {were} 'the effect of the subsidy' {was} not necessary."[1079]

5.424. Having made these observations, the original panel found nothing in Article 6.4 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)".[1080] The original panel considered that the use of the phrase "shall include" indicated 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). The original panel added that, "{r}ather than limiting the circumstances in which

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[1072] European Union's response to questioning at the oral hearing.
[1073] European Union's appellant's submission, paras. 686-698.
[1074] Original Panel Report, para. 7.1762. (emphasis omitted)
[1075] Original Panel Report, para. 7.1766.
[1076] The panel in *Indonesia – Autos* found:

> If the type of analysis set forth in Article 6.4 is appropriate in this case, then the complainants arguably could make a *prima facie* case of displacement or impedance simply by demonstrating that the market share of a subsidized product has increased over an appropriately representative period. If, on the other hand, the type of analysis set forth in Article 6.4 is not appropriate in this case, then the complainants must demonstrate that "*the effect of the subsidy*" is to displace or impede imports into Indonesia, that is, that they have lost export sales to Indonesia that they would otherwise have made and that those export sales were lost as a result of the subsidies provided pursuant to the National Car programme.

(Panel Report, *Indonesia – Autos*, para. 14.209 (emphasis original)). (See also Original Panel Report, para. 7.1767.)
[1077] Original Panel Report, para. 7.1767.
[1078] Original Panel Report, para. 7.1768. (emphasis added)
[1079] Original Panel Report, para. 7.1769.
[1080] Original Panel Report, para. 7.1769.

Article 6.3(b) may be satisfied", Article 6.4 simply "set{s} out additional guidance for the application of Article 6.3(b) in certain particular circumstances".[1081]

5.425. Based on this reasoning, the original panel rejected the European Communities' view that "Article 6.4 {was} the exclusive basis for a finding of displacement or impedance under Article 6.3(b)".[1082] In so doing, the original panel emphasized that the interpretation suggested by the European Communities would mean 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".[1083] The original panel characterized this as "a sort of 'clean hands' requirement for complaining Members *as a prerequisite* to a claim under Article 6.3(b)".[1084]

5.426. The original panel found support for its view in the negotiating history of Article 6 of the SCM Agreement. In particular, it considered that its reading of Article 6.3:

> fit{s} with the overall architecture of Article 6 as originally negotiated and adopted, with different burdens for establishing serious prejudice, ranging from "deemed" serious prejudice in the case of certain subsidies under Article 6.1, to a lesser burden for complaining Members with "clean hands", *i.e.*, an unsubsidized competing product, to the requirement to prove that the market effects of displacement or impedance are the effect of the subsidies.[1085]

5.427. Neither party appealed these findings, and the original panel report as modified by the Appellate Body report in relation to other matters, was adopted by the DSB. Thus, the Appellate Body did not have the occasion to review the original panel's findings in this respect. However, while completing – at least to some extent – the legal analysis of the United States' claims of displacement under Articles 6.3(a) and 6.3(b) of the SCM Agreement, the Appellate Body made certain statements regarding Article 6.3 and Article 6.4. The Appellate Body found that, while displacement under Article 6.3(a) arises "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", under Article 6.3(b), displacement occurs "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".[1086] With regard to Article 6.4, the Appellate Body noted that, under this provision, the change in relative market shares shall be demonstrated "over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned".[1087]

5.6.1.2 Arguments before the Panel and Panel findings in the compliance proceedings

5.428. Before the Panel, the European Union argued 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 {had to} demonstrate, by virtue of Article 6.4, that {its} product being allegedly displaced or impeded in any relevant third country market {was} a 'non-subsidized like product'."[1088] The European Union submitted that "the fact that there {was} now a multilateral determination {in *US – Large Civil Aircraft (2nd complaint)*} that the United States' 'like products' {were} subsidized mean{t} that the relevant factual circumstances ha{d} changed" such that "there {was} now a new 'matter' before the compliance Panel that {had to} be resolved".[1089] Additionally, the European Union argued that given the context of

[1081] Original Panel Report, para. 7.1769.
[1082] Original Panel Report, para. 7.1770.
[1083] Original Panel Report, para. 7.1770. (emphasis omitted)
[1084] Original Panel Report, para. 7.1770. (emphasis added)
[1085] Original Panel Report, para. 7.1771.
[1086] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1170. (emphasis added)
[1087] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1166. (fn omitted)
[1088] Panel Report, para. 6.1114.
[1089] Panel Report, para. 6.1115 (referring to European Union's second written submission to the Panel, paras. 708-712).

Article 6.4, "the existence of such subsidisation" was something that the Panel had to take into account in its assessment of causation and non-attribution.[1090] The European Union alleged that there were, in any event, "cogent reasons" to review the original panel's interpretation of the relationship between Article 6.3(b) and Article 6.4 of the SCM Agreement.[1091]

5.429. In response, the United States submitted that "the 'non-subsidized like product' arguments … in this compliance dispute were already addressed and rejected in the unappealed findings from the original proceeding that were adopted by the DSB", which "impl{ied} that the European Union {was} not entitled to reopen the matter".[1092] According to the United States, the European Union's submission that there was a new "matter" before the Panel "in the light of the alleged 'changed facts' {was} premised on a mischaracterization of the original panel's findings".[1093] The United States submitted 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'."[1094] Furthermore, the United States disagreed with the European Union's contention that there were "cogent reasons" for the Panel to review the original panel's findings.[1095]

5.430. The Panel began its analysis by noting that, in the original proceedings, "the European Communities {had} advanced essentially the same line of argument" it now advanced in these compliance proceedings to support its proposition that the United States' claims under Article 6.3(b) should be rejected.[1096] The Panel recalled the original panel's finding that "the 'non-subsidized like product' language appearing in Article 6.4 … 'may well require that a complaining Member demonstrate, in the circumstances of that provision, that its like product … is not subsidized'."[1097] However, the Panel noted that the original panel had proceeded to examine "another question, namely, 'whether Article 6.4 {was} the necessary or exclusive mechanism for demonstrating displacement or impedance of exports … under Article 6.3(b), or whether … displacement and impedance under Article 6.3(b) {could} be demonstrated without reference to Article 6.4'."[1098] The Panel considered that 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."[1099] The Panel further noted that "{t}he European Union did not appeal the original panel's findings on this point; and the {original} panel report, as modified by the Appellate Body in relation to other matters, was adopted by the DSB."[1100]

5.431. The Panel understood the European Union to now request that it "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."[1101] The Panel first considered the European Union's argument that "new factual circumstances mean{t} that there {was} a new 'matter' before the … Panel" and, therefore, that the Panel was "not precluded from addressing the European Union's arguments concerning the interpretation of Articles 6.3(b) and 6.4".[1102] The Panel found, however, that the original panel's interpretation of the relationship between Article 6.3(b) and Article 6.4 had "decided the matter"[1103], and considered that "the extent to which Boeing LCA were subsidized

[1090] European Union's appellant's submission, para. 645. See also Panel Report, para. 6.1116.
[1091] Panel Report, para. 6.1115.
[1092] Panel Report, para. 6.1121 (referring to United States' second written submission to the Panel, paras. 404-406, 409-410, and 412).
[1093] Panel Report, para. 6.1122.
[1094] Panel Report, para. 6.1122 (quoting United States' second written submission to the Panel, paras. 413-415 (emphasis and fn omitted by the Panel)).
[1095] Panel Report, para. 6.1122.
[1096] Panel Report, para. 6.1126.
[1097] Panel Report, para. 6.1127 (quoting Original Panel Report, para. 7.1765).
[1098] Panel Report, para. 6.1127 (quoting Original Panel Report, para. 7.1766).
[1099] Panel Report, para. 6.1130.
[1100] Panel Report, para. 6.1131.
[1101] Panel Report, para. 6.1131.
[1102] Panel Report, para. 6.1132 (referring to European Union's second written submission to the Panel, paras. 709-710).
[1103] Panel Report, para. 6.1135.

played no role at all in the original panel's legal analysis".[1104] For the Panel, the adopted recommendations and rulings in *US – Large Civil Aircraft (2nd complaint)* in relation to "the subsidization of Boeing LCA" therefore did not mean there was "now a new 'matter'" before the Panel "as regards the European Union's reliance on Article 6.4 to reject the United States' claims made under Article 6.3(b)".[1105]

5.432. The Panel next turned to address the European Union's argument that "there {were} 'cogent reasons' for the … Panel to review the original panel's interpretation of the relationship between Articles 6.3(b) and 6.4" of the SCM Agreement.[1106] The Panel began by noting 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.*"[1107] The Panel recalled the findings in *US – Countervailing and Anti-Dumping Measures (China)* where the panel had indicated the types of considerations that could, in appropriate cases, justify a panel adopting a different interpretation.[1108] Referring to the Appellate Body report in *US – Stainless Steel (Mexico)*, the Panel expressed the view 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 proceedings of the same dispute, when "that legal interpretation was left unappealed and ultimately the subject of recommendations and rulings adopted by the DSB".[1109] Thus, the Panel concluded that it was not convinced that "the European Union {was} entitled to reopen the original panel's findings with respect to its arguments concerning the relevance of Article 6.4 … to the United States' claims under Article 6.3(b)."[1110] In any event, the Panel found that, "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"[1111], the explanations provided by the European Union did "not amount to 'cogent reasons'".[1112] On this basis, the Panel dismissed the European Union's request to reject the United States' claim under Article 6.3(b) of the SCM Agreement in light of the adopted recommendations and rulings in *US – Large Civil Aircraft (2nd complaint)* regarding the subsidization of Boeing LCA.[1113]

[1104] Panel Report, para. 6.1136.
[1105] Panel Report, para. 6.1138.
[1106] Panel Report, para. 6.1139 (referring to European Union's first written submission to the Panel, para. 657; second written submission to the Panel, paras. 713 and 727).
[1107] Panel Report, para. 6.1140 (referring to 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). (emphasis original)
[1108] Panel Report, para. 6.1143 (quoting Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.315-7.317). In *US – Countervailing and Anti-Dumping Measures (China)*, the panel noted that, although the Appellate Body has not defined the concept of "cogent reasons", its reference to "cogent reasons" must be considered in the context of its other statements regarding the hierarchy provided for in the DSU between itself and panels, the objectives that are served through the development of a consistent, coherent and predictable body of jurisprudence, and the concerns that it has expressed when panels have departed from its prior jurisprudence. (Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.316) Accordingly, the panel stated:

> 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.

(Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.317)
[1109] Panel Report, para. 6.1142 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, fn 309 to para. 158). (emphasis original)
[1110] Panel Report, para. 6.1143.
[1111] Panel Report, para. 6.1143.
[1112] Panel Report, para. 6.1143.
[1113] Panel Report, para. 6.1154.

5.6.1.3 Claims and arguments on appeal

5.433. As noted, the European Union argued before the Panel that in dealing with the United States' claim under Article 6.3(b) of the SCM Agreement, the Panel was required to take into account the context of Article 6.4, including, particularly, the phrase "non-subsidized like product", when assessing the United States' assertions on the issue of causation.[1114] On appeal, the European Union emphasizes that it had argued not only that "any subsidisation of the like product would preclude or defeat a claim under Article 6.3(b) (the original 'clean hands' argument)", but also that "the existence of such subsidisation was something that the … Panel had to take into account, in any event, in its assessment of causation and non-attribution under Article 6.3(b) (the 'causation' argument)".[1115] The European Union added that "there was now, for the first time, an express multilateral determination in {*US – Large Civil Aircraft (2nd complaint)*} to the effect that the like products referred to by the United States (Boeing LCA) are subsidised".[1116] For the European Union, the Panel's finding that "there was no new matter before it"[1117] is erroneous because "{a} 'matter' necessarily consists of the treaty terms identified by the parties as framing the obligation alleged to have been breached (duly clarified), as well as the particular facts identified by both the complainant and the defendant."[1118] The European Union therefore faults the Panel for disregarding "the fact that, as between the original proceedings and the compliance proceedings, the interpretative propositions advanced … and the facts referenced by the European Union when referring to Article 6.4 have changed."[1119]

5.434. The European Union further submits that the United States brought a claim under Article 6.3(b) in response to which "the European Union referred to Article 6.4, and also made certain factual assertions and adduced certain evidence in support of its position."[1120] According to the European Union, "this constituted the matter that the compliance Panel was obliged to objectively assess."[1121] Thus, the European Union submits that it was not asking the Panel to "reopen" the findings in the original proceedings, but "simply asking" it "to clarify the relevant legal provisions, taking into account the intervening guidance provided by the Appellate Body, and apply them to the arguments and fact pattern arising in these compliance proceedings".[1122]

5.435. Referring to Article 11 of the DSU, the European Union also claims that the Panel's treatment of the arguments raised by the European Union reveals "a lack of even-handedness on the part of the Panel".[1123] The European Union refers to a series of alleged "qualifications, omissions and misstatements", and maintains that the Panel sought to shield from "review an interpretation of Articles 6.3(b) and 6.4 {by the original panel} that is clearly incorrect".[1124] In particular, the European Union alleges that the Panel denied "the European Union its day in court on this matter"; and wrongly suggested that the European Union was "precluded" from challenging a prior "adopted" interpretation "whilst at the same time re-writing that very same interpretation by retroactively eliminating key elements of the reasoning".[1125] The European Union also identifies several "additional elements" that it claims, "taken together or in any combination", demonstrate a breach of Article 11 of the DSU.[1126]

5.436. For its part, the United States recalls that the original panel framed the relevant question before it as "whether Article 6.4 {was} the necessary or exclusive mechanism for demonstrating displacement or impedance of exports to a third country market under Article 6.3(b), or whether, to the contrary, displacement and impedance under Article 6.3(b) {could} be demonstrated without reference to Article 6.4."[1127] According to the United States, this "was a *legal* question for

[1114] See European Union's appellant's submission, para. 701.
[1115] European Union's appellant's submission, para. 645. (emphasis omitted)
[1116] European Union's appellant's submission, para. 703.
[1117] European Union's appellant's submission, para. 705 (referring to Panel Report, para. 6.1138).
[1118] European Union's appellant's submission, para. 710. (emphasis omitted)
[1119] European Union's appellant's submission, para. 712.
[1120] European Union's appellant's submission, para. 726.
[1121] European Union's appellant's submission, para. 726.
[1122] European Union's appellant's submission, para. 746.
[1123] European Union's appellant's submission, para. 718.
[1124] European Union's appellant's submission, para. 718.
[1125] European Union's appellant's submission, para. 718.
[1126] European Union's appellant's submission, paras. 718 and 749.
[1127] United States' appellee's submission, para. 371 (quoting Original Panel Report, para. 7.1766).

which the existence (or not) of subsidization to Boeing large civil aircraft was irrelevant"[1128], and the Panel "was correct in concluding that subsidization of Boeing large civil aircraft did not play a role in the original panel's unappealed and DSB-adopted legal interpretation of Article 6.4."[1129] Referring to the Appellate Body reports in the original proceedings in this dispute and in *US – Large Civil Aircraft (2nd complaint)*, the United States adds that, while the Appellate Body has found that the phrase in Article 6.4 "over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned" provides relevant context in interpreting Article 6.3(b)[1130], it has not "found that claims under Article 6.3(b) must *in all cases* also satisfy *every provision* in Article 6.4".[1131] The United States adds that "Article 6.4 does not describe the exclusive basis on which a claim under Article 6.3(b) may be demonstrated"[1132], and that, "*even if* relevant intervening Appellate Body statements in another dispute were to exist, it is not at all clear that such statements would allow a compliance panel to deviate from previously adopted DSB findings."[1133]

5.437. Regarding the European Union's claims under Article 11 of the DSU, the United States submits that the Panel "did a careful and thoughtful job reviewing the issues before it" and that "it is evident that the {European Union's} submission does not challenge a lack of objectivity in the Panel's assessment of the facts, but the correctness of the Panel's legal analysis that it {was} precluded from reviewing the original panel's interpretation of Article 6.4."[1134] According to the United States, "if the Appellate Body decides not to entertain the {European Union's} submission in respect of the original panel's DSB-adopted legal interpretation of Article 6.4, the {European Union's} Article 11 claims would merit similar treatment."[1135] In any event, the United States asserts that the European Union has not identified any "specific errors that are so material that, 'taken together or singly', they undermine the objectivity of the {P}anel's assessment of the matter before it."[1136]

5.438. Having summarized the original panel's and the Panel's analysis, as well as the arguments on appeal, we turn to address the issues raised by the European Union.

5.6.1.4 Whether the Panel erred in declining to address the arguments raised by the European Union

5.439. As noted above, the European Union argued before the Panel that: (i) the SCM Agreement establishes a remedy for displacement or impedance of exports in third country markets under Article 6.3(b) *only* in situations where the complaining Member has demonstrated that its like product is non-subsidized; and (ii) subsidization of the like product must, in any event, be taken into account in the assessment of causation. In so doing, the European Union expressed concern with, in particular: (i) the original panel's description of Article 6.4 of the SCM Agreement as a "special rule"; (ii) its conclusions, drawn from the "shall include" language in the first sentence of Article 6.4, regarding the relationship between Article 6.3(b) and Article 6.4; (iii) its reference to preparatory work; and (iv) its view on how its interpretation fit with the overall architecture of Article 6 of the SCM Agreement.[1137]

5.440. Based on its review of the European Union's arguments, the Panel considered the European Union to have articulated "reasons" as to why it "*disagree{d}* with the original panel's findings concerning the relationship between the relevant provisions and certain 'other related matters referenced' in the {original} panel report".[1138] The Panel added that "the European Union's

[1128] United States' appellee's submission, para. 371. (emphasis original)
[1129] United States' appellee's submission, para. 372.
[1130] United States' appellee's submission, para. 395.
[1131] United States' appellee's submission, para. 379. (emphasis original)
[1132] United States' appellee's submission, para. 381.
[1133] United States' appellee's submission, para. 382. (emphasis original)
[1134] United States' appellee's submission, para. 399.
[1135] United States' appellee's submission, para. 399.
[1136] United States' appellee's submission, para. 400 (quoting Appellate Body Report, *Peru – Agricultural Products*, para. 5.66, in turn quoting Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1318; *US – Anti-Dumping and Countervailing Duties (China)*, para. 337 (fns omitted by the United States)).
[1137] Panel Report, para. 6.1152.
[1138] Panel Report, para. 6.1153. (emphasis original)

submissions appear{ed} to be arguments that a party might raise in an appeal of a legal interpretation before the Appellate Body".[1139] As detailed above, the Panel considered, however, that the original panel's interpretation of the relationship between Article 6.3(b) and Article 6.4 had "decided the matter"[1140], and it therefore declined to "reopen the original panel's findings with respect to {the European Union's} arguments concerning the relevance of Article 6.4 … to the United States' claims under Article 6.3(b)".[1141] For the Panel, there were no "cogent reasons" to do so.[1142]

5.441. We recall that the United States claimed before the Panel that Boeing continued to experience displacement and/or impedance of its exports to certain third country markets, and adduced evidence in support of its claim under Article 6.3(b). For its part, the European Union sought to rebut the United States' claim by referring to Article 6.4 and to interpretative guidance provided by the Appellate Body in the original proceedings in this dispute and in *US – Large Civil Aircraft (2nd complaint)* regarding the meaning of Article 6.3(b) and the contextual relevance of Article 6.4.[1143] The European Union also referred to the recommendations and rulings of the DSB in *US – Large Civil Aircraft (2nd complaint)* establishing that Boeing LCA were subsidized, arguing that they should be taken into account in assessing the United States' claims under Article 6.3(b).[1144]

5.442. As we see it, the Panel was under a duty, pursuant to Article 11 of the DSU, to adjudicate the claims brought by the United States in these compliance proceedings in light of the evidence and arguments put forward by the European Union and the relevant WTO jurisprudence. In order to do so, the Panel was required to examine the meaning of Article 6.3(b) of the SCM Agreement, including the relationship between this provision and Article 6.4, as clarified by the Appellate Body in *the original proceedings in this dispute* and in *US – Large Civil Aircraft (2nd complaint)*. It was also appropriate for the Panel to take into account the findings and reasoning by the original panel regarding the meaning of Article 6.4. We note, as did the Panel, that an "*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."[1145]

5.443. That said, we note that the European Union put forward new arguments and evidence regarding the relevance of alleged subsidization of the like product to rebut new claims brought by the United States under Article 6.3(b) with respect to the post-implementation period, which is different from the reference period covered in the original proceedings. In doing so, the European Union relied upon the contextual guidance regarding the relationship between Article 6.3(b) and Article 6.4 provided by the Appellate Body in *the original proceedings* in this dispute[1146] and in *US – Large Civil Aircraft (2nd complaint)*. In these circumstances, the Panel could not simply refuse to address the arguments and evidence before it in dealing with the United States' claims under Article 6.3(b); rather, the Panel was required to adjudicate the United States' claims under Article 6.3(b) in light of the arguments raised and evidence submitted by both parties to the dispute.[1147] By refusing to give *full consideration* to the specific facts and circumstances of the present case and to the legal arguments raised by the parties to the dispute, the Panel breached its duties under Article 11 of the DSU. Accordingly, we declare moot and of

[1139] Panel Report, para. 6.1153.
[1140] Panel Report, para. 6.1135.
[1141] Panel Report, para. 6.1143.
[1142] Panel Report, para. 6.1143.
[1143] European Union's appellant's submission, paras. 727-728.
[1144] European Union's appellant's submission, paras. 645 and 703.
[1145] Panel Report, para. 6.1140 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93 (emphasis original)).
[1146] We note in this respect that findings contained in the original panel report on the issue of "non-subsidized like product" were adopted by the DSB together with the guidance contained in the Appellate Body report in the same original proceedings regarding the relationship between Article 6.3(b) and Article 6.4 of the SCM Agreement.
[1147] We recall that, having noted that Article 11 of the DSU provides that a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements", the Appellate Body explained that "{t}he 'matter' is constituted by both the facts of the case (and, in particular, the specific measures at issue) as well as the legal claims raised". (Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 105 (referring to Appellate Body Report, *Guatemala – Cement I*, para. 73))

no legal effect the Panel's finding, in paragraph 6.1154 of the Panel Report, concerning the European Union's reliance on Article 6.4 to reject the United States' claims under Article 6.3(b) of the SCM Agreement. Having reached this conclusion, we see no need to make additional findings regarding whether the Panel also erred in finding that there were no "cogent reasons" to depart from the original panel's findings, or whether the Panel acted inconsistently with Article 11 of the DSU on other grounds, as claimed by the European Union. We fail to see how such additional findings would assist in securing a "positive solution" to the dispute or a "satisfactory settlement of the matter".

5.444. We therefore proceed to address the European Union's arguments regarding the relationship between Article 6.3(b) and Article 6.4 of the SCM Agreement.[1148]

5.6.1.4.1 The relationship between Article 6.3(b) and Article 6.4 of the SCM Agreement

5.445. As we understand it, the issues raised by the European Union on appeal relate to two fundamental questions: (i) what is the role of Article 6.4 of the SCM Agreement for the purposes of serious prejudice claims asserted under Article 6.3(b) of the SCM Agreement, including whether Article 6.4 can be considered as providing an exclusive pathway for demonstrating displacement or impedance of exports in a third country market for purposes of Article 6.3(b) and (ii) to what extent, if any, should the subsidization of the like product be taken into account in an adverse effects analysis under Article 6.3(b)?

5.446. Starting with the text of the relevant provisions, we note that Article 6.3(b) provides that serious prejudice within the meaning of Article 5(c) of the SCM Agreement may arise when "the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market". Article 6.3(b) thus speaks to the question of whether there is a "causal relationship" between the challenged subsidy and its effects. Article 6.4, in turn, speaks more directly to the relevant market phenomenon caused by the subsidy, that is, "the displacement or impeding of exports". The first sentence of Article 6.4 describes the link between Article 6.3(b) and Article 6.4 in the following terms:

> 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 (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year).[1149]

5.447. The use of the words "shall include any case" in Article 6.4 indicates that there may be cases, *other than those set out* in Article 6.4, in which a Member could demonstrate the "displacement or impeding of exports" for purposes of Article 6.3(b). Article 6.4 therefore does *not* set out an exclusive way to demonstrate displacement or impedance of exports in a third country market.[1150] At the same time, Article 6.4 provides guidance as to the meaning of the terms "displacement" and "impedance", indicating that these phenomena can be found to exist where "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." The second sentence of Article 6.4 indicates that such a "{c}hange in relative shares of the market" can be found to exist where: (a) "there is an increase in the market share of the subsidized product"; (b) "the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined"; and (c) "the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy."

5.448. We do not read Article 6.4 as dispensing with the requirement to assess causation – i.e. whether any change in relative shares of the market to the disadvantage of the non-subsidized like product is the "effect of the subsidy" in question. Given that Article 6.4 contemplates a finding

[1148] See European Union's appellant's submission, paras. 720-723.
[1149] Emphasis added.
[1150] In contrast, Article 6.7 of the SCM Agreement describes circumstances in which displacement or impedance under Article 6.3 of that Agreement shall not be found to exist.

of "the displacement or impeding of exports" to be made "{f}or the purpose of" Article 6.3(b), it would appear that the required nexus between the subsidy and the relevant effects must be demonstrated on the basis of an evaluation of whether the former amounts to a genuine and substantial cause of the latter. Thus, rather than indicating that a complainant would not be required to demonstrate a "causal link" between the subsidy and its effects to the extent that it has shown that its like product is not subsidized, as the original panel appears to have suggested[1151], Article 6.4 provides guidance as to *how* displacement or impedance of exports can be demonstrated to exist in particular cases or situations.

5.449. Looking to the context of Article 6.3(b), we note that there is no corresponding provision similar to Article 6.4 that would elucidate on how displacement and/or impedance can be demonstrated with respect to "imports of a like product of another Member into the market of the subsidizing Member" within the meaning of Article 6.3(a). We understand the European Union to argue that, where a complainant raises claims under both Article 6.3(a) and Article 6.3(b), it would be required to demonstrate that its like product is non-subsidized for the purposes of any claim it brings under Article 6.3(b), but not for purposes of its claims under Article 6.3(a). We find it difficult to see a basis for this distinction given that Article 6.3(a) and Article 6.3(b) both speak to displacement and/or impedance, albeit in different geographic markets. Indeed, as the Appellate Body found in *US – Large Civil Aircraft (2nd complaint)*, Article 6.4 "applies to both phenomena referred to in Article 6.3(a) and (b)" and requires simply that, "as with displacement, a finding of impedance should be supported by evidence of changes in the relative market share in favour of the subsidized product, over a sufficiently representative period, to demonstrate 'clear trends' in the development of the market concerned."[1152]

5.450. Moreover, we note that Article 6.3(c) establishes that serious prejudice within the meaning of Article 5(c) of the SCM Agreement may arise in cases where the effect of the subsidy is "a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market". In addition, Article 6.5 of the SCM Agreement states:

> For the purpose of paragraph 3(c), *price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market*. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.[1153]

5.451. Article 6.5 therefore clarifies that price undercutting within the meaning of Article 6.3(c) "shall include" any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a "non-subsidized like product" supplied to the same market. We view the relationship between Article 6.3(c) and Article 6.5 as similar to that between Article 6.3(b) and Article 6.4, in the sense that Article 6.3(c) speaks broadly to the question of whether a "causal relationship" exists between the challenged subsidy and the relevant price effects, while Article 6.5 speaks to one of the relevant market phenomena mentioned in Article 6.3(c), that is, "significant price undercutting", and how it can be found to exist by comparing certain prices. Rather than indicating that a complainant would not be required to demonstrate a "causal link" between the subsidy and the undercutting of prices of a "non-subsidized like product", Article 6.5 provides guidance as to which prices to compare to determine whether undercutting occurs. We do not find support in Article 6.5 for the proposition that a complainant would be required in each case to demonstrate that its like product is non-subsidized in the context of claims brought under Article 6.3(c).

5.452. The European Union submits that "the language of Article 6.4 must be taken into account in *any* circumstances when Article 6.3(b) is applied."[1154] In the original proceedings,

[1151] See Original Panel Report, paras. 7.1769 and 7.1771.
[1152] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1086.
[1153] Emphasis added.
[1154] European Union's appellant's submission, para. 644. (emphasis original)

the Appellate Body noted that Article 6.4 "provides that the change in relative market shares shall be demonstrated 'over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned'."[1155] Moreover, referring to its findings in the original proceedings in this dispute, the Appellate Body stated in *US – Large Civil Aircraft (2nd complaint)* that "the effect of a subsidy must be examined 'over a sufficiently long period of time and is not limited to the year in which it was paid' because consideration of developments over a longer period 'provides a more robust basis for a serious prejudice evaluation'."[1156] The Appellate Body added that Article 6.4 "applies to both phenomena referred to in Article 6.3(a) and (b)"[1157], and requires, as with displacement, that a finding of impedance "be supported by evidence of changes in the relative market share in favour of the subsidized product, over a sufficiently representative period, to demonstrate 'clear trends' in the development of the market concerned."[1158] While we agree with the European Union that Article 6.4 is context for a proper interpretation of Article 6.3(b), we do not consider that it follows from this that a complainant is required in each case to demonstrate that its like product is non-subsidized to establish the existence of displacement or impedance under Article 6.3(b). Nor do we find support for such a proposition in the Appellate Body reports in the original proceedings in this dispute or in *US – Large Civil Aircraft (2nd complaint)*. As noted earlier, Article 6.4, and in particular its reference to "non-subsidized like product", does *not* set out an exclusive pathway to demonstrate displacement or impedance of exports in a third country market.

5.453. The European Union also maintains, in the alternative, that the existence of subsidization of the like product (Boeing LCA) "was something that the … Panel had to take into account, in any event, in its assessment of causation and non-attribution under Article 6.3(b)".[1159] Depending on the arguments and evidence that the parties put before a panel, it may be relevant for a panel to consider, as a part of its causation analysis, whether the like product of the complainant is subsidized. However, we see no reason why a panel would be required to determine whether one subsidizing Member is causing a particular market phenomenon to the exclusion of another subsidizing Member, as the European Union seems to suggest.[1160]

5.6.1.5 Conclusion

5.454. Regarding the European Union's arguments concerning the relevance of Article 6.4 of the SCM Agreement to the United States' claims under Article 6.3(b) of that Agreement, the Panel was required to examine the meaning of Article 6.3(b), including the relationship between this provision and Article 6.4, as clarified by the Appellate Body in the original proceedings in this dispute and in *US – Large Civil Aircraft (2nd complaint)*. It was also appropriate for the Panel to take into account the findings and reasoning by the original panel regarding the meaning of Article 6.4. The Panel could not simply refuse to address the arguments and evidence before it in dealing with the United States' claims under Article 6.3(b). Rather, the Panel was required to adjudicate the United States' claims under Article 6.3(b) in light of the arguments raised and evidence submitted by both parties to the dispute, and it erred by declining to do so.

5.455. Accordingly, we declare moot and of no legal effect the Panel's finding, in paragraph 6.1154 of the Panel Report, concerning the European Union's reliance on Article 6.4 to reject the United States' claims under Article 6.3(b) of the SCM Agreement. Based on our interpretation of Article 6.3(b), read together with Article 6.4, we disagree, however, with the European Union that a complainant is required to demonstrate, in each case, that its like product is non-subsidized in order to show that the effect of the subsidy is displacement and/or impedance of its like product in a third country market.

[1155] Appellate Body Report, *EC and certain member States — Large Civil Aircraft*, para. 1166. (fn omitted)

[1156] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1081 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1166, in turn quoting Appellate Body Report, *US – Upland Cotton*, para. 478).

[1157] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1086.

[1158] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1086.

[1159] European Union's appellant's submission, para. 645. (emphasis omitted)

[1160] See European Union's appellant's submission, para. 672. (fn omitted)

5.6.2 The relevant product markets

5.456. We turn next to examine the European Union's appeal regarding the Panel's analysis of the relevant product markets, which, as the European Union notes, formed the basis for the Panel's subsequent assessment of the adverse effects of the challenged subsidies.[1161] To provide context for our analysis, we begin by surveying the relevant findings by the Panel in some detail, before addressing the issues raised by the participants on appeal.

5.6.2.1 Arguments before the Panel and Panel findings

5.457. Before the Panel, the United States argued that there are three separate product markets relevant to its claims of serious prejudice in this dispute, namely: (i) the market for single-aisle aircraft; (ii) the market for twin-aisle aircraft; and (iii) the market for VLA.[1162] More specifically, the United States referred to the following product markets:

Table 5: Competitive relationships among 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 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

Source: Panel Report, Table 14 at paragraph 6.1155.

5.458. By contrast, the European Union argued that more than three, and up to six or seven, product markets should be considered in the context of an analysis of serious prejudice[1163]:

[1161] The European Union has separately appealed the Panel's failure properly to take into account, in its causation analysis, the differences in the nature and degree of competition between the relevant Airbus and Boeing LCA products in the various product and geographic markets in respect of which the United States brought its claims of serious prejudice. (European Union's appellant's submission, fn 521 to para. 559 and fn 616 to para. 626 (referring to section VIII.E.4.a of its appellant's submission))

[1162] Panel Report, para. 6.1155.

[1163] Panel Report, para. 6.1156.

Table 6: Competitive relationships among 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

Source: Panel Report, Table 15 at paragraph 6.1156.

5.459. Referring to the original appellate proceedings in this dispute, the Panel noted that the parties had "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".[1164] The Panel recalled, however, that the European Union had argued in the current compliance proceedings that Airbus and Boeing LCA compete in up to six or seven distinct product markets, two of which are "temporal" monopoly markets where either Airbus or Boeing is the sole credible supplier.[1165] The Panel further noted the United States' contention that the same three product markets relied upon by the Appellate Body in the original proceedings continue to exist.[1166]

5.460. Before turning to examine the parties' respective positions, the Panel referred to and quoted extensively from the Appellate Body's findings in the original proceedings regarding the identification of the relevant product markets and how this can assist a panel in determining whether a complainant has properly framed its claims of serious prejudice.[1167] The Panel recognized, in particular, that, when examining claims brought under Article 6.3 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".[1168] The Panel also noted that the Appellate Body referred to the notion of "market" as consisting of "the set of products (and geographical areas) that exercise *some* competitive constraint on each other".[1169] The Panel further recalled that the Appellate Body 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"[1170], and that "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."[1171] The Panel added that "a consideration of substitutability on the *supply-side*

[1164] Panel Report, para. 6.1157 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1177-1178).
[1165] Panel Report, para. 6.1157.
[1166] Panel Report, para. 6.1157.
[1167] Panel Report, paras. 6.1158-6.1172.
[1168] Panel Report, para. 6.1160. (emphasis original)
[1169] Panel Report, para. 6.1169 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 2467 to para. 1120 (emphasis added by the Panel)).
[1170] Panel Report, para. 6.1169 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1136).
[1171] Panel Report, para. 6.1170 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1134).

may also be required in order to determine whether two products compete in the same product market."[1172]

5.461. With these considerations in mind, the Panel turned to address the merits of the parties' respective positions in order to determine whether the United States had properly framed its claims of serious prejudice. In so doing, the Panel noted the European Union's argument that the United States was required to present "*quantitative analysis* in support of its allegations of demand-side substitutability between the relevant LCA products".[1173] The Panel found nothing in the Appellate Body report in the original proceedings to suggest that "a complainant bringing a serious prejudice complaint *must* identify the relevant product markets by using evidence that is 'rooted in' *quantitative analyses*."[1174] Instead, the Panel understood the Appellate Body to have simply found that, in determining whether two products "form part of the same product market, it will be important to explore and analyse the particular characteristics and features of demand and, in certain situations, supply".[1175] For the Panel, the reference by the Appellate Body to the "Small but Significant Non-Transitory Increase in Prices" (SSNIP) test was merely a reference to a test "that is *commonly* used to ascertain whether two products exercise competitive constraints on each other"[1176], and did not suggest that the Appellate Body had considered 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."[1177]

5.462. In light of the particular characteristics of the LCA industry, and of the absence of reliable pricing information and difficulties associated with identifying the relevant product markets, the Panel further emphasized that "the task of performing a reliable econometric analysis of the demand for LCA products would face a number of significant methodological and data challenges."[1178] The Panel went on to note that it could not see how, in the absence of accurate pricing information, "the United States could have generated *meaningful* results from the application of any of the … relevant quantitative methods of analysis identified by the European Union".[1179] Referring to the practice of competition authorities, the Panel added that the European Commission, for instance, would "only take into account 'available quantitative evidence' for the purpose of identifying relevant product markets when it is 'capable of withstanding rigorous scrutiny'; 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'."[1180] Thus, the Panel found "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".[1181] Accordingly, the Panel concluded that "the United States was entitled to advance its case using any and all evidence it believe{d} establishe{d} the existence of the three relevant products markets".[1182]

5.463. The Panel next turned to consider the European Union's argument that "the United States ha{d} failed to establish the existence of the three alleged passenger LCA product markets because it ha{d} 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."[1183] The

[1172] Panel Report, para. 6.1172. (emphasis original)
[1173] Panel Report, para. 6.1174. (emphasis original)
[1174] Panel Report, para. 6.1178 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1120-1121). (emphasis original)
[1175] Panel Report, para. 6.1178.
[1176] Panel Report, para. 6.1179 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 2468 to para. 1120 (emphasis added by the Panel)).
[1177] Panel Report, para. 6.1179. (emphasis original)
[1178] Panel Report, para. 6.1205.
[1179] Panel Report, para. 6.1207. (emphasis original)
[1180] Panel Report, para. 6.1207 (quoting, respectively, Commission Notice on the Definition of Relevant Market, para. 39, published in *Official Journal of the European Communities*, C Series, No. 372 (1997) (Panel Exhibit USA-551), para. 38; OECD Policy Roundtables, Competition Committee, Background Note on Market Definition (2012) (Panel Exhibit USA-549), European Commission submission, p. 336).
[1181] Panel Report, para. 6.1208.
[1182] Panel Report, para. 6.1208.
[1183] Panel Report, para. 6.1209 (quoting European Union's second written submission to the Panel, paras. 626-704; responses to Panel questions Nos. 48, 49, 50, 52-56, 70-71, 75, and 79, paras. 213, 215,

Panel recalled the Appellate Body's finding that two products are in the same product market when they are "sufficiently substitutable so as to create competitive constraints on each other".[1184] The Panel noted that the Appellate Body had not qualified this statement by stating "that the required competitive constraints must be 'significant'".[1185] For the Panel, "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", it was "apparent" that the Appellate Body had not articulated a standard that "*require{d}* showing that two products impose 'significant competitive constraints' on each other or that those products {were} 'closely competitive'".[1186]

5.464. Based on its analysis, the Panel found no basis to interpret the word "market" in Article 6.3 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"[1187], 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".[1188] The Panel recalled 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*."[1189]

5.465. Thereafter and having recalled the general conditions of competition in the LCA industry[1190], the Panel considered certain marketing materials and presentations in its evaluation of "the extent to which the parties' arguments demonstrate the existence of the alleged single-aisle, twin-aisle and {VLA} … product markets".[1191] The Panel was not convinced that these materials presented "a clear picture of the extent to which Airbus and Boeing consider{ed that} competition takes place *exclusively* across the three … LCA product markets asserted by the United States".[1192] Nonetheless, the Panel considered that this evidence suggested that "Airbus and Boeing {would}, 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."[1193] For the Panel, therefore, the relevant materials lent "a degree of support to the continued existence of the three LCA … markets … which the United States relie{d} upon to make its serious prejudice complaint" in these compliance proceedings.[1194]

5.466. The Panel next turned to examine the parties' positions with respect to each of the three alleged product markets individually. For each market, the Panel examined the parties' arguments and evidence, including multiple expert statements, addressing: (i) the physical and performance characteristics, end-uses, and customers of the various LCA; (ii) the extent to which different LCA exercised pricing constraints on each other; and (iii) Airbus' and Boeing's marketing strategies and sales campaigns.

5.467. Regarding single-aisle LCA, the United States argued that each LCA model in Boeing's 737 family competes with each LCA model in Airbus' A320 family.[1195] While the European Union agreed that competition existed between Airbus and Boeing single-aisle products, it argued that 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*,

221-225, 227, 230, 232, 250, 253, 255, 258, 261, 277, 288-291, 303, and 327, respectively (emphasis added by the Panel)).

[1184] Panel Report, para. 6.1210 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120).

[1185] Panel Report, para. 6.1210.

[1186] Panel Report, para. 6.1211. (emphasis original)

[1187] Panel Report, para. 6.1211.

[1188] Panel Report, para. 6.1211.

[1189] Panel Report, para. 6.1211. (emphasis original)

[1190] Panel Report, paras. 6.1213-6.1223.

[1191] Panel Report, para. 6.1224.

[1192] Panel Report, para. 6.1236. (emphasis original)

[1193] Panel Report, para. 6.1236.

[1194] Panel Report, para. 6.1236.

[1195] Panel Report, para. 6.1237.

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".[1196]

5.468. The Panel noted that there was "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"[1197], and ultimately found that "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."[1198]

5.469. Regarding the existence of effective competition between the current and new generation of single-aisle LCA products, the Panel found that "the superior fuel-efficiency of the new generation of Airbus and Boeing single-aisle aircraft {did} not mean they {were} impervious to competition from current versions."[1199] The Panel found that, to the extent that the European Union had demonstrated that "the A320ceo cannot overcome the fuel-burn advantage of the A320neo by price discounting when *both aircraft are delivered on the same date*"[1200], it did "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."[1201] On this basis, the Panel found that the current versions of Airbus and Boeing single-aisle aircraft not only 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."[1202]

5.470. The Panel also assessed whether the existence of competition between the current and new generations of Airbus and Boeing single-aisle aircraft was supported by evidence proffered by the United States concerning two specific sales campaigns: the 2011 American Airlines and 2011-2012 Norwegian Air Shuttle campaigns.[1203] The Panel found the A320neo to have been a "very strong competitor" in those sales campaigns[1204], and concluded that "the United States ha{d} 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 {its} serious prejudice claims".[1205]

5.471. Regarding twin-aisle LCA, the United States argued that the Boeing 767, 777, and 787 families of LCA compete in the same product market as the Airbus A330 and A350XWB families.[1206] Conversely, the European Union asserted that there were a number of separate markets for these five families of Airbus and Boeing LCA. In particular, the European Union

[1196] Panel Report, para. 6.1237 (referring to European Union's first written submission to the Panel, paras. 600-606; Christophe Mourey, Senior Vice President, Contracts, Airbus, "Statement on Current Competitive Conditions in the LCA Industry", 4 July 2012 (Mourey Statement) (Panel Exhibit EU-8 (BCI)), paras. 75-84). (emphasis original)

[1197] Panel Report, para. 6.1287.

[1198] Panel Report, para. 6.1287. See also para. 6.1246.

[1199] Panel Report, para. 6.1288.

[1200] Panel Report, para. 6.1288. (emphasis original) The Panel further recalled that the European Union had failed to disclose the information on price concessions that were used in the Supplemental Statement by Christophe Mourey (Christophe Mourey, Senior Vice President, Contracts, Airbus, "Supplemental statement on current competitive conditions in the LCA industry", 12 December 2012 (Supplemental Mourey Statement) (Panel Exhibit EU-124 (BCI/HSBI))) to arrive at its conclusions. (Ibid., fn 2187 thereto (referring to para. 6.1262))

[1201] Panel Report, para. 6.1288.

[1202] Panel Report, para. 6.1288.

[1203] Panel Report, para. 6.1277.

[1204] Panel Report, para. 6.1290.

[1205] Panel Report, para. 6.1292.

[1206] Panel Report, para. 6.1293. The Panel noted that the United States also argued that the alleged market for twin-aisle LCA includes the A340. However, the Panel found 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 project in November 2011. Accordingly, the Panel considered that the A340 family of Airbus LCA was no longer available and could not, therefore, fall within the scope of the alleged twin-aisle market for LCA that exists currently. (Ibid., fn 2188 thereto)

submitted 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."[1207] In respect of the 767, the European Union submitted that "its allegedly 'outdated' and 'inferior' technology mean{t} that it {did} not compete in the same product market as the A330 and that, in any case, it ha{d} been replaced by the 787."[1208]

5.472. The Panel found that, "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."[1209] The Panel added that, "within the range of potential customer needs that may be satisfied by the five families of LCA, there {we}re 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."[1210] For the Panel, this suggested that, "while the potential customer-base for Airbus and Boeing twin-aisle aircraft {was} likely to be more varied than the potential customer-base for their single-aisle aircraft, any individual customer {was} likely to have multiple combinations of relatively closely-matched Airbus and Boeing twin-aisle aircraft to choose from."[1211]

5.473. The Panel did "not consider the superior operating performance of the new generation of Airbus and Boeing twin-aisle aircraft compared with their current generation models {to} signal{} that they {were} sold {in} separate product markets."[1212] Rather, the Panel considered that "Airbus and Boeing {would} regularly compete with each other on the timing of the availability of their aircraft".[1213] According to the Panel, this was "because of the important role that delivery considerations play in a potential customer's purchase decision".[1214] However, the Panel did not consider "the relative near-term availability" of the A330 and 777 as an advantage that places those aircraft models in "'temporary' product markets of their own".[1215] Rather it saw this as simply "*one* of the factors that customers … {would} take into account in their purchase decisions".[1216] The Panel noted in this regard that "non-price factors other than delivery terms (e.g. fleet commonality) might … serve to diminish the performance advantages of new generation aircraft over current generation aircraft" and might create "more room for price discounting to play a greater role in a customer's purchase decision".[1217]

5.474. The Panel further found that "the competitive relationships between all five families of Airbus and Boeing twin-aisle aircraft have been constantly evolving, reflecting not only changing demand … but also the pace and nature of aircraft innovation."[1218] However, the Panel cautioned that "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".[1219] In the Panel's view, "these and other considerations suggest{ed} that the 787 and the A350XWB {did} not merely face competitive constraints from each other, but also from other twin-aisle aircraft."[1220]

[1207] Panel Report, para. 6.1293.
[1208] Panel Report, para. 6.1293 (referring to European Union's first written submission to the Panel, paras. 607-619; second written submission to the Panel, paras. 626-628; response to Panel question No. 70).
[1209] Panel Report, para. 6.1363.
[1210] Panel Report, para. 6.1363.
[1211] Panel Report, para. 6.1363.
[1212] Panel Report, para. 6.1364.
[1213] Panel Report, para. 6.1364.
[1214] Panel Report, para. 6.1364.
[1215] Panel Report, para. 6.1364.
[1216] Panel Report, para. 6.1364. (emphasis original)
[1217] Panel Report, para. 6.1365.
[1218] Panel Report, para. 6.1367.
[1219] Panel Report, para. 6.1367. (emphasis original)
[1220] Panel Report, para. 6.1365.

5.475. Finally, the Panel turned to consider the United States' assertion that the existence of the alleged competitive relationships between (i) "the A330 and the 787", and (ii) "the A330, A350XWB, and the 777", are also substantiated by the HSBI and other evidence before the Panel.[1221] The Panel found that "it {was} 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"[1222] or, "at the very least, imposing some level of competitive constraint on its rival's offering".[1223] In this regard, the Panel recalled the Appellate Body's finding in the original proceedings dismissing 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, notwithstanding the absence of any formal aircraft offer having been made on the part of Boeing."[1224] On this basis, the Panel considered that "evidence that both Airbus and Boeing *actually did participate* in the same sales campaign should, *a fortiori*, be interpreted to strongly suggest … that the products in question were in competition with each other for the relevant customer's sales."[1225] Accordingly, the Panel concluded that the United States had 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".[1226]

5.476. Finally, with respect to VLA, the Panel recalled the United States' argument that the A380 and the 747-8I compete in the VLA product market and, further, 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."[1227] By contrast, the European Union had asserted that "the A380 and the 747-8I are sold in two separate monopoly markets" and that "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."[1228]

5.477. The Panel noted that the A380 and the 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.[1229] The Panel stated that, "{w}hile the A380's larger seating capacity and relatively modern technologies mean{t} that it has a per/seat operating cost and revenue advantage over the 747-8I", it considered that "this advantage {would} decrease the closer the expected seating capacity of a particular mission is to the maximum seating capacity of the 747-8I."[1230] Thus, the Panel considered it "apparent from the conditions of competition in the LCA industry that the A380 and the 747-8I {would} have a potential customer base that {would} include airlines with mission requirements that overlap the capabilities of the two aircraft".[1231] The Panel did not consider that "the A380's operating cost and revenue advantage over the 747-8I on missions where passenger capacity is close to {the A380's} maximum" would demonstrate that the former was "sold in its own monopoly market".[1232]

5.478. The Panel next considered whether the existence of competition between the A380 and the 747-8I in the same product market was further evidenced by the pricing pressure that each aircraft imposed upon the other. "{G}iven that there {would} be a range of customer demands for LCA with a passenger capacity exceeding 400 seats", the Panel found that "one would expect to

[1221] Panel Report, para. 6.1346.
[1222] Panel Report, para. 6.1348.
[1223] Panel Report, para. 6.1348.
[1224] Panel Report, para. 6.1349. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1223.
[1225] Panel Report, para. 6.1349. (emphasis original)
[1226] Panel Report, para. 6.1370.
[1227] Panel Report, para. 6.1371 (referring to United States' second written submission to the Panel, para. 492; response to Panel question Nos. 50, 52, and 63, paras. 156, 166, and 247, respectively).
[1228] Panel Report, para. 6.1371 (referring to European Union's first written submission to the Panel, paras. 620-633).
[1229] Panel Report, para. 6.1407.
[1230] Panel Report, para. 6.1407.
[1231] Panel Report, para. 6.1407 (referring to paras. 6.1379-6.1383).
[1232] Panel Report, para. 6.1407.

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."[1233] However, the Panel considered that "this {did} not imply the absence of competition", but only that "the competitive constraints imposed by one LCA on the other {would} be more or less intense depending upon which product more closely satisfie{d} the relevant needs of a potential customer".[1234]

5.479. Finally, the Panel addressed the United States' argument 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".[1235] The Panel considered it to be "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".[1236] The Panel found that "the United States' HSBI evidence clearly show{ed} 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".[1237] The Panel further considered the 747-8I and the A380 to compete regularly for the same customers, finding "additional support in the Qantas and British Airways sales campaigns that resulted in the order of 20 A380s in 2006 and 2007".[1238] Noting that the A380 and the 747-8I were "not perfect substitutes", the Panel, nonetheless, considered that "the fact that one LCA will have a superior economic value to another under certain demand conditions, does not render it impervious to competition".[1239] Instead, the Panel found that "{o}ne aircraft's economic advantage over another might simply reflect that it is better placed to *win the competition* for sales between two imperfectly substitutable products".[1240] Accordingly, the Panel found that "the United States ha{d} established that, for the purpose of evaluating its claims of serious prejudice under Article 6.3 … the A380 and 747-8I {could} be considered to compete against each other in one single product market for VLA".[1241]

5.480. For all these reasons, the Panel concluded that it was appropriate to examine the United States' claims of serious prejudice on the basis of the three separate product markets identified above.[1242] The Panel, however, emphasized 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. 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) they represent the three segments within which most competitive interactions between the relevant aircraft will commonly take place.[1243]

5.6.2.2 Claims on appeal

5.481. In its appellant's submission, the European Union takes issue with the Panel's findings on three grounds. First, the European Union claims that the Panel erred in interpreting the term "market" in Article 6.3 of the SCM Agreement to mean that two products fall within the same product market as long as there is "some" competitive relationship between the products,

[1233] Panel Report, para. 6.1408.
[1234] Panel Report, para. 6.1408.
[1235] Panel Report, para. 6.1396 (referring to United States' first written submission to the Panel, paras. 483-486 and 493-503; response to Panel question No. 49).
[1236] Panel Report, para. 6.1400.
[1237] Panel Report, para. 6.1400.
[1238] Panel Report, para. 6.1402.
[1239] Panel Report, para. 6.1405.
[1240] Panel Report, para. 6.1405. (emphasis original)
[1241] Panel Report, para. 6.1410.
[1242] Panel Report, paras. 6.1416 and 7.1.d.xi.
[1243] Panel Report, para. 6.1416. (emphasis original; fns omitted)

and consequently failing to perform a quantitative analysis of the nature and degree of competition between the products at issue to determine whether it was "significant".[1244] Second, the European Union argues that, even assuming that the Panel's interpretation was correct, the Panel erred in its application of Articles 5(c), 6.3, and 7.8 of the SCM Agreement because it failed to make the product market finding necessarily implied by its interpretation – i.e. that there exists a single product market "encompassing at least *all* LCA"[1245] based on the existence of "some" competition between each model of Airbus and Boeing LCA. Third, the European Union submits that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU by assessing the United States' adverse effects claims on the basis of the three-way market segmentation proposed by the United States, without assessing the nature and extent of competition between the aircraft that the United States had placed in separate product markets.[1246]

5.482. We address each of these claims below, beginning with the interpretation of the term "market" in Article 6.3 of the SCM Agreement, and the type of adverse effects analysis that is required under this Agreement. We note that in arguing that the Panel erred in its interpretation of the term "market", the European Union refers to various statements made by the Panel which, according to the European Union, demonstrate that the Panel erred in its interpretative approach.[1247]

5.6.2.3 Whether the Panel erred in interpreting the term "market" in Article 6.3 of the SCM Agreement

5.483. The European Union relies upon the Appellate Body's findings in the original proceedings to argue that "'the nature and degree' of competition, and *not merely the existence of competition*, is decisive for determining 'the scope of the relevant product market'."[1248] For the European Union, "the mere existence of competition between two products is *insufficient* to group them into the same product market" for purposes of conducting an adverse effects analysis.[1249] Instead, the European Union submits that two products would fall within the same market only where an analysis of "the 'nature and degree of competition' between them reveals that they exercise '*significant competitive constraints*' on one another."[1250] Conversely, they would fall within separate product markets where there is no "significant" competition between them.[1251] The European Union argues therefore that the Panel erred in interpreting the term "market" to mean that two products fall within the same product market as long as there is "some" competitive relationship between the products, regardless of the nature or degree of that relationship.[1252] According to the European Union, the Panel's erroneous interpretation of the term "market" in Article 6.3 of the SCM Agreement is reflected in the Panel's analysis of the product market delineations suggested by both parties before the Panel.

5.484. The United States counters that the Panel followed the Appellate Body's guidance concerning the term "market" in Article 6.3 and the importance of making an objective assessment of product markets in accordance with that meaning.[1253] Contrary to what the European Union suggests, the Panel did not "find that all products that have some competitive relationship, regardless of the nature or degree of that relationship, must always be found to be in the same market for the purposes of Article 6.3"[1254]; nor did the Panel consider the intensity of competition between different LCA product pairings "to be irrelevant".[1255] Instead, in the United States' view,

[1244] European Union's appellant's submission, paras. 597-598 and 606.
[1245] European Union's appellant's submission, para. 639. (emphasis original) See also para. 540.
[1246] European Union's appellant's submission, paras. 541-542 and 639.
[1247] European Union's appellant's submission, paras. 599-601.
[1248] European Union's appellant's submission, para. 577 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1123 (emphasis added by the European Union)).
[1249] European Union's appellant's submission, para. 579. (emphasis added)
[1250] European Union's appellant's submission, para. 579 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1123 (emphasis added by the European Union)).
[1251] European Union's appellant's submission, para. 579.
[1252] European Union's appellant's submission, paras. 597 and 602.
[1253] United States' appellee's submission, para. 273.
[1254] United States' appellee's submission, para. 274.
[1255] United States' appellee's submission, para. 274 (quoting European Union's appellant's submission, para. 599).

the Panel "selected the best possible market definitions − those which captured 'most competitive interactions' − in light of the difficulties inherent in 'drawing a line' amidst products that are imperfect substitutes subject to demand of a 'complex, constantly evolving and often idiosyncratic' nature."[1256] The United States further submits that the Panel rightly "recognized that the Appellate Body had identified quantitative methods of analysis as potentially useful tools without imposing a legal requirement that they must be used in every case".[1257]

5.485. Regarding the meaning of the term "market", we note that the Appellate Body has explained that "a market comprises only those products that exercise competitive constraint on each other".[1258] It has also considered that "two products would be in the same market if they were engaged in actual or potential competition in that market."[1259] In the original proceedings, the Appellate Body further referred to the notion of "market" as consisting of "the set of products (and geographical areas) that exercise some competitive constraint on each other".[1260] In so doing, the Appellate Body referred to a *range* of considerations that may assist in determining whether two products compete in the same market, in the sense that they "exercise competitive constraints on each other".[1261] Specifically, with respect to demand-side substitutability, the Appellate Body explained that it may be relevant for a panel to consider, for example, "whether customers demand a range of products or whether they are interested in only a particular product type".[1262] Factors such as "product homogeneity, flight ranges, seating capacities, prices, fuel efficiency, and other performance characteristics" may also be relevant.[1263] The Appellate Body noted that, "{o}rdinarily, the subsidized product and the like product will form part of a larger product market" but "it may be the case that a complainant chooses to define the subsidized and like products so broadly that it is necessary to analyze these products in different product markets".[1264] Competition may thus be found to occur not *only* between specific pairings of product types[1265] but, "{i}n some cases, the entire product range offered by the complainant may compete with the range of products of the respondent that is allegedly subsidized."[1266]

5.486. The Appellate Body has found that a panel is "required to make an objective assessment of the competitive relationship between specific products in the marketplace and to define the relevant product market in order to determine whether particular products can be treated as forming part of a single product market or several product markets" for purposes of an analysis of a serious prejudice under Articles 6.3(a) and 6.3(b) of the SCM Agreement.[1267] As we see it, a panel is called upon in this respect to carry out a holistic consideration of all relevant evidence and arguments before it in order to make an objective determination of the relevant product

[1256] United States' appellee's submission, para. 288 (quoting Panel Report, para. 6.1412).
[1257] United States' appellee's submission, para. 277.
[1258] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1120. (fn omitted)
[1259] Appellate Body Report, *US − Upland Cotton*, para. 408. The Appellate Body in that dispute also agreed with a definition of "market" as "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices". (Ibid. (quoting Panel Report, *US − Upland Cotton*, para. 7.1236, in turn quoting *Merriam-Webster Dictionary online*))
[1260] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, fn 2467 to para. 1120 (quoting Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2005), p. 102).
[1261] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1120.
[1262] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1120.
[1263] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1134. We also recall that in *US − Upland Cotton*, the Appellate Body shared the panel's view that "the scope of the 'market', for determining the area of competition between two products, may depend on several factors such as the nature of the product, the homogeneity of the conditions of competition, and transport costs." (Appellate Body Report, *US − Upland Cotton*, para. 408 (fn omitted))
[1264] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1119. The Appellate Body emphasized, however, that "it is important to note that whether or not a broad or narrow range of products benefit from subsidization says little about whether all these products compete in the same market" and that "products benefiting from subsidies may compete in very different markets". (Ibid., para. 1123)
[1265] We recall the Appellate Body to have found that "an assessment of the conditions of competition may reveal the existence of multiple product markets in which particular products of the complaining Member compete with particular subsidized products of the respondent". (Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1123)
[1266] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1123.
[1267] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1123.

market. A panel should assess whether it is appropriate to examine serious prejudice claims on the basis of the particular market segmentation proposed by the complainant or whether the range of products at issue compete in different and distinct markets.[1268] In so doing, the panel has to examine the respondent's arguments alleging the existence of different market segmentations and rebutting the complainant's arguments.[1269] An assessment of "whether the alleged subsidized and like products compete in the same market or multiple markets" is, as the Appellate Body has found, "a prerequisite for assessing" claims brought under Article 6.3.[1270] However, 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."[1271] According to the Appellate Body, "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."[1272] Thus, two products are in the same product market when they are "sufficiently substitutable so as to create competitive constraints on each other"[1273], or if they exercise "meaningful competitive constraints"[1274] on each other.[1275]

5.487. As we understand it, the European Union does not argue that the use of quantitative methods of analysis is required in each case. The European Union insists, however, that placing two products into the same product market requires a careful consideration of the nature and degree of competition between them.[1276] The European Union further submits that, in assessing the scope of product markets in a given case, a panel must ensure that products within a product market compete more closely with one another than with products outside that product market.[1277]

5.488. As noted by the Appellate Body, a consideration of *quantitative* tools and evidence may assist a panel in defining the relevant product markets[1278] and in answering the question of

[1268] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1131.

[1269] In the original proceedings, the Appellate Body found that 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' for purposes of its adverse effects inquiry". In so doing, the Appellate Body stated that the original panel was also required to assess "the European Communities' allegation that there {were}, in fact, five distinct product markets of Airbus and Boeing LCA". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1131 (emphasis original)) According to the Appellate Body, the original panel should have then reached a conclusion as to whether any of the parties' or a different "product market" definition was appropriate for purposes of its displacement analysis. (Ibid.)

[1270] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1128.

[1271] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.

[1272] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120. The Appellate Body noted that "{a}lthough 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." (Ibid. (emphasis original))

[1273] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.

[1274] We note that the compliance panel in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* found that "the European Union has not demonstrated that existing technology aircraft and new technology aircraft of similar capacity, range, and MTOW no longer exercise meaningful competitive constraints on each other such that they presently compete in separate LCA product markets". (Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 9.39) We further note that, in coming to that conclusion, the compliance panel in that dispute noted this Panel's finding that "all Airbus and Boeing single-aisle aircraft compete in one and the same LCA product market", and "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 LCA product market for the purpose of the serious prejudice claims". (Ibid., fn 2712 to para. 9.39 (referring to Panel Report, paras. 6.1286 and 6.1370))

[1275] In its opening statement at the second session of the oral hearing, the European Union recalled that the compliance panel in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* used the formulation "meaningful competitive constraints", rather than significant competitive constraints. The European Union emphasized that what matters is not the adjective chosen to describe the requirement, provided that a panel's analysis properly takes into account the required nature and degree of competition between the products.

[1276] European Union's opening statement at the second session of the oral hearing.

[1277] European Union's opening statement at the second session of the oral hearing.

[1278] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1134 and fn 2492 thereto.

whether products exercise meaningful competitive constraints on each other and are sufficiently substitutable to fall within the same product market. However, like the Panel, we do not see a reason to preclude that a careful scrutiny of *qualitative* evidence may also be sufficient provided that it permits an informative and meaningful analysis of the relevant product markets. Depending on the particularities of a given case[1279], it may be sufficient for a panel to examine *qualitative* evidence regarding demand-side and supply-side substitutability, product characteristics, end-uses, and customer preferences to reach a conclusion as to the nature and degree of competition between two products. Further to the arguments raised in its appellant's submission, the European Union clarified at the oral hearing that it was *not* arguing that complainants *must* use *quantitative* analyses to identify relevant product markets *in each case*. Rather, as the European Union had argued before the Panel, such tools should be used where possible and where they assist the task of identifying relevant product markets.[1280] As we see it, the Panel rightly relied on the Appellate Body report in the original proceedings to reject the proposition that "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."[1281] While the European Union does not argue that a review of *quantitative* evidence is required in each case, its appellant's submission focuses on specific aspects of the Panel's analysis to argue that the Panel considered the intensity of competition between different product pairings to be altogether "irrelevant".[1282] We address these arguments below, in particular when we discuss the Panel's analysis of the product market segmentations proposed by the parties.

5.489. The Appellate Body has emphasized that, in cases where a complainant chooses to define the subsidized and like products "broadly", it will be "necessary to analyze these products in different product markets … so as to analyze further the real competitive interactions that are taking place, and thereby determine whether displacement {or impedance} is occurring".[1283] While it may be possible to conduct an analysis of adverse effects and reach meaningful findings of serious prejudice in instances where "all products are not engaged in direct competition for the same sales or orders – or where the competitive relationship between such products is, at most, indirect or remote"[1284], this must however "be properly accounted for" in the serious prejudice analysis.[1285] Thus, to the extent that a complainant has adopted a broad product market definition, it may be more difficult, depending on the facts of a given case, for such complainant to establish the existence of adverse effects. We therefore agree with the European Union to the extent that it suggests that there is a critical relationship between product market definition and the causation analysis, in the sense that the tighter the market definition, the easier it may be to demonstrate causation, and conversely, the looser the market definition the more difficult it may be to demonstrate causation.[1286]

5.490. As detailed above, the Panel referred extensively to the Appellate Body report in the original proceedings, including the finding that two products are in the same product market when they are "sufficiently substitutable so as to create competitive constraints on each other".[1287] In particular, the Panel correctly noted 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, it will be important to explore and analyse the particular characteristics and features of demand and, in certain situations, supply."[1288] The Panel also recognized that, when examining claims brought under Article 6.3, "a panel must make an objective assessment of

[1279] In this regard, we recall the Appellate Body's guidance that the identification of the relevant product market(s) "is likely to vary from case to case depending upon the particular factual circumstances". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1123)

[1280] European Union's response to questioning at the oral hearing.

[1281] Panel Report, para. 6.1204. (emphasis original)

[1282] European Union's appellant's submission, para. 599 (referring to Panel Report, para. 6.1289), para. 600 (referring to Panel Report, para. 6.1382), and para. 601 (referring to Panel Report, paras. 6.1280, 6.1315, 6.1320, and 6.1348).

[1283] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1119. The Appellate Body noted that a similar argument can be made with respect to impedance. (Ibid., fn 2466 thereto)

[1284] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1136.

[1285] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1136.

[1286] European Union's opening statement at the second session of the oral hearing.

[1287] Panel Report, para. 6.1210 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120).

[1288] Panel Report, para. 6.1178.

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."[1289] In doing so, the Panel, in our view, properly articulated the standard to be applied in identifying the relevant product market(s) in this dispute. However, we note that the European Union refers to certain statements made by the Panel[1290] that, according to the European Union, demonstrate that the Panel erred in its interpretative approach. In particular, the European Union contends that these statements made by the Panel reveal that the "the Panel considered the intensity of competition to be irrelevant"[1291] in coming to its product market delineation. We therefore turn now to consider the specific arguments that the European Union makes in this regard.

5.491. We recall that the Panel undertook a qualitative assessment of the intensity of competition between products for the purposes of identifying the relevant product markets in this dispute, having regard to the Appellate Body's jurisprudence and the relevant evidence and arguments before it. In so doing, the Panel observed that the parties' arguments focused little on supply-side substitutability[1292], and that the debate between them mainly addressed the extent to which a level of demand-side substitution between different Airbus and Boeing aircraft was demonstrated by: (i) the physical and performance characteristics, end-uses, and customers of the different Airbus and Boeing aircraft; (ii) the existence and nature of any pricing constraints between these aircraft; and (iii) the evidence with respect to sales campaigns.[1293] With this background in mind, we begin our review with the single-aisle LCA market.

5.6.2.3.1 Single-aisle LCA market

5.492. Beginning with the Panel's analysis of competition in the single-aisle LCA market, the European Union points to the Panel's statement that:

> 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.[1294]

5.493. The European Union refers to this statement to support its assertion that the Panel considered that two products are "in separate product markets only where there is an absence of competition, such that customers would buy *no product at all* if the subsidised product were unavailable".[1295]

5.494. The United States counters that the European Union misconstrues the Panel's findings when it cites this statement as standing for the proposition that the Panel's test places products into the same market unless there is no competition between them.[1296] According to the United States, the Panel was making the point that "the success of the A320neo '*over the 737NG*' in a given sales campaign does not demonstrate an absence of competition."[1297]

5.495. Contrary to what the European Union suggests, we do not understand the above-quoted statement from the Panel Report to indicate that the Panel considered the intensity of competition between different product types to be *irrelevant per se*. Rather, the Panel appears to have simply expressed the view that, to accept the argument by the European Union that there was

[1289] Panel Report, para. 6.1160. (emphasis original)
[1290] European Union's appellant's submission, para. 599 (referring to Panel Report, para. 6.1289), para. 600 (referring to Panel Report, para. 6.1382), and para. 601 (referring to Panel Report, paras. 6.1280, 6.1315, 6.1320, and 6.1348).
[1291] European Union's appellant's submission, para. 599.
[1292] Panel Report, paras. 6.1238, 6.1294, and 6.1372.
[1293] Panel Report, paras. 6.1238, 6.1294, and 6.1372.
[1294] European Union's appellant's submission, para. 599 (quoting Panel Report, para. 6.1289). (emphasis original)
[1295] European Union's appellant's submission, para. 597 (referring to Panel Report, paras. 6.1210, 6.1211, 6.1236, 6.1289, and 6.1382). (emphasis original)
[1296] United States' appellee's submission, para. 330.
[1297] United States' appellee's submission, para. 329 (quoting Panel Report, para. 6.1289). (emphasis original)

no competition at all between the 737NG and the A320neo in the sales campaigns at issue, it would have had to find that the A320neo had a temporary monopoly at the time of the sales. It does not follow from this that the Panel would have considered that two products could be found to compete in the same, or in different, product markets *regardless of the nature and degree of competition* that exists between them. Instead, the Panel recognized that the degree of competition existing in each of the relevant product markets will not "be identical between all pairings or combinations of aircraft", that there "will be weaker and stronger competitive relationships within each market *depending upon the particular circumstances of a sale*"[1298], and that "important competitive relationships may also exist between pairings or combinations of aircraft *across* two, or even all three, of the product markets".[1299] The Panel found, however, that:

> while it {was} apparent that the three product markets the United States {had} 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, {the Panel was} satisfied that at present (as in the original proceeding) they represent the three segments within which *most* competitive interactions between the relevant aircraft will commonly take place.[1300]

5.496. Specifically, with respect to competition in the single-aisle LCA market, the Panel noted that "Airbus ha{d} itself emphasized the high degree of commonality between the A320ceo and the A320neo in a number of publicly available presentations and documents."[1301] The Panel also found that "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."[1302] In the Panel's view, it followed that "a typical customer wanting to purchase a single-aisle aircraft {would} have a *potential* choice between two aircraft from each manufacturer, one from a current version and another from the new generation of products."[1303] Thus, as we see it, in assessing the nature and extent of competition between "both producers' range of new generation single-aisle products {and} their current versions"[1304], the Panel took into account the Appellate Body's guidance regarding the identification of relevant product markets by considering the requisite demand-side substitutability factors.[1305] Contrary to what the European Union appears to suggest, the Panel therefore did not disregard the European Union's argument that competition in the single-aisle LCA market takes place in two separate product markets: one for the current versions of the A320 and 737NG families; and the other for the new generation A320neo and 737MAX families.[1306] Rather, the Panel addressed this argument by the European Union, but disagreed with it.

5.497. The Panel considered, for example, the United States' argument 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."[1307] The Panel found in this regard that, "in setting the price for new generation products, Airbus and Boeing {would} not only have to consider each other's pricing on the 737MAX and A320neo, but also the 737NG and A320ceo."[1308] According to the Panel, this suggested that "current versions of

[1298] Panel Report, para. 6.1416. (emphasis added)
[1299] Panel Report, para. 6.1416. (emphasis original; fn omitted)
[1300] Panel Report, para. 6.1416. (emphasis added; fn omitted)
[1301] Panel Report, para. 6.1244.
[1302] Panel Report, para. 6.1287. See also para. 6.1246.
[1303] Panel Report, para. 6.1287. (emphasis original)
[1304] Panel Report, para. 6.1237.
[1305] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1120-1122 and 1134.
[1306] Panel Report, para. 6.1237 (referring to European Union's first written submission to the Panel, paras. 600-606; Mourey Statement (Panel Exhibit EU-8 (BCI)), paras. 75-84).
[1307] Panel Report, para. 6.1249 (referring to Bair Declaration (Panel Exhibit USA-339 (BCI)), paras. 27 and 29; United States' response to Panel question No. 63). (emphasis added) We note that Bair uses the phrase "significant competitive relationships" to describe the competition between the 737NG, 737MAX, A320ceo, and A320neo. (Bair Declaration (Panel Exhibit USA-339 (BCI)), paras. 27 and 29)
[1308] Panel Report, para. 6.1252.

Airbus and Boeing single-aisle LCA do impose pricing constraints on their new generation models".[1309] The Panel found additional support from the evidence on record, noting:

> 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.[1310]

> 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 new generation neo and MAX with single-aisle customers.*[1311]

5.498. The Panel also considered the European Union's arguments that "the current versions of Airbus and Boeing single-aisle LCA products {did} not place any significant pricing constraints on their respective new generation models"[1312] and "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."[1313] Based on its analysis of the evidence adduced by the European Union, the Panel found that, "{w}hile operating costs (including fuel-efficiency) {would} invariably play a significant role in any customer's purchase decision, there {were} other factors that {would} also play an important role", such as "price, fleet commonality, and date of delivery".[1314] The Panel further considered that "the available date of delivery of a particular aircraft {would} weigh heavily in the economic assessment that a potential customer {would} undertake of the value of that aircraft to its business model and strategic objectives."[1315] In each case, the customer would have to choose between two options: (i) "buying a relatively higher priced {new generation} aircraft with relatively low operating costs that *is not* available in the near term"; or (ii) "buying a lower priced {current version} aircraft with higher operating costs that *is* available in the near term".[1316] On this basis, the Panel agreed 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*."[1317] The Panel added:

> 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*.[1318]

[1309] Panel Report, para. 6.1252.

[1310] Panel Report, para. 6.1252 (quoting Bair Declaration (Panel Exhibit USA-339 (BCI)), para. 27 (emphasis added by the Panel)).

[1311] Panel Report, para. 6.1252 (quoting Supplemental Mourey Statement (Panel Exhibit EU-124 (BCI/HSBI)), para. 23 (emphasis added by the Panel)). (additional fn omitted)

[1312] Panel Report, para. 6.1251 (referring to European Union's comments on the United States' response to Panel question No. 63, paras. 509-510).

[1313] Panel Report, para. 6.1251.

[1314] Panel Report, para. 6.1260. (fn omitted)

[1315] Panel Report, para. 6.1264 (referring to para. 6.1217).

[1316] Panel Report, para. 6.1264. (emphasis original)

[1317] Panel Report, para. 6.1265. (emphasis added)

[1318] Panel Report, para. 6.1265. (emphasis added)

5.499. Thereafter, the Panel turned to the arguments and evidence presented by the parties in respect of specific sales campaigns. Based on its analysis, the Panel did not understand the 2011 AirAsia, Cebu Pacific Air, GoAir, IndiGo, Lufthansa, Qantas/Jetstar, and TAM sales campaigns "to be examples of situations where customers found new generation and current versions of Airbus and Boeing single-aisle aircraft not to compete".[1319] Rather, the Panel considered that "the fact that several airlines chose to purchase the A320neo *over the 737NG*, simply suggest{ed} 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."[1320]

5.500. Turning to the 2011 American Airlines and 2011-2012 Norwegian Air Shuttle campaigns, the Panel found that these sales campaigns did "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".[1321] The Panel added that, "{r}ather than showing that the 737NG {did} not compete with the A320neo", the 2011 American Airlines sales campaign represented "a clear example of one aspect of the *very essence of competition* between Airbus and Boeing"[1322], namely, "the introduction of technologically superior products for the purpose of *winning the competition* for single-aisle aircraft customers."[1323] The Panel further stated that it did "not believe that the acknowledged fuel-burn superiority of the new generation of Airbus and Boeing single-aisle LCA *necessarily* mean{t} that they {did} not compete with current versions of their single-aisle offerings."[1324] Instead, the Panel recalled that "both manufacturers' new generation aircraft {were} specifically intended to operate missions that {would} largely overlap those already serviced by current versions."[1325] It was in this context that the Panel stated that, "{in} order to accept that the 737NG did not compete with the A320neo in these sales, {it} 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."[1326] As we understand it, this statement by the Panel concerns circumstances in which the Panel could find that the 737NG and the A320neo did not compete in the context of a particular sales campaign; it does not suggest that the Panel considered the degree and nature of competition between different product types to be altogether irrelevant, as the European Union suggests. Indeed, the Panel observed that the nature and degree of competition between product types may vary "*depending upon the particular circumstances of a sale*".[1327]

5.501. As we see it, the Panel therefore sufficiently scrutinized the nature and extent of actual or potential competition between the new generation and the current generation of Boeing and Airbus single-aisle LCA, in light of the arguments and evidence presented by the parties, to conclude eventually that "*the degree of demand-side substitution that exists between these two lines of single-aisle aircraft is sufficient*"[1328] 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."[1329] In reaching this conclusion, the Panel analysed the relevant qualitative factors concerning demand-side substitutability in its assessment of the nature and extent of actual or potential competition, and also considered that, in the facts of this dispute, "producing accurate and reliable quantitative evidence of the degree of demand-side substitution between different LCA products would be a formidable task."[1330] In particular, the Panel considered that, "to generate accurate and meaningful results" in the use of quantitative analysis for the purposes of identifying relevant product markets, "a significant volume of historical

[1319] Panel Report, para. 6.1289.
[1320] Panel Report, para. 6.1289. (emphasis original)
[1321] Panel Report, para. 6.1290. (emphasis added)
[1322] Panel Report, para. 6.1280. (emphasis added)
[1323] Panel Report, para. 6.1280. (emphasis added) We recall that, while assessing the general conditions of competition in the LCA industry, the Panel considered that, as in the original proceedings, technological innovation remained a key element of the competition between Airbus and Boeing. (Ibid., para. 6.1220)
[1324] Panel Report, para. 6.1280. (emphasis original)
[1325] Panel Report, para. 6.1280.
[1326] Panel Report, para. 6.1289. (italics original; underlining added)
[1327] Panel Report, para. 6.1416. (emphasis added)
[1328] Panel Report, para. 6.1286. (emphasis added)
[1329] Panel Report, para. 6.1286.
[1330] Panel Report, para. 6.1205.

information on the prices *actually* paid by LCA customers"[1331] would be required. The Panel "raised doubts about the availability of such actual pricing data"[1332], observing further that, "when asked to disclose the anticipated A350XWB price information used by Professor Whitelaw to derive the internal rates of return", the European Union "redacted the price data from its response".[1333] The Panel went on to observe 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."[1334] In addition, the Panel considered the "limited argumentation … advanced in respect of *supply-side substitutability*"[1335] by the parties.[1336]

5.502. In sum, we are satisfied that the Panel's identification of the single-aisle LCA market as comprising the new generation and the current generation of Boeing and Airbus single-aisle LCA was based on a proper analysis of the competition between these products, which the Panel found to demonstrate sufficient substitutability, in accordance with the standard articulated by the Appellate Body in the original proceedings. We do not agree with the European Union that the Panel's analysis of competition in the single-aisle LCA market was based on the premise that two products would be "in separate product markets only where … customers would buy *no product at all* if the subsidised product were unavailable".[1337] Nor do we agree with the European Union that the Panel disregarded the European Union's arguments regarding the nature and degree of competition between the new and current generations of Boeing and Airbus single-aisle LCA such that they should be placed into different product markets. Rather, as noted, the Panel considered those arguments but decided to reject them. In light of the foregoing considerations, we are satisfied that the Panel's analysis identifying the single-aisle LCA market reflects a proper reading of the term "market" in Article 6.3 of the SCM Agreement.

5.6.2.3.2 Twin-aisle LCA market

5.503. The European Union similarly submits that the Panel considered the intensity of competition to be "irrelevant" when it found that "the A330 and the 777 belong in the same product market because {the} 'potential customer base for the A330 *{was} likely to at least overlap* with the range of customers that {would} be interested in the 777'"[1338] and, further, in finding that "the A330-300 and the 777-200ER belong{ed} in the same product market" based on the absence of evidence indicating that they exercise "competitive constraints on each other".[1339]

5.504. The United States contends that an overlap in customer bases is highly relevant to assessing demand-side substitutability and the dynamics of competition, but that "the Panel never suggested that it was the only, or even the primary, reason for its product market definitions".[1340] According to the United States, the statement in the Panel Report that the European Union refers to "is simply one observation" from a detailed analysis carried out by the Panel.[1341]

5.505. We recall in this regard that, in considering the "competitive relationship between the A330 and the 777"[1342], the Panel noted that "a customer's decision to purchase an LCA {would} 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 {would} be the types of missions it intends to operate".[1343] The Panel noted that "passenger demand is a multi-faceted parameter that for any particular route" would "vary 'at all

[1331] Panel Report, para. 6.1205. (emphasis original)
[1332] Panel Report, para. 6.1205.
[1333] Panel Report, para. 6.1181 (referring to European Union's response to Panel question No. 132; United States' comments on the European Union's response to Panel question No. 132).
[1334] Panel Report, para. 6.1205.
[1335] Panel Report, para. 6.1294. (emphasis original; fn omitted)
[1336] Panel Report, paras. 6.1238, 6.1294, and 6.1372.
[1337] European Union's appellant's submission, para. 597 (referring to Panel Report, paras. 6.1210, 6.1211, 6.1236, 6.1289, and 6.1382). (emphasis original)
[1338] European Union's appellant's submission, para. 601 (quoting Panel Report, para. 6.1315 (emphasis added by the European Union)).
[1339] European Union's appellant's submission, para. 601 (quoting Panel Report, para. 6.1320).
[1340] United States' appellee's submission, para. 333.
[1341] United States' appellee's submission, para. 333.
[1342] Panel Report, para. 6.1312.
[1343] Panel Report, para. 6.1313.

times of the day or from one season or year to the next', not only between different airlines but also for an individual airline".[1344] Thus, the Panel considered that "the process of forecasting required seating capacity and route structures over the commercial life of any particular aircraft for a potential LCA customer {was} likely to be highly complex, bringing with it a certain measure of risk."[1345] Based on its analysis, the Panel found 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 {was} specifically designed necessarily implie{d} that it {would} face no competition from the 777".[1346] The Panel went on to state that, "{i}f relative performance advantages over *optimized* missions were a sufficient basis to identify relevant product markets in the LCA sector"[1347], it would seem 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."[1348]

5.506. It was in this context that the Panel considered "the potential customer base{s}" for the A330 and the 777 as part of its assessment of the competitive relationship between these aircraft, noting that evidence of the existence of "an overlapping potential customer base … may be highly relevant to the task of identifying LCA product markets."[1349] In this respect, the United States had pointed to "a number of examples of airlines having chosen to operate a range of different twin-aisle aircraft on the same routes"[1350], arguing that this "support{ed} the view that there {was} 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" in light of the "complex patterns of customer demand and product uses".[1351] Based on the evidence before it, the Panel found, for example, that the decision by Malaysia Airlines and Singapore Airlines to "switch away from the 777 to the A330 provide{d} not only a *clear example of demand-side substitutability* between two differentiated products"[1352], but "also demonstrate{d} 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".[1353] We see no error in the Panel's analysis in this regard. Nor do we understand the statements referred to by the European Union[1354] to indicate that the Panel considered the intensity of competition in the twin-aisle LCA market to be irrelevant. Indeed, as noted by the Appellate Body in the original proceedings, "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."[1355]

5.507. Moreover, we note that the Panel considered the European Union's arguments and came to the conclusion that, for the Panel "to accept that the differences in {net present values} of the A330 and 777 when performing *optimized missions* demonstrate{d} that the two aircraft {did} not impose competitive constraints on each other"[1356] would be akin to finding that "only two types of customers {were} 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)."[1357] The Panel found the European Union's position "to be overly simplistic and at odds with even its own description of the

[1344] Panel Report, para. 6.1313 (quoting Supplemental Mourey Statement (Panel Exhibit EU-124 (BCI/HSBI)), para. 91).
[1345] Panel Report, para. 6.1313.
[1346] Panel Report, para. 6.1314.
[1347] Panel Report, para. 6.1314. (emphasis original)
[1348] Panel Report, para. 6.1314.
[1349] Panel Report, paras. 6.1316-6.1317.
[1350] Panel Report, para. 6.1318.
[1351] Panel Report, para. 6.1318 (quoting United States' comments on the European Union's response to Panel question No. 75).
[1352] Panel Report, para. 6.1322. (emphasis added)
[1353] Panel Report, para. 6.1322.
[1354] European Union's appellant's submission, para. 601 (referring to Panel Report, paras. 6.1315 and 6.1320).
[1355] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.
[1356] Panel Report, para. 6.1344. (emphasis original)
[1357] Panel Report, para. 6.1344.

core features of aircraft demand".[1358] The Panel thus rejected the European Union's argument 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."[1359]

5.508. Turning to the A350XWB, the Panel recalled the European Union's contention that "the A350XWB and the 787 closely compete{d} in the same product market for technologically advanced and fuel-efficient new generation aircraft".[1360] However, the Panel considered that 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" suggested that "it must have expected potential customers to be interested in learning about the relative performance characteristics of *all three aircraft*".[1361] The Panel further noted that, "since it was launched, Airbus … continued to market the A350XWB family as an alternative to both the 787 *and the 777*."[1362] The Panel considered that the fact that the evidence on record sought "to highlight the '*competitiveness*' of the technologically advanced A350XWB by focusing on its relative performance advantages over the 787, 777, and 767" was consistent with the fact 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 characteristics of, at least, all three families of Boeing aircraft."[1363]

5.509. The Panel further found that there was evidence to suggest that "Airbus intended to win sales away from the 787 not only using the A350XWB, *but also the A330*."[1364] In this regard, the Panel considered that it did "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".[1365] According to the Panel, the evidence on record recognized that "the A330 was … in a competitive relationship with the 787"[1366], and in particular, "the Mourey Statement … explain{ed} 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'."[1367] In the Panel's view, these considerations suggested that "the 787 and the A350XWB {did} not merely face competitive constraints from each other, but also from other twin-aisle aircraft."[1368]

5.510. As regards the 767, the Panel found that "the range of missions and operating performance offered by the 767" were "somewhat limited compared with the larger versions of the 787, and the 777 and A350XWB families".[1369] The Panel noted that the evidence indicated that the 767 and the A330 were roughly the same size offering a "comparable range"[1370], and further that, with the introduction of the 787, the sales of both "the 767 and the A330 were significantly affected".[1371] This, in the Panel's view, suggested the possibility that customers were choosing Boeing's new generation aircraft over both the A330 and the 767.[1372] The Panel also found evidence that the A330 was marketed "by comparing its sales performance and operating characteristics against not only the 777 and 787, but also the 767".[1373] Finally, the Panel considered that, "{a}s an 'eventual replacement' of an aircraft, which at the time, was considered by Airbus to be a better performing rival to the 767", it logically followed 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."[1374] To that extent, we find the Panel to have

[1358] Panel Report, para. 6.1344 (referring to paras. 6.1311-6.1322).
[1359] Panel Report, para. 6.1293.
[1360] Panel Report, para. 6.1293.
[1361] Panel Report, para. 6.1307. (emphasis original)
[1362] Panel Report, para. 6.1308. (emphasis original)
[1363] Panel Report, para. 6.1309. (emphasis original)
[1364] Panel Report, para. 6.1310. (emphasis original)
[1365] Panel Report, para. 6.1311.
[1366] Panel Report, para. 6.1310.
[1367] Panel Report, para. 6.1310 (quoting Mourey Statement (Panel Exhibit EU-8 (BCI)), para. 88).
[1368] Panel Report, para. 6.1365.
[1369] Panel Report, para. 6.1327.
[1370] Panel Report, para. 6.1327. (fn omitted)
[1371] Panel Report, para. 6.1327. (fn omitted)
[1372] Panel Report, para. 6.1327.
[1373] Panel Report, para. 6.1327. (emphasis and fn omitted)
[1374] Panel Report, para. 6.1327.

addressed and rejected the European Union's argument that the 767 did not compete with the A330 and that, in any case, it had been replaced by the 787.[1375]

5.511. The Panel observed that "the competitive relationships between all five families of Airbus and Boeing twin-aisle aircraft {had} been constantly evolving, reflecting not only changing demand … but also the pace and nature of aircraft innovation."[1376] The Panel further explained that:

> 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.[1377]

5.512. However, as noted above, in rejecting the European Union's contention, the Panel cautioned that, "to say that *every time* a newly introduced technologically advanced or more efficient aircraft wins sales against existing models mean{t} that it face{d} 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".[1378] The Panel therefore did "not consider {that} the superior operating performance of the new generation of Airbus and Boeing twin-aisle aircraft compared with their current generation models signal{ed} that they {were} sold {in} separate product markets."[1379]

5.513. As we see it, the Panel's analysis concerning the twin-aisle market took into account the competing arguments and evidence put forward by the European Union in support of its position. In our view, the Panel's identification of the twin-aisle LCA market as comprising the Boeing 767, 777, 787 and the Airbus A330 and A350XWB families was based on a proper analysis of the competition between these products, which the Panel found to demonstrate sufficient substitutability, in accordance with the standard articulated by the Appellate Body in the original proceedings. Before reaching this finding, the Panel discussed the parties' arguments regarding the intensity of competition between various twin-aisle LCA offered by Boeing and Airbus. As we understand it, the existence of meaningful competition was not contested between the parties in relation to certain Airbus and Boeing product pairings (the A350WXB and the 787). However, the parties disagreed on the nature and degree of competition between other Airbus and Boeing twin-aisle LCA (the 767, 777, and A330). Having evaluated the parties' arguments regarding the varying degrees of competitive relationship between these twin-aisle LCA, we see no reason to disagree with the Panel's conclusion that "all five families of Airbus and Boeing twin-aisle LCA exercise{d} 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".[1380] In light of the foregoing considerations, we are satisfied that the Panel's analysis identifying the twin-aisle LCA market reflects a proper reading of the term "market" in Article 6.3 of the SCM Agreement.

5.6.2.3.3 VLA market

5.514. With regard to the Panel's analysis of the VLA market, the European Union points to yet another statement by the Panel, arguing that it demonstrates that the Panel treated the nature and extent of competition as "irrelevant".[1381] Specifically, the European Union takes issue with the Panel's statement that:

> 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

[1375] Panel Report, paras. 6.1293 and 6.1338.
[1376] Panel Report, para. 6.1367.
[1377] Panel Report, para. 6.1363.
[1378] Panel Report, para. 6.1367. (emphasis original)
[1379] Panel Report, para. 6.1364.
[1380] Panel Report, para. 6.1370.
[1381] European Union's appellant's submission, para. 599.

exclusively serve a particular customer space that the 747 (or indeed any other aircraft) could not attract.[1382]

5.515. The United States recalls that the Panel extensively discussed the reasons why the two aircraft compete with one another, including the existence of an overlapping customer base, which in turn was consistent with "the pattern of competitive interaction that drives Airbus' and Boeing's supply decisions".[1383] The United States further notes the Panel's description of the strategy employed by both LCA producers to meet demand with the fewest possible product lines to satisfy a wide array of requirements.[1384] Thus, the United States submits that the Panel's statement highlighted by the European Union was intended to explain that "the {European Union's} theory of the A380 being placed in a monopoly market would require accepting that the A380 was developed not to compete with Boeing's nearest competitor, but rather to serve a customer space that the 747 could not attract, which is contrary to the evidence regarding how Boeing and Airbus develop their product lines."[1385]

5.516. We begin by noting that the statement quoted by the European Union was made by the Panel in the context of analysing the physical and performance characteristics, end-uses, and customers for the A380 and the 747-8I to determine if the A380 and the 747-8I fell within the same product market – i.e. the product market for VLA, as proposed by the United States. However, prior to that, the Panel had considered that, as regards the A380 and the 747-8I, "the essential point of divergence between the parties … focused on the conclusions that {could} be drawn about the *degree of demand-side substitutability* that exist{ed} between the A380 and the 747-8I as a result of their relative performance advantages."[1386] Thus, the Panel was aware of its task to consider the nature and degree of demand-side substitutability, a factor that the Appellate Body, in the original proceedings, considered to be "indispensable" when assessing whether two products are in a single market.[1387]

5.517. The Panel began by setting out the following table of data submitted by the parties.

Table 7: Basic physical and performance characteristics of Airbus and Boeing VLA[1388]

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

Source: Panel Report, Table 18 at paragraph 6.1373.

[1382] European Union's appellant's submission, para. 600 (quoting Panel Report, para. 6.1382 (emphasis added by the European Union)).
[1383] United States' appellee's submission, para. 332 (quoting Panel Report, para. 6.1382).
[1384] United States' appellee's submission, para. 332.
[1385] United States' appellee's submission, para. 332.
[1386] Panel Report, para. 6.1378. (emphasis added)
[1387] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1121.
[1388] Panel Report, para. 6.1373, Table 18 (referring to Mourey Statement (Panel Exhibit EU-8 (BCI)), Table 7; Bair Declaration (Panel Exhibit USA-339 (BCI)), para. 43).

5.518. The Panel considered that, although the European Union denied the existence of anything more than "weak or minimal" competition between the 747-8I and the A380[1389], the Mourey Statement "recognize{d} that the two aircraft '{were} the closest to one another' in terms of size"[1390] and, "moreover, 'ha{d} similar range capabilities', meaning that they {could} both 'generally be used for the same long-haul routes'."[1391] Accordingly, the Panel noted that the parties therefore "seem{ed} to agree that the differences between the A380 and the 747-8I in terms of size and flying range {did} not preclude the possibility that, in general, the two aircraft {could} be used to serve the same long-haul routes."[1392]

5.519. The Panel noted that the A380 and the 747-8I were the largest civil aircraft produced by Airbus and Boeing, and could both generally be used to cover the same long-haul routes.[1393] The Panel stated that, "{w}hile the A380's larger seating capacity and relatively modern technologies mean{t} that it ha{d} a per/seat operating cost and revenue advantage over the 747-8I", the Panel considered that "this advantage {would} decrease the closer the expected seating capacity of a particular mission {was} to the maximum seating capacity of the 747-8I".[1394] For the Panel, "{t}he smaller the difference, the greater {was} 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."[1395] Thus, the Panel considered it "apparent from the *conditions of competition* in the LCA industry that the A380 and the 747-8I {would} have a potential customer base that {would} include airlines with mission requirements that overlap the capabilities of the two aircraft."[1396] The Panel found that a number of features of demand and supply of LCA products[1397] suggested that "the potential customer base of the A380 {was} 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."[1398] The Panel concluded that "{t}hese general and A380-specific features of LCA demand {did} not weigh in favour of the argument that the A380's potential customers {would} *only* ever seriously consider purchasing it for the purpose of missions that {could not} also be serviced by the 747-8I".[1399] This, according to the Panel, "implie{d} that … there {were} customers that {would} explore the economics of both the A380 and the 747-8I for the purpose of performing comparable missions".[1400]

5.520. It was in this context that the Panel stated that, "to accept that the A380's relative performance advantage over the 747-8I place{d} it in a monopoly market, {it} 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."[1401] As we understand it, the Panel appears, in this context, to have simply expressed this view *only* with respect to the A380's relative performance advantage over the 747-8I. It does not follow from this that the Panel considered that the A380 and the 747-8I would compete in the same market *regardless of the nature and degree of competition* that existed between them. As we recall, the Panel found that the conditions of competition revealed that "the A380 and the 747-8I {would} have a potential customer base that {would} include airlines with mission requirements that overlap the capabilities of the two aircraft."[1402] The Panel's analysis is in consonance with the Appellate Body's guidance in the original proceedings that, in determining "whether two products compete in the same market … it may also be relevant to consider whether customers demand a range of products or *whether they*

[1389] Panel Report, para. 6.1378 (quoting Supplemental Mourey Statement (Panel Exhibit EU-124 (BCI/HSBI)), para. 65; European Union's second written submission to the Panel, para. 690).
[1390] Panel Report, para. 6.1378 (quoting Supplemental Mourey Statement (Panel Exhibit EU-124 (BCI/HSBI)), para. 79).
[1391] Panel Report, para. 6.1378 (quoting Mourey Statement (Panel Exhibit EU-8 (BCI)), para. 149).
[1392] Panel Report, para. 6.1378.
[1393] Panel Report, para. 6.1407.
[1394] Panel Report, para. 6.1407.
[1395] Panel Report, para. 6.1407. (fn omitted)
[1396] Panel Report, para. 6.1407. (emphasis added; fn omitted)
[1397] Panel Report, para. 6.1380.
[1398] Panel Report, para. 6.1379.
[1399] Panel Report, para. 6.1381. (emphasis original)
[1400] Panel Report, para. 6.1381.
[1401] Panel Report, para. 6.1382.
[1402] Panel Report, para. 6.1407. (fn omitted)

are interested in only a particular product type."[1403] In case of the former, the Appellate Body considered that, "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."[1404]

5.521. Moreover, we note that the Panel's analysis did not end there. Instead, after reviewing the evidence on record, the Panel noted that, "outside of the context of this proceeding, Airbus ha{d} consistently maintained the view that the potential customers of the A380 {would} also be likely to seriously consider the 747-8I in a segment of the LCA market that {was} covered by no other aircraft."[1405]

5.522. As it did in the context of its analysis of competition in the single-aisle and twin-aisle LCA markets, the Panel next turned to consider whether the existence of competition between the A380 and the 747-8I was evidenced by the pricing pressure that each aircraft imposed upon the other.

5.523. Before the Panel, the United States had referred to certain HSBI evidence, which, according to the United States, revealed Boeing's net present value analyses and pricing considerations with respect to both aircraft in the 2007 Emirates and 2006 British Airways sales campaigns.[1406] The United States additionally argued that "the existence of reciprocal pricing constraints follow{ed} logically from the dynamics of sales negotiations in the LCA industry, where 'companies bargain over prices based on the best alternative to negotiated agreement … faced by each player'."[1407] The Panel noted that, while the European Union accepted that "the A380's presence ha{d} caused significant pricing pressure on the 747-8I"[1408], it denied that "the 747-8I constrain{ed} Airbus' pricing of the A380 in any substantial way"[1409], asserting further that, just because "the 747-8I may be the 'closest alternative' to the A380 {did} not … reveal the degree of competition that exist{ed} between the two products, and for this reason, it {was} legally and factually insufficient to establish the requisite demand-side substitutability."[1410]

5.524. The Panel agreed that "the mere fact that one aircraft may be an 'alternative' to another for the purpose of flying the same missions {said} little about the degree of competition that exist{ed} between those aircraft".[1411] The Panel also considered that "the HSBI evidence relied upon by the United States … represent{ed} no more than Boeing's view that at a certain point in time during the 2007 Emirates and 2006 British Airways sales campaigns, **[BCI]**".[1412] Addressing the European Union's net present value analyses of the A380 and the 747-8I, the Panel found that the net present value comparison analysis conducted in the Supplemental Mourey Statement "fail{ed} to demonstrate that the two aircraft {did} not compete with one another in the same product market".[1413] The Panel reasoned that "all that the {net present value} analyses ultimately demonstrate{d} {was} that, excluding price, fleet commonality, delivery date and other factors … the A380 {would} have a significant operating cost and revenue advantage over the 747-8I on

[1403] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120. (emphasis added)
[1404] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.
[1405] Panel Report, para. 6.1383.
[1406] Panel Report, para. 6.1387 (referring to United States' response to Panel questions No. 53, para. 176 (HSBI) and No. 58; **[[HSBI]]** (Panel Exhibit USA-539 (HSBI)); **[[HSBI]]** (Panel Exhibit USA-557 (HSBI))).
[1407] Panel Report, para. 6.1387 (quoting United States' response to Panel question No. 54, para. 177; Expert Declaration of Dr Chetan Sanghvi, NERA, 21 May 2013 (Panel Exhibit USA-530), paras. 40-41).
[1408] Panel Report, para. 6.1388 (referring to European Union's second written submission to the Panel, para. 693).
[1409] Panel Report, para. 6.1388 (referring to European Union's first written submission to the Panel, para. 631; second written submission to the Panel, para. 693; response to Panel question No. 54, para. 258 and fn 434 to para. 256; comments on the United States' response to Panel question No. 54, para. 392).
[1410] Panel Report, para. 6.1388 (referring to European Union's comments on the United States' response to Panel question No. 53, paras. 381-382).
[1411] Panel Report, para. 6.1390.
[1412] Panel Report, para. 6.1391. (emphasis original)
[1413] Panel Report, para. 6.1394.

missions where the latter {could not} satisfy the demand for seating capacity, which demand {could} only be met by one aircraft in the LCA industry – the A380."[1414]

5.525. The Panel further noted that, as the A380 and the 747-8I were the only two aircraft capable of flying well over 400 passengers on long-haul routes, the Panel found it "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".[1415] The Panel found that "the fact that Airbus may {have} face{d} relatively less pricing pressure from the 747-8I when a potential customer {was} looking for an LCA with a seating capacity that approximate{d} the maximum capacity of the A380 {did} not necessarily signal the absence of reciprocal pricing constraints."[1416] Rather, according to the Panel, "given that there {would} 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{ed} the relative advantage of one aircraft over the other."[1417] The Panel concluded that, "{a}t either end of this range of customer needs, one aircraft {would} impose greater pricing pressure on the other."[1418] However, according to the Panel, this did "not imply the absence of competition, but only that *the competitive constraints imposed by one LCA on the other {would} be more or less intense depending* upon which product more closely satisfie{d} *the relevant needs of a potential customer*".[1419] As we understand it, this statement suggests that the Panel considered the nature and degree of competition between these two product types to vary depending upon the needs of a customer. In our view, this is in line with the Panel's observation that the nature and degree of competition between product types could vary "*depending upon the particular circumstances of a sale*".[1420] We do not find the Panel to have considered the nature and degree of competition between these two product types to be altogether irrelevant, as the European Union suggests.

5.526. Turning to the sales campaigns at issue, the Panel considered that, although it had no evidence before it "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"[1421] suggested that, "according to Boeing, at a certain point in time during those campaigns, **[BCI]**."[1422] The Panel found this to be consistent with "not only the evidence showing that Airbus considered competition for the British Airways' sales to be 'intense'"[1423], but also that, from "the evidence {it had} reviewed from four other sales campaigns (Asiana Airlines, Hong Kong Airlines, Skymark and Qantas)", it was "apparent that Boeing presented the 747-8I as an alternative to the A380 with a view to winning sales from the relevant customers."[1424] In particular, the Panel considered that the sales campaign for British Airways showed that Airbus appeared "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'."[1425] Moreover, we also recall that, in its analysis of the sales campaigns for Transaero, Korean Air, and Lufthansa, the Panel noted that, "{w}hile {it} agree{d} with the European Union that the evidence … suggest{ed} that the three airlines purchased the A380 and the 747-8I to fill different capacity segments of their operations", the Panel did "not believe that this alone implie{d} that the two LCA were sold to each customer in the absence of effective competition."[1426]

[1414] Panel Report, para. 6.1394.
[1415] Panel Report, para. 6.1408.
[1416] Panel Report, para. 6.1408.
[1417] Panel Report, para. 6.1408.
[1418] Panel Report, para. 6.1408.
[1419] Panel Report, para. 6.1408. (emphasis added)
[1420] Panel Report, para. 6.1416. (emphasis added)
[1421] Panel Report, para. 6.1409. (emphasis original)
[1422] Panel Report, para. 6.1409. (emphasis omitted)
[1423] Panel Report, para. 6.1409.
[1424] Panel Report, para. 6.1409.
[1425] Panel Report, para. 6.1402 (quoting EADS Press Release, "British Airways to buy 12 Airbus A380 aircraft for long haul fleet", 27 September 2007 (Panel Exhibit USA-256)). (emphasis added)
[1426] Panel Report, para. 6.1405.

5.527. Based on its analysis, the Panel found that "despite some appreciable differences", the A380 and 747-8I are "sufficiently similar to be considered by airlines wanting to … operate long-haul, slot-constrained missions requiring a maximum seating capacity in excess of 400 passengers".[1427] The Panel concluded that the United States had established that, "for the purpose of evaluating its claims of serious prejudice under Article 6.3 … the A380 and 747-8I {could} be considered to compete against each other in one single product market for VLA."[1428] The Panel further considered that its "conclusion reflect{ed} the Appellate Body's explicit confirmation … that 'there {was} competition between the Airbus A380 and the Boeing 747 and that Airbus and Boeing competed for the Emirates' Airlines A380 orders in 2000."[1429]

5.528. Based on the above, we see no interpretative error in the Panel's reading of the term "market", and the standard it sought to apply. Nor do we agree with the European Union that the Panel considered the nature and degree of competition in the VLA market to be irrelevant for purposes of its analysis. Indeed, as noted, the Panel clarified that "{t}here {would} be weaker and stronger competitive relationships within each market depending upon the particular circumstances of a sale."[1430] We also disagree with the European Union to the extent that it suggests that the Panel failed to consider whether these product types were sufficiently substitutable to be placed into the same market, or that the Panel disregarded the European Union's argument that "the larger passenger capacity and advanced technologies of the A380" meant that "the A380 ha{d} an insurmountable per{} seat operating cost advantage and generate{d} higher revenues … placing it in a separate product market."[1431] Rather, we understand the Panel to have considered these arguments but rejected them based on its review of the parties' arguments and of evidence regarding physical characteristics, end-uses, customers, pricing constraints, and sales campaigns. In light of the foregoing considerations, we are satisfied that the Panel's analysis identifying the VLA product market reflects a proper reading of the term "market" in Article 6.3 of the SCM Agreement.

5.529. Moreover, we understand that the Panel took into account the European Union's contention that "differing degrees of less-than-vigorous competition exist{ed} between other combinations of Airbus and Boeing aircraft"[1432], and that, "in some cases, an LCA product of one manufacturer {could} impose significant competitive constraints on another LCA product without having to face any or the same level of competitive constraint from that product itself."[1433] In particular, the Panel recalled that, according to the European Union, there was "'limited' or 'very little' competition between the new and current generations of Airbus and Boeing single-aisle and twin-aisle aircraft"[1434]; "'little' or 'weak' competition between the A330 and all three families of Boeing twin-aisle LCA"[1435]; and "'very limited' or 'very weak' competition between the A380 and the 747-8".[1436] However, on balance, the Panel considered that, "while it {was} apparent that the three product markets the United States {had} chosen to rely upon to bring its complaint … {did} not exhaustively capture how competition takes place between aircraft in the LCA sector at all

[1427] Panel Report, para. 6.1386.
[1428] Panel Report, para. 6.1410.
[1429] Panel Report, para. 6.1410 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1227-1228).
[1430] Panel Report, para. 6.1416.
[1431] Panel Report, para. 6.1377 (referring to European Union's first written submission to the Panel, paras. 626-629; second written submission to the Panel, para. 691; response to Panel question No. 49, para. 222; Mourey Statement (Panel Exhibit EU-8 (BCI)), paras. 151-152 and 160; Supplemental Mourey Statement (Panel Exhibit EU-124 (BCI/HSBI)), paras. 67-69).
[1432] Panel Report, para. 6.1413.
[1433] Panel Report, para. 6.1413.
[1434] Panel Report, para. 6.1413 (referring to European Union's first written submission to the Panel, paras. 491, 602, 604, and 718; second written submission to the Panel, paras. 636, 639, and 677; Mourey Statement (Panel Exhibit EU-8 (BCI)), para. 82; Supplemental Mourey Statement (Panel Exhibit EU-124 (BCI/HSBI)), paras. 10, 13, 19, and 22).
[1435] Panel Report, para. 6.1413 (referring to European Union's first written submission to the Panel, para. 860; Supplemental Mourey Statement (Panel Exhibit EU-124 (BCI/HSBI)), paras. 10, 26, 35, 43, 50-51, and 60).
[1436] Panel Report, para. 6.1413 (referring to European Union's first written submission to the Panel, para. 629; second written submission to the Panel, para. 690; response to Panel question No. 58; Mourey Statement (Panel Exhibit EU-8 (BCI)), para. 176; Supplemental Mourey Statement (Panel Exhibit EU-124 (BCI/HSBI)), para. 65).

times", it was satisfied that "they represent{ed} the three segments within which *most competitive interactions* between the relevant aircraft {would} commonly take place."[1437]

5.530. As we see it, this discussion by the Panel, including its emphasis on the three market segments as areas where the "most competitive interactions" take place, clearly suggests that the Panel considered the intensity of competition between concerned aircrafts to be relevant, and sought to take it into account in its analysis. We therefore do not agree with the European Union that the Panel sought simply to assess whether there were "some" competitive constraints or interactions among different LCA models. Instead, we agree with the United States that, consistent with the Appellate Body's guidance, the Panel was aware of the differences in the degree of competition between products[1438] and "did *not* define markets based on the slightest competitive constraints or interactions, as evidenced by its finding that the three-market delineation does not 'exhaustively capture how competition takes place between aircraft in the LCA sector at all times'."[1439] Our review above also suggests that the Panel's three-way product market delineation was based on a proper analysis of the competition between relevant LCA that the Panel found to demonstrate sufficient substitutability, in accordance with the standard articulated by the Appellate Body in the original proceedings.

5.531. Finally, the European Union contends that the Panel considered the intensity of competition to be "irrelevant" when it stated that "Airbus' and Boeing's mere participation with a particular product offering in a sales campaign{} was 'highly relevant to {the} task of determining the existence of relevant product markets', because it indicated that the manufacturer had a reasonable expectation of 'imposing *some level of competitive constraint* on its rival's offering'."[1440]

5.532. For its part, the United States recalls the Panel's explanation that "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."[1441] The United States submits that the Panel was correct in this analysis and that nothing suggests that the Panel considered the intensity, degree, or level of competition to be "irrelevant".[1442]

5.533. We recall the Panel's finding that "evidence showing that Airbus and Boeing presented or formally offered one or more LCA products for consideration in a particular sales campaign {would} be highly relevant to {its} task of determining existence of relevant product markets."[1443] The Panel considered such evidence to "strongly suggest that a customer's ultimate purchase decision {would} be informed by its consideration of the relative strengths and weaknesses of either company's respective offerings."[1444] In support, the Panel recalled the Appellate Body's finding in the original proceedings dismissing 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, notwithstanding the absence of any formal aircraft offer having been made on the part of Boeing."[1445] Contrary to what the European Union suggests, we do not understand the Panel to have treated participation in a particular sales campaign as determinative of two products competing in the same market. Rather, the Panel stated that it was

[1437] Panel Report, para. 6.1416. (emphasis added) In a footnote, the Panel also recalled that, during the original appellate proceedings, "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", noting further that the Appellate Body went on to "complete the analysis" on the basis of the same three product markets. (Ibid., fn 2416 thereto)

[1438] United States' appellee's submission, para. 349.

[1439] United States' appellee's submission, para. 349 (quoting Panel Report, para. 6.1416). (emphasis original)

[1440] European Union's appellant's submission, para. 601 (quoting Panel Report, para. 6.1348 (emphasis added by the European Union)).

[1441] United States' appellee's submission, para. 333 (quoting Panel Report, para. 6.1348).

[1442] United States' appellee's submission, para. 333.

[1443] Panel Report, para. 6.1348.

[1444] Panel Report, para. 6.1399.

[1445] Panel Report, para. 6.1349. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1223.

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."[1446] We see nothing objectionable *per se* in these statements. Nor do we understand the Panel to have discounted the intensity of competition between the relevant LCA in coming to its three-way market delineation. Instead, as considered above, the Panel's overall analysis, in our view, shows that the Panel's assessment and identification of the three product markets was based on competition that was "meaningful" between the relevant pairings of LCA.

5.534. In light of the foregoing considerations, we do not agree with the European Union to the extent that it claims that the Panel erred in its interpretation of the term "market" in Article 6.3 of the SCM Agreement.[1447] Instead, our review above of the Panel's product market analysis, including for each of the three LCA markets, shows that the Panel did not err in its interpretation of the term "market" in Article 6.3 of the SCM Agreement.

5.6.2.4 Whether the Panel erred in its application of Article 6.3 of the SCM Agreement

5.535. The European Union submits in the alternative that, even assuming that the Panel properly interpreted Article 6.3 of the SCM Agreement, it nonetheless erred in applying this provision to the facts of this case.[1448] In this regard, the European Union recalls that both parties agreed that, under a broad approach to the interpretation of the term "market", all LCA could be placed in the same product market.[1449] The European Union adds that the evidence offered by the parties "is consistent with the Panel's findings of the existence of competition between aircraft that the United States placed into separate product markets"[1450], pointing in particular to the competition between the 747-8 (placed in the VLA market) and the 777-300ER and the A350XWB-1000 (placed in the twin-aisle LCA market), as cited by the Panel itself.[1451] Therefore, the European Union contends that, "{h}aving recognised that competition existed {among} all LCA, the Panel should have applied its product market standard to find a single product market in which all LCA (if not also a range of other means of transport) competed".[1452]

5.536. The United States counters that the European Union's argument is based on "the flawed premise that the Panel 'replaced the Appellate Body's 'significant competitive constraints' standard with a standard based on the mere existence of competitive constraints'."[1453] The United States further submits that neither party argued for broader product market definitions, and that, "in any event, broadening the definitions would have risked including products in the same market that placed insufficient competitive constraints on each other."[1454]

5.537. We understand this aspect of the European Union's appeal to be predicated on its view that the Panel considered the existence of *any* or *some* competition to be sufficient to support a finding that two products fall within the same product market. We have disagreed with that proposition above. Instead, we have found that the Panel's three-way product market delineation was based on a proper analysis of the competition among relevant LCA that the Panel found to demonstrate sufficient substitutability, in accordance with the standard articulated by the Appellate Body in the original proceedings. In these circumstances, we see no reason to further engage with the arguments advanced by the European Union in this regard.

[1446] Panel Report, para. 6.1348.
[1447] European Union's appellant's submission, para. 615.
[1448] European Union's appellant's submission, para. 616. We note that the European Union requests us to consider this appeal only if we reject the European Union's appeal concerning the Panel's interpretation of the term "market" in Article 6.3, and instead consider that the Panel properly interpreted the term "market". (Ibid., para. 540, and fn 576 to para. 595)
[1449] European Union's appellant's submission, para. 619.
[1450] European Union's appellant's submission, para. 620.
[1451] European Union's appellant's submission, para. 621 (referring to Panel Report, fn 2415 to para. 6.1416).
[1452] European Union's appellant's submission, para. 623.
[1453] United States' appellee's submission, para. 348 (quoting European Union's appellant's submission, para. 624).
[1454] United States' appellee's submission, para. 350.

5.6.2.5 Article 11 of the DSU

5.538. In a final set of arguments, the European Union claims that the Panel acted inconsistently with its obligations under Article 11 of the DSU by viewing its task as consisting solely of carrying out an examination of "whether there existed intra-market competition between products that the *United States* had placed within each of its three alleged product markets".[1455] According to the European Union, this was not sufficient, given that the Panel was also required to assess whether "the competitive dynamic between a given pairing of aircraft, which the United States asserted to be in two *separate* product markets, was such that the aircraft should instead be placed in the *same* product market."[1456] The European Union contends that, "on the sole basis that the United States alleged them to be in different product markets, the Panel neglected altogether to examine whether the A321neo exerts competitive constraints on the 767, or whether the 777-300ER or the A350XWB-1000 exert competitive constraints on the 747-8".[1457] The European Union submits that this constitutes error under Article 11 of the DSU.[1458]

5.539. For its part, the United States submits that "the Panel determined that the three product markets outlined by the United States provided a proper basis to analyze allegations of displacement, impedance, and lost sales"[1459], while recognizing, based on the voluminous evidence adduced by the parties, that "important competitive relationships may also exist between pairings or combinations of aircraft *across* two, or even all three, of the product markets."[1460] However, the Panel determined that, "while it {was} apparent that the three product markets the United States ha{d} chosen to rely upon to bring its complaint of non-compliance {did} not exhaustively capture how competition takes place between aircraft in the LCA sector at all times", it was "satisfied that at present (as in the original proceeding) they represent{ed} the three segments within which most competitive interactions between the relevant aircraft will commonly take place."[1461] In respect of the European Union's assertion that the Panel neglected to examine, for example, whether the A321neo exerted competitive constraints on the 767, the United States submits that, "{d}espite submitting thousands of pages of briefing and thousands of exhibits, neither party suggested that the A321neo (which is in the A320 family) and the 767 were in the same market."[1462] Accordingly, the United States maintains that there was no reason for the Panel to "explain in detail why these products were not placed in the same market".[1463] The United States adds that the Panel "conducted an exhaustive review of all of the evidence and argumentation submitted by the parties, and gave equal consideration to both parties' proposals"[1464], and did not act inconsistently with Article 11 of the DSU.[1465]

5.540. For purposes of identifying relevant product market(s) in the context of a serious prejudice analysis under Articles 6.3(a) and 6.3(b) of the SCM Agreement, the mandate of a panel under Article 11 of the DSU is "to make an objective assessment of the competitive relationship between specific products in the marketplace and to define the relevant product market in order to determine whether particular products can be treated as forming part of a single product market or several product markets".[1466] In this regard, a panel is called upon to carry out a holistic consideration of all the relevant evidence and arguments before it in order to make an objective determination of the relevant product market. A panel should assess whether it is appropriate to examine serious prejudice claims on the basis of the particular market segmentation proposed by the complainant or whether the range of products at issue compete in different and distinct

[1455] European Union's appellant's submission, para. 629. (emphasis original)
[1456] European Union's appellant's submission, para. 635. (emphasis original) In its opening statement at the second session of the oral hearing, the European Union argued that, in assessing the scope of product markets in a given case, a panel must ensure that products within a product market would compete more closely with one another than with products outside that product market.
[1457] European Union's appellant's submission, para. 630.
[1458] European Union's appellant's submission, para. 637.
[1459] United States' appellee's submission, para. 354.
[1460] United States' appellee's submission, para. 355 (quoting Panel Report, para. 6.1416 (emphasis original; fn omitted)).
[1461] United States' appellee's submission, para. 355 (quoting Panel Report, para. 6.1416 (fn omitted)).
[1462] United States' appellee's submission, para. 356.
[1463] United States' appellee's submission, para. 356.
[1464] United States' appellee's submission, para. 357.
[1465] United States' appellee's submission, para. 358.
[1466] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1123.

markets. In so doing, the panel has to examine the respondent's arguments alleging the existence of different market segmentations and rebutting the complainant's arguments.[1467]

5.541. Depending on the facts of a particular case, there can be multiple ways in which a complainant may choose to frame the scope of its serious prejudice claims. We recall that the Appellate Body in the original proceedings recognized that "there is no inhibition on how a complainant may choose to formulate its claim as to the scope of the 'subsidized product'"[1468], adding that "it can do so as it thinks best comports with the adverse effects it seeks to challenge."[1469] Accordingly, the Appellate Body agreed with the original panel that "Members of the WTO have the sovereign right to structure their complaints as they choose."[1470] However, at the same time, the Appellate Body emphasized "the difference between a WTO Member's freedom to formulate its complaint"[1471] and the duty of a panel to scrutinize "whether the complaint, so formulated, holds true and is a proper account of the phenomenon in question, be it displacement, impedance, or any other effect of a subsidy."[1472]

5.542. The Panel in these compliance proceedings noted the European Union's argument that LCA are currently "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 … the sole credible supplier".[1473] At the same time, the Panel noted the United States' argument that "the same three … LCA product markets relied upon by the Appellate Body in the original proceeding to 'complete the analysis' continue to exist."[1474]

5.543. As discussed above, in assessing the three-way market segmentation proposed by the United States, we understand the Panel to have conducted its own objective assessment of the relevant product markets in light of the competing arguments and evidence presented by the parties. As noted, the Panel began its analysis with the three-way market segmentation proposed by the complainant but, in conducting its analysis, the Panel also addressed the arguments by the European Union regarding the existence of "up to six or seven distinct product markets".[1475] In particular, the Panel took into account the Appellate Body's guidance in the original proceedings regarding the *range* of factors that may assist a panel in determining whether two products are in the same market, in the sense that they "create competitive constraints on each other".[1476] The Panel also carefully assessed whether LCA customers sought to procure a range of products to satisfy their needs and requirements. Indeed, "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."[1477] The Panel analysed the relevant *qualitative* factors concerning demand-side substitutability in its assessment of the nature and extent of actual or potential competition between specific products. It also noted that "producing accurate and reliable quantitative evidence of the degree of demand-side substitution between different LCA products would be a formidable task."[1478] Based on its analysis of the arguments and evidence before it, the Panel found it "appropriate to examine the United States' claims of serious prejudice on the basis of the three separate product markets {the Panel had} identified".[1479]

5.544. In so doing, however, the Panel cautioned that it was "*not* {its} view that the degree of competition existing within each of these markets {would} be identical between all pairings or combinations of aircraft"[1480], and further, that "{t}here {would} be weaker and stronger competitive relationships within each market depending upon the particular circumstances of a

[1467] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1131.
[1468] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1131.
[1469] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1131.
[1470] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1130.
[1471] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1130.
[1472] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1130.
[1473] Panel Report, para. 6.1157.
[1474] Panel Report, para. 6.1157.
[1475] Panel Report, para. 6.1157.
[1476] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.
[1477] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.
[1478] Panel Report, para. 6.1205.
[1479] Panel Report, para. 6.1416.
[1480] Panel Report, para. 6.1416. (emphasis original)

sale."[1481] In this context, the Panel observed that "important competitive relationships {could} also {have} exist{ed} between pairings or combinations of aircraft *across* two, or even all three, of the product markets."[1482] The Panel further stated that, while the three product markets the United States had chosen to rely upon to bring its complaint did "not exhaustively capture how competition {took} place between aircraft in the LCA sector at all times", it was satisfied that "they represent{ed} the three segments within which *most competitive interactions* between the relevant aircraft {would} commonly take place."[1483] That said, we note that the European Union did not argue before the Panel that the 747-8I and the 777-300ER and the A350XWB-1000 should have been placed into the same product market. Nor did it contend that the A321neo and the 767 competed in the same market. To the contrary, we understand the European Union's position before the Panel to have been that the "allegedly 'outdated' and 'inferior' technology {of the 767} mean{t} that it {did} not compete in the same product market as the A330 and that, in any case, it ha{d} been replaced by the 787."[1484] In respect of the 777-300ER, the European Union argued that the 777 family was in a "temporal" monopoly market[1485], while the A350XWB-1000 competed closely with the 787 family in the market for technologically advanced and fuel-efficient new generation aircraft.[1486] The European Union did not place the 747-8I into this product market but, rather, placed it into a product market of its own.[1487] We fail to see why the Panel would therefore have been required to separately analyse and make findings on whether "the A321neo exert{ed} competitive constraints on the 767, or whether the 777-300ER or the A350XWB-1000 exert{ed} competitive constraints on the 747-8" such that they should have been placed in the same market.[1488] Rather, as we see it, the Panel was "required to make an objective assessment of the competitive relationship between specific products in the marketplace and to define the relevant product market"[1489], taking properly into account the European Union's arguments and evidence regarding the existence of up to six or seven distinct product markets.[1490] The Panel had no duty, in our view, to make additional findings regarding the nature and degree of competition among LCA that neither party had argued were in meaningful competition or were sufficiently substitutable.

5.545. We note that a panel is required, under Article 11 of the DSU, "to 'consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence'".[1491] A panel does not err simply because it declines to accord to the evidence or to an argument the weight that one of the parties believes should be

[1481] Panel Report, para. 6.1416.

[1482] Panel Report, para. 6.1416. (emphasis original; fn omitted)

[1483] Panel Report, para. 6.1416. (emphasis added) In a footnote, the Panel also recalled that, during the original appellate proceedings, "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", noting further that the Appellate Body went on to "complete the analysis" on the basis of the same three product markets. (Ibid., fn 2416 thereto)

[1484] Panel Report, para. 6.1293 (referring to European Union's first written submission to the Panel, paras. 607-619; second written submission to the Panel, paras. 626-628; response to Panel question No. 70). The Panel noted that the European Union "also appear{ed} to argue that there may be no product market at all in which the 767-300ER is currently sold". (Ibid., para. 6.1157 (fn omitted))

[1485] Panel Report, para. 6.1156, Table 15: Competitive relationships between LCA according to the European Union.

[1486] Panel Report, para. 6.1293.

[1487] Panel Report, para. 6.1156, Table 15: Competitive relationships between LCA according to the European Union.

[1488] European Union's appellant's submission, para. 630.

[1489] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1123.

[1490] In the original proceedings, the Appellate Body stated that "{t}he {original panel} was also required to assess the European Communities' allegation that there are, in fact, five distinct product markets of Airbus and Boeing LCA". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1131)

[1491] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.78 (quoting Appellate Body Reports, *China – Rare Earths*, para. 5.178, in turn referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 185; *EC – Hormones*, paras. 132 and 133; *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258).

accorded to it.[1492] As we see it, in this case, the Panel properly assessed the United States' three-way market segmentation in light of the arguments and evidence before it, including those advanced by the European Union regarding the existence of more segmented market delineations, before concluding that it was "appropriate to examine the United States' claims of serious prejudice on the basis of the three separate product markets {the Panel had} identified above".[1493] In coming to this conclusion, the Panel did not suggest that the United States' identification of the relevant product markets was the *only* way to analyse the adverse effects of the challenged subsidies. The fact that the Panel did not agree with the six- or seven-way market segmentation proposed by the European Union does not mean that the Panel committed legal error amounting to a violation of Article 11 of the DSU.

5.546. For all these reasons, we see no basis to find that the Panel acted inconsistently with Article 11 of the DSU.

5.6.2.6 Overall conclusion

5.547. Regarding the term "market" in Article 6.3 of the SCM Agreement, for the purposes of conducting an adverse effects analysis, two products are in the same market if they are sufficiently substitutable and they exercise "meaningful" competitive constraints on each other. A consideration of *quantitative* tools and evidence may assist a panel in defining the relevant product markets and in answering the question of whether products exercise meaningful competitive constraints on each other and are sufficiently substitutable to fall in the same product market. However, like the Panel, we do not see a reason to preclude that a careful scrutiny of *qualitative* evidence may also be sufficient, provided that it permits an informative and meaningful analysis of the relevant product markets. Depending on the particularities of a given case, it may be sufficient for a panel to examine *qualitative* evidence regarding demand-side and supply-side substitutability, product characteristics, end-uses, and customer preferences in order to reach a conclusion as to the nature and degree of competition between two products. Having reviewed the Panel's analysis of competition in the single-aisle LCA, twin-aisle LCA, and VLA product markets, we are satisfied that the Panel's identification of the product markets in the present dispute was based on a proper analysis of the competition among the relevant products, which the Panel found to demonstrate sufficient substitutability, in accordance with the standard articulated by the Appellate Body in the original proceedings. We are also satisfied that the Panel's analyses identifying the single-aisle LCA, twin-aisle LCA, and VLA product markets reflect a proper reading of the term "market" and we do not agree with the European Union to the extent that it argues that the Panel erred in its interpretation of the term "market" in Article 6.3 of the SCM Agreement.

5.548. Accordingly, we uphold the Panel's finding, in paragraph 6.1416 of the Panel Report, that the United States had brought its 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.

5.549. That said, we wish to emphasize that the identification of relevant product markets is a threshold question, the disposition of which informs the subsequent analysis of whether a complainant has established that the effect of a particular subsidy is serious prejudice. While it may be possible to conduct an analysis of adverse effects and reach meaningful findings of serious prejudice in instances where "all products are not engaged in direct competition for the same sales or orders – or where the competitive relationship between such products is, at most, indirect or remote"[1494] – this must, however, "be properly accounted for" in the serious prejudice analysis.[1495]

[1492] Appellate Body Reports, *Australia – Salmon*, para. 267; *Japan – Apples*, para. 221; *Korea – Alcoholic Beverages*, para. 164.
[1493] Panel Report, para. 6.1416.
[1494] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1136.
[1495] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1136.

5.6.3 "Product effects" of LA/MSF subsidies on Airbus LCA

5.6.3.1 Introduction

5.550. As discussed above, in examining the causal link between the LA/MSF subsidies and the alleged serious prejudice, the Panel began by reviewing the "product effects" of the LA/MSF subsidies.[1496] The Panel found that 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 of Airbus LCA.[1497] The Panel also found that the aggregated LA/MSF subsidies, with the exception of LA/MSF for the A300 and A310, are a genuine and substantial cause of the market presence of the A350XWB.[1498]

5.551. On appeal, the European Union maintains that the Panel's erroneous interpretation of Article 7.8 of the SCM Agreement "led it to assess, erroneously, adverse effects of withdrawn subsidies"[1499], and made its causation assessment "for an overly broad basket of subsidies".[1500] The European Union further contends that the Panel "compounded" its errors by committing a number of additional errors in its causation analysis.[1501] With respect to the pre-A350XWB LA/MSF subsidies, the European Union alleges that the Panel erred by relying solely on the original panel's finding that Airbus would not have existed with its current range of product offerings during the original reference period (2001-2006), because Airbus would not have launched those products "as and when" it did "but for" the pre-A350XWB LA/MSF subsidies.[1502] According to the European Union, while such a "but for" approach can identify the "necessary" cause of the current market presence of Airbus' product offerings[1503], it is incapable of determining a genuine and substantial cause in this case, due to its failure to account for the passage of time and relevant events during that time, including the expiry of several LA/MSF subsidies and non-subsidized investments in Airbus' A320 and A330 families of Airbus LCA.[1504]

5.552. As a preliminary matter, we note that the errors alleged above by the European Union regarding the Panel's findings on the "product effects" of the pre-A350XWB LA/MSF subsidies on the market presence of the A320 and A330 families of Airbus LCA concern primarily the LA/MSF subsidies that had expired before the end of the implementation period, namely, the subsidies for the A300, A310, A320, A330, and A340. In particular, the European Union contends that "the basket of subsidies considered by the Panel included subsidies that were granted more than four decades ago, most of which the Panel itself found have since expired."[1505] In the European Union's view, "{c}onsistent with Article 7.8 of the SCM Agreement, the compliance Panel's task was, therefore, to examine if the passage of time, and events that have occurred during that time, including the expiry of the subsidies and massive non-subsidised post-launch investments, have resulted in 'remov{al} of the adverse effects' found to exist in the original proceedings."[1506]

5.553. In section 5.4.2 of this Report, we have found that the Panel erred in its interpretation of Article 7.8 of the SCM Agreement in finding that the European Union has a compliance obligation in respect of subsidies that had expired prior to the adoption of the panel and Appellate Body reports in the original proceedings – i.e. before the beginning of the implementation period. In addressing the European Union's consequential appeal in section 5.5 of this Report, we have

[1496] As noted above, the Panel used the term "product effects" to refer to the effects of LA/MSF subsidies on the ability of Airbus to launch and bring to market an Airbus LCA as and when it did, and further found that "product effects" consisted of "direct effects" and "indirect effects", depending on whether the effects concern Airbus' ability to launch the particular model of LCA specifically funded by an LA/MSF subsidy (direct), or other models of LCA (indirect). (See *supra* fn 1052)

[1497] Panel Report, para. 6.1534.

[1498] Panel Report, paras. 6.1778 and 7.1.d.xiii.

[1499] European Union's appellant's submission, para. 774. (fn omitted)

[1500] European Union's appellant's submission, para. 776.

[1501] European Union's appellant's submission, para. 776.

[1502] European Union's appellant's submission, para. 834 (quoting Original Panel Report, paras. 7.1920, 7.1940, 7.1984, and 7.2025).

[1503] European Union's appellant's submission, para. 834.

[1504] European Union's appellant's submission, paras. 777, 854, and 857.

[1505] European Union's appellant's submission, para. 854 (referring to Panel Report, para. 6.907).

[1506] European Union's appellant's submission, para. 854.

therefore highlighted that the pertinent question for purposes of these compliance proceedings is whether the subsidies granted or maintained by the European Union – i.e. the subsidies existing in the post-implementation period (after 1 December 2011) – cause adverse effects. Thus, to the extent that some subsidies have expired, a further examination of the removal of the effects of those subsidies would not be necessary. In other words, it is not pertinent to examine whether the Panel's findings on the "product effects" of the *expired* subsidies can support its ultimate conclusion of non-compliance under Article 7.8 of the SCM Agreement. In line with this view, we do not consider it necessary to make separate findings on the European Union's appeal insofar as it concerns the Panel's alleged failure to assess properly the passage of time and the events during that time in reaching its findings on the "product effects" of the expired subsidies.[1507]

5.554. Furthermore, we have noted above that whether the Panel had a sufficient basis for its ultimate conclusions is a question that can only be answered following a careful review of the Panel's reasoning and analysis as it relates to the LA/MSF subsidies *existing* in the post-implementation period. Therefore, in addressing the errors alleged by the European Union in respect of the Panel's adverse effects analysis[1508], we will focus our review on the Panel's analysis and findings regarding the effects of subsidies existing in the post-implementation period, and the European Union's appeal thereof, to determine whether those findings support the Panel's ultimate conclusion regarding serious prejudice.

5.555. With respect to the A380 LA/MSF subsidies, which had not expired, the European Union claims on appeal that, to the extent that the Panel found that the A380 LA/MSF subsidies resulted in "direct effects" on the A380, such a finding lacks sufficient evidentiary basis.[1509] As to the Panel's finding of the "product effects" of LA/MSF subsidies on the A350XWB, the European Union alleges, first, that the Panel's finding that the A350XWB LA/MSF subsidies had "direct effects" on the launch of the A350XWB lacks sufficient evidentiary basis[1510], and is contradicted by certain other findings made by the Panel.[1511] Second, the European Union claims that the Panel erred in finding that the A380 LA/MSF had "indirect effects" on Airbus' ability to launch the A350XWB.[1512]

5.556. In carrying out our analysis of these claims, we bear in mind the findings from the original proceedings concerning the effects of the LA/MSF subsidies on Airbus' ability to launch the LCA products at issue in the original proceedings as and when it did. As noted, the expired subsidies are relevant for our review of the Panel's findings *not* to determine whether *they* cause "adverse effects", but only as part of a matrix of analysis that seeks to understand the effects of the subsidies existing in the post-implementation period. This is particularly the case given that, as further discussed below, the subsidies at issue in these compliance proceedings operate along the same causal pathway as the subsidies that were found to have caused adverse effects in the original proceedings.[1513]

5.557. With these considerations in mind, we begin by providing an overview of the Panel's findings on the "product effects" of LA/MSF subsidies. Thereafter, we recall briefly the causation standard under Articles 5 and 6 of the SCM Agreement, as explained by the Appellate Body in past disputes. We then describe the relevant findings from the original proceedings concerning the "product effects" of the pre-A350XWB LA/MSF, and review the extent to which the findings from the original proceedings informed the Panel's findings on adverse effects in these compliance proceedings. Finally, we proceed to review the European Union's appeal of the Panel's findings concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period, namely, its findings regarding the A380 and A350XWB LA/MSF subsidies.

[1507] As noted above, such events include the expiry of certain LA/MSF subsidies and non-subsidized investments in the A320 and A330 families of Airbus LCA.
[1508] European Union's appellant's submission, paras. 776-786.
[1509] European Union's appellant's submission, paras. 878-884.
[1510] European Union's appellant's submission, paras. 888, 899, and 913.
[1511] European Union's appellant's submission, paras. 901 and 913.
[1512] European Union's appellant's submission, paras. 890-895.
[1513] See sections 5.6.3.4 and 5.6.3.5 of this Report.

5.6.3.2 Summary of Panel findings

5.558. The Panel explained at the outset of its analysis that the effects of the relevant subsidies should be determined by conducting a unitary 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".[1514] The Panel agreed with the United States that the starting point of the counterfactual analysis in these compliance proceedings should be the counterfactual that formed the basis of the original panel and Appellate Body findings on the effects of the pre-A350XWB LA/MSF subsidies in the 2001-2006 period.[1515] Moreover, the counterfactual analysis in this dispute requires consideration of the extent to which "the design, structure and operation of the challenged LA/MSF subsidies" are 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* (i.e. after 1 December 2011).[1516] Having recalled the relevant findings from the original proceedings[1517], the Panel considered that 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"[1518] would have been present on the market (the "unlikely" scenario).[1519]

5.559. Having reviewed the findings from the original proceedings, the Panel explained that it would begin its evaluation by first determining the effects of the pre-A350XWB LA/MSF subsidies in the post-implementation period on the A320, A330, and A380 families of Airbus LCA, before examining the extent to which *all* of the challenged LA/MSF subsidies (including the pre-A350XWB and the A350XWB LA/MSF subsidies) allowed Airbus to launch and bring to market the A350XWB as and when it did.

5.6.3.2.1 Findings on the "product effects" of pre-A350XWB LA/MSF subsidies on the A320, A330, and A380

5.560. The Panel considered 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* as they did at the time of the original proceedings, the United States would have to demonstrate that: (i) a non-subsidized Airbus would not exist today; or (ii) any non-subsidized Airbus company coming

[1514] Panel Report, para. 6.1453 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1110). The Panel explained that, in contrast to a "unitary approach", 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. The Panel recalled that, while the Appellate Body accepted the validity of this approach in the original proceedings, it explicitly stated that a "unitary analysis" would be preferable. (Ibid., fn 2490 thereto (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1107 and 1109)).

[1515] Panel Report, paras. 6.1457 and 6.1461. See also United States' first written submission to the Panel, paras. 335-352; second written submission to the Panel, paras. 367-373. As further discussed in para. 5.591 below, the original panel discussed four scenarios "for the LCA industry in the counterfactual world that would exist in the absence of subsidies to Airbus". (Original Panel Report, para. 7.1984) Scenarios 1 and 2, which were considered "plausible" by the original panel, contemplated that a non-subsidized Airbus would have had no market presence in the 2001-2006 period. Scenarios 3 and 4, which the original panel considered "unlikely", 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". (Ibid., paras. 7.1984 and 7.1993)

[1516] Panel Report, para. 6.1462.

[1517] See Panel Report, paras. 6.1464-6.1479.

[1518] Panel Report, para. 6.1475 (quoting Original Panel Report, paras. 7.1984 and 7.1993).

[1519] Panel Report, para. 6.1475. (emphasis original)

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.[1520] Noting the complexities of LCA production and the dynamics and history of competition in the LCA industry, the Panel found it difficult to see how any non-subsidized Airbus company 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.[1521]

5.561. The Panel noted that the European Union did not argue 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), nor that a "much weaker" non-subsidized Airbus, with "at best a more limited offering of LCA models" during the 2001-2006 period, could have developed the same or comparable range of LCA that it offers today.[1522] Instead, the Panel noted that the European Union's "core argument" was that any "product effects" found to exist up to the end of 2006 have today either: (i) dissipated over time; or (ii) been significantly attenuated by a number of non-subsidized Airbus investments in the A320 and A330.[1523] The Panel then turned to address these arguments.[1524]

5.562. In respect of the first argument, recalling the Appellate Body's recognition that the "life" of a subsidy will not necessarily define the duration of its effects[1525], the Panel considered that 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.[1526] The Panel noted 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", but the effects of those subsidies, together with the effects of all of the other challenged subsidies, were found in the original proceedings to be a "genuine and substantial" cause of serious prejudice.[1527] The Panel saw no reason why the logic underpinning those findings should not be equally applicable for the purpose of determining the extent to which the effects of the challenged LA/MSF subsidies in these compliance proceedings have dissipated and come to an end with the passage of time.[1528]

5.563. The Panel recalled that the causation findings in the original proceedings were based on the existence of two types of "product effects" attributable to the LA/MSF subsidies: (i) "direct effects" − namely, the effects of any given LA/MSF subsidy on Airbus' ability to launch and bring to market the particular model of Airbus LCA specifically funded by that LA/MSF loan; and (ii) "indirect effects" − namely, the "learning", scope, and financial effects that any given LA/MSF subsidy provided specifically for one model of LCA may have on Airbus' ability to launch and bring to market another model of LCA.[1529] The Panel considered that the duration of the "direct effects" of any particular LA/MSF subsidy 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 subsidy, then as a matter of logic,

[1520] Panel Report, para. 6.1480.
[1521] Panel Report, para. 6.1481.
[1522] Panel Report, para. 6.1481 (quoting Original Panel Report, paras. 7.1984 and 7.1993).
[1523] Panel Report, para. 6.1481.
[1524] The Panel further observed that, "{a}dditionally, and in the alternative", the European Union had argued that any lingering present-day effects of the challenged LA/MSF subsidies were 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 could be explained by a number of factors unrelated to the effects of LA/MSF. (Panel Report, para. 6.1481) The Panel examined the "alternative" argument in the final part of its analysis of the United States' claims of Boeing lost sales, displacement, and impedance in the various LCA product markets. (Ibid., paras. 6.1782-6.1783, 6.1790-6.1797, and 6.1810-6.1816)
[1525] Panel Report, para. 6.1488.
[1526] Panel Report, para. 6.1489.
[1527] Panel Report, para. 6.1490 (referring to paras. 6.879 and 6.1076).
[1528] Panel Report, para. 6.1491.
[1529] Panel Report, para. 6.1492. According to the Panel, learning, scope, and financial effects refer to the extent to which LA/MSF subsidies enable Airbus to: (i) develop the "knowledge, know-how and experience" to launch other LCA models; (ii) share inputs and spread costs between different LCA models; and (iii) lower the cost of financing new LCA models and generate revenues that would not otherwise exist in the absence of LA/MSF. (Ibid., paras. 6.1510-6.1511)

the Panel considered it likely that the "direct effects" of that LA/MSF subsidy would continue to be felt throughout the marketing life of the specifically funded aircraft.[1530] As for the "indirect effects" of LA/MSF subsidies, the Panel was of the view that the duration of such "indirect effects" 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".[1531] In sum, the Panel stated that it did "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."[1532]

5.564. Turning to the alleged non-subsidized investments in the A320 and A330 families of LCA, the Panel had "no doubt" 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.[1533] Nonetheless, the Panel recalled 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".[1534] The Panel reasoned that, because 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."[1535] In the Panel's view, the same was true with respect to the post-launch investments the European Union identified as having taken place *after* the end of 2006. The Panel considered it difficult to contemplate how a non-subsidized Airbus entering the LCA market in 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 types comparable to those with respect to which Airbus decided to make the post-2006 investments.[1536] The Panel therefore found that the "direct effects" and "indirect effects" of the pre-A350XWB LA/MSF subsidies continued to be a "genuine and substantial" cause of the market presence of the current versions of the A320 and A330 families of Airbus LCA, although they were not the only cause.[1537]

5.565. In conclusion, the Panel was not convinced that the relevant arguments and evidence before it "demonstrate{d} that the mere passage of time or the few events which the European Union ha{d} identified to have taken place since the beginning of 2007 (or even before then), ha{d} materially eroded the causal link that was found to exist in the original proceeding up until the end of 2006".[1538] In the Panel's view, the European Union's arguments and evidence concerning the passage of time and post-launch investments were "factually unpersuasive".[1539] Consequently, the Panel found that the "direct effects" 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 of Airbus LCA. In other words, in the absence of the pre-A350XWB LA/MSF subsidies, Airbus would not be selling these aircraft today.[1540]

5.6.3.2.2 Findings on the "product effects" of the challenged LA/MSF subsidies on the A350XWB

5.566. With regard to the A350XWB, the Panel sought to determine whether Airbus could have launched the A350XWB *as and when it did* in December 2006 in the absence of the "individual

[1530] Panel Report, para. 6.1508. (emphasis omitted) By contrast, the Panel observed that, where the very existence and ongoing market presence of an aircraft that was specifically funded with LA/MSF subsidies is *not* dependent on 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 subsidy, 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". (Ibid. (emphasis original))
[1531] Panel Report, para. 6.1513.
[1532] Panel Report, para. 6.1515. (emphasis original)
[1533] Panel Report, para. 6.1524.
[1534] Panel Report, para. 6.1525.
[1535] Panel Report, para. 6.1525.
[1536] Panel Report, para. 6.1526.
[1537] Panel Report, para. 6.1527.
[1538] Panel Report, para. 6.1531.
[1539] Panel Report, para. 6.1534.
[1540] Panel Report, para. 6.1534.

and/or combined impact" of: (i) the "direct effects" of A350XWB LA/MSF subsidies; and (ii) the "indirect effects" of the pre-A350XWB LA/MSF subsidies.[1541] In its analysis, the Panel used the two "unlikely" counterfactual scenarios from the original proceedings as the starting point[1542], having concluded that, under the two "plausible" counterfactual scenarios adopted in the original proceedings, "there {was} no doubt that the A350XWB could not have been launched and brought to market in the absence of LA/MSF."[1543]

5.567. The parties' arguments before the Panel focused on the extent to which the *subsidized* Airbus that *actually existed* in the 2006-2010 period could have launched the A350XWB in the absence of the individual and/or combined impact of the "direct effects" of the A350XWB LA/MSF subsidies and the "indirect effects" of the pre-A350XWB LA/MSF subsidies. The Panel explained that this was based on "a counterfactual that is different to the one that form{ed} the basis of the question" that the Panel had posed, and that neither party had advanced any arguments as to the ability of the *non-subsidized* Airbus company that would exist in the "unlikely" counterfactual scenarios to launch the A350XWB.[1544] Nonetheless, the Panel considered that, by examining the impact of LA/MSF on the *subsidized* Airbus company that *actually existed* from 2006 to 2010, "inferences {could} be drawn about the extent to which the non-subsidized Airbus company that would {have} exist{ed} in the 'unlikely' counterfactual scenarios could have done the same", 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."[1545] Adopting this analytical framework, the Panel turned to examine the merits of the parties' arguments regarding the ability of Airbus – as it actually existed in 2006 – to launch the A350XWB as and when it did, with a view to drawing inferences concerning whether the non-subsidized Airbus company that would have existed in the "unlikely" counterfactual scenarios could have launched the A350XWB *as and when it did*.[1546]

5.6.3.2.2.1 Findings on the "direct effects" of the A350XWB LA/MSF subsidies on the A350XWB

5.568. The Panel began by setting forth the factual background to the launch of the A350XWB, in the form of a "narrative" of the A350XWB programme "running from its origins through to the period during which the A350XWB LA/MSF contracts were entered into".[1547] The Panel divided its narrative into three main parts, beginning with an examination of the "pre-launch period"[1548], and then turning to the "{l}aunch and the A350XWB Business Case"[1549], and the "post-launch period".[1550]

5.569. Beginning with the "pre-launch period", the Panel identified three "material" topics: (i) the origins of the A350XWB programme; (ii) the A350XWB programme's developmental status leading up to launch; and (iii) Airbus' and EADS' financial situation leading up to the launch.[1551] Based on its analysis of the evidence pertaining to these topics, the Panel made the following findings with respect to the pre-launch period: (i) "serious financial difficulties had arisen for

[1541] Panel Report, para. 6.1535. (emphasis omitted)
[1542] See 5.591 below. See also *supra* fn 1515.
[1543] Panel Report, para. 6.1535. The Panel explained that, under the "plausible" counterfactual scenarios, a non-subsidized Airbus would not have existed in 2006; and that there was, furthermore, no evidence before the Panel to suggest (and the European Union did not argue) that a non-subsidized Airbus would have come into being any time thereafter. (Ibid.)
[1544] Panel Report, para. 6.1537.
[1545] Panel Report, para. 6.1537. (fn omitted)
[1546] Panel Report, para. 6.1538.
[1547] Panel Report, para. 6.1540. The Panel referred to this as the "Contracting Period". See also para. 6.1539.
[1548] This is the period consisting of events surrounding the A350XWB programme that occurred before the launch of the A350XWB, that is, before 1 December 2006. (Panel Report, para. 6.1541)
[1549] This relates to the A350XWB Business Case presented to the EADS Board of Directors on **[BCI]**, in preparation for the launch of the A350XWB, and to the official approval by EADS of the launch of the A350XWB on the basis of the Business Case, on 1 December 2006. (Panel Report, para. 6.1568; A350XWB Business Case Presentation (Panel Exhibit EU-130 (HSBI)))
[1550] Panel Report, para. 6.1574. This period relates to certain events surrounding the A350XWB programme occurring after the launch of the A350XWB, and through the Contracting Period. (Ibid.)
[1551] Panel Report, para. 6.1541.

Airbus and EADS that adversely affected their financial condition moving forward"[1552]; (ii) although it was forecast to be a very expensive project, Airbus deemed the A350XWB programme important enough to pursue because of, *inter alia*, its considerable strategic importance to Airbus' competitiveness; (iii) 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 by securing commitments from the member States regarding the future provision of some sort of financial assistance in connection with the A350XWB programme; and (iv) these strategies allowed Airbus and EADS to overcome their financial problems, to the point where they were prepared to proceed with the A350XWB launch decision.[1553]

5.570. Turning to the A350XWB Business Case Presentation on **[BCI]** in preparation for the launch of the A350XWB, the Panel took "particular note" of three aspects.[1554] First, based on different press reports, the Panel was of the view that disagreements among EADS' shareholders regarding how the A350XWB would be funded delayed the launch, and such disagreements were resolved, at least in part, with a French Government guarantee to provide certain financial support for the programme.[1555] Second, the Panel found that the assumption that the A350XWB programme would be "funded in part with financing that involved member State **[BCI]** permeated the A350XWB Business Case".[1556] Finally, the Panel considered that the business case highlighted both risks and strategic benefits associated with the A350XWB programme.[1557]

5.571. The Panel next analysed evidence from the post-launch period relating to the following four topics: (i) the developmental status of the A350XWB programme; (ii) Airbus' and EADS' financial position during this period; (iii) negotiations between Airbus and the member States concerning financial assistance for the A350XWB programme generally, and A350XWB LA/MSF specifically; and (iv) certain government documents discussing the importance of member State financial assistance in connection with the A350XWB programme. The Panel made the following findings: (i) as of the First Contract Date[1558], EADS had experienced certain successes with efforts to mitigate its financial problems that had arisen in the pre-launch period, but continued to face financial problems moving forward[1559]; (ii) 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[1560]; (iii) statements made by certain UK and Airbus officials, the European Commission State Aid Decisions[1561], and a written assessment by the UK Government of the merits of Airbus' request for A350XWB LA/MSF[1562] (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[1563]; and (iv) 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 the availability of such assistance.[1564]

5.572. Having set out its narrative of the A350XWB programme, the Panel assessed the parties' arguments regarding the extent to which the A350XWB LA/MSF subsidies had an impact on the ability of the Airbus company that *actually existed* in the 2006-2010 period to launch the A350XWB as and when it did. In doing so, the Panel focused its analysis on the impact of the A350XWB LA/MSF subsidies on the "viability" of the programme with respect to both the launch date and the First Contract Date.[1565] The Panel examined four main aspects of the A350XWB programme bearing upon the issue of viability, namely: (i) Airbus' expected ability to effectively

[1552] Panel Report, para. 6.1567. See also e.g. paras. 6.1544, and 6.1550-6.1553.
[1553] Panel Report, para. 6.1567.
[1554] Panel Report, para. 6.1573.
[1555] Panel Report, para. 6.1573. See also para. 6.1568.
[1556] Panel Report, para. 6.1573. See also paras. 6.1569-6.1570.
[1557] Panel Report, para. 6.1573. See also paras. 6.1571-6.1572.
[1558] The Panel used the term "First Contract Date" to refer to the date on which the evidence establishes that the first LA/MSF contract came into being. (Panel Report, para. 6.1631)
[1559] Panel Report, para. 6.1624. See also paras. 6.1585-6.1587.
[1560] Panel Report, paras. 6.1584 and 6.1624.
[1561] Panel Report, paras. 6.1613-1623.
[1562] UK Appraisal (Panel Exhibit EU-(Article 13)-34 (HSBI)).
[1563] Panel Report, paras. 6.1600-6.1609, and 6.1624.
[1564] Panel Report, para. 6.1624. See also para. 6.1598.
[1565] Panel Report, para. 6.1639.

fund the programme with financing on market terms; (ii) the programme's base-case NPV; (iii) the strategic reasons for Airbus to pursue the programme not already taken into account in the base-case NPV; and (iv) the programme's risks.[1566]

5.573. Beginning with Airbus' ability to fund the programme in the absence of A350XWB LA/MSF, the Panel examined evidence pertaining to: (i) increased use of risk-sharing partners (RSPs)[1567]; (ii) increased profitability and cash generation[1568]; (iii) disposal of non-core assets; (iv) a reduction in shareholder distributions; (v) equity-related financing[1569]; (vi) cash reserves[1570]; and (vii) increased debt.[1571] In addition to the *extent* of the financial resources available to effectively fund the A350XWB programme, the Panel considered three other factors bearing upon the issue of viability *vis-à-vis* the date of launch and the First Contract Date, namely: (i) the programme's base-case NPV; (ii) the programme's strategic benefits; and (iii) the programme's risks.[1572]

5.574. Taking all of these factors into account, the Panel found that, while "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", the evidence demonstrated that pursuing the programme in the absence of A350XWB LA/MSF would have been "a more complicated, more costly and riskier endeavour"[1573], such that, in the absence of A350XWB LA/MSF, it would be highly likely that 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".[1574] Consequently, the Panel found that, 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."[1575]

5.575. Following its findings on the impact of A350XWB LA/MSF on the *subsidized* Airbus company's ability to launch and bring to market the A350XWB, and recalling that, under both "unlikely" counterfactual scenarios, a non-subsidized Airbus operating in the 2001-2006 period

[1566] Panel Report, para. 6.1638.

[1567] The Panel considered that, while it was theoretically possible for Airbus to involve a greater number of RSPs in the A350XWB programme by some degree, it was not persuaded that Airbus could have in practice relied on RSPs to a level that would have come anywhere close to doubling their involvement compared to the actual situation. (Panel Report, para. 6.1656)

[1568] The Panel found it far from clear that EADS was in a position to cut further significant costs from its budget at any relevant time, at least without inviting disruptions and other potential problems to its operations. (Panel Report, para. 6.1659)

[1569] While the Panel accepted that disposal of non-core assets by EADS, a reduction in shareholder distributions by EADS, and equity-related financing may have been options for EADS, it concluded that the extent to which they could be credible sources of funding for the A350XWB programme in the absence of A350XWB LA/MSF, at any relevant time remained speculative. (See Panel Report, paras. 6.1657, 6.1664, and 6.1668)

[1570] The Panel considered that, although EADS had significant cash that it could have diverted to the A350XWB programme, doing so would have entailed significant risks for EADS given the uncertainties surrounding its future cash positions and the competing pressures on its cash reserves. (Panel Report, para. 6.1690)

[1571] While the Panel expressed certain reservations regarding the probative value of the evidence submitted by the European Union, the Panel detected little evidence that EADS would have had "*no* appreciable debt-raising capacity in the relevant time periods in the absence of A350XWB LA/MSF", and thus accepted that this was likely an option that could have been pursued to at least some material degree. (Ibid., para. 6.1700 (emphasis original)).

[1572] Panel Report, para. 6.1701. See also paras. 6.1702-6.1712.

[1573] Panel Report, para. 6.1717. According to the Panel, any single one of the potentially available funding options to Airbus, via EADS, would have had its own risks, costs and/or difficulties, and would have been "insufficient on its own to replace either the absolute monetary value or the relative financial security provided through the generally back-loaded, unsecured and success-dependent repayment terms of A350XWB LA/MSF". (Ibid., para. 6.1715 (fn omitted))

[1574] Panel Report, para. 6.1716. Making such compromises would, in the Panel's view, be a way to reduce costs and/or risk associated with the programme. Further, the Panel noted several pieces of evidence on the record indicating how financial troubles may delay an LCA programme. (Ibid., para. 6.1716 and fn 3074 thereto (additional text in fn omitted))

[1575] Panel Report, para. 6.1717. (emphasis original)

would have been "a 'much weaker' company 'with at best a more limited offering of LCA models'", the Panel found 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.[1576] The Panel explained 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", and 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."[1577]

5.6.3.2.2.2 Findings on the "indirect effects" of the pre-A350XWB LA/MSF subsidies on the A350XWB

5.576. Next, the Panel considered the extent to which the "indirect effects" of the pre-A350XWB LA/MSF subsidies 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".[1578] The Panel recalled that the indirect effects of LA/MSF take the form of: (i) "learning effects"; (ii) "scope and scale effects"; and (iii) "financial effects".[1579] Starting with the learning effects, the Panel examined "duelling expert reports" presented by both parties[1580], as well as "historical record evidence in the form of press reports, the A350XWB Business Case, Airbus/EADS presentations and other materials"[1581], and found the evidence to show that "the A350XWB programme significantly benefitted from Learning Effects arising from previous, subsidized Airbus LCA programmes, especially (but not only) the A380 programme."[1582] The Panel thus found the learning effects of the pre-A350XWB LA/MSF subsidies to be "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".[1583] The Panel however considered it "difficult to materially attribute the same degree of importance to any Learning Effects from the A300 and A310 LA/MSF subsidies".[1584]

5.577. With regard to financial effects, the Panel examined the impact of the pre-A350XWB LA/MSF subsidies on the A350XWB programme in terms of (i) enterprise value[1585]; (ii) return on capital employed (ROCE)[1586]; (iii) mitigation of A380 and A340 programme issues[1587]; (iv) the report by Professor David Wessels of the Wharton Business School[1588];

[1576] Panel Report, paras. 6.1718-6.1719 and 6.1722.
[1577] Panel Report, para. 6.1722.
[1578] Panel Report, para. 6.1723.
[1579] Panel Report, paras. 6.1724-6.1725.
[1580] Panel Report, para. 6.1726. See also paras. 6.1727-6.1744.
[1581] Panel Report, para. 6.1726. See also paras. 6.1745-6.1746.
[1582] Panel Report, para. 6.1747.
[1583] Panel Report, para. 6.1760. (fn omitted)
[1584] Panel Report, fn 3222 to para. 6.1760. The Panel explained in this regard that the specific A350XWB components and systems that it found to have benefitted from "learning effects" "generally appear{ed} to be derivations of similar components and systems used on more recent Airbus LCA programmes such as the A380". (Ibid.)
[1585] Before the Panel, the United States argued that "pre-A350XWB LA/MSF made EADS more attractive to investors by positively impacting EADS' enterprise value". (Panel Report, para. 6.1762)
[1586] ROCE is calculated by dividing a company's earnings by its invested capital. (See Panel Report, fn 3230 to para. 6.1764) Before the Panel, the United States argued that pre-A350XWB LA/MSF allowed EADS to "alter its ROCE to make itself appear more attractive to investors". (Ibid., para. 6.1764 (fn omitted))
[1587] Before the Panel, the United States argued 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". (Panel Report, para. 6.1767 (referring to United States' first written submission to the Panel, para. 372))
[1588] Professor David Wessels, "Assessing Airbus' Capacity to Fund Large Scale Projects Without LA/MSF", 17 October 2012 (Wessels Report) (Panel Exhibit USA-364). Before the Panel, the United States relied on the Wessels Report to argue that, if Airbus had launched its subsidized LCA programmes using market financing, the "resulting debt burden would have been so great as to prohibit the launch and development of the A350XWB at any relevant time". (Panel Report, para. 6.1768)

and (v) revenues.[1589] On balance, the Panel found that "the evidence … demonstrate{d} that the A350XWB programme significantly benefitted from two of the five Financial Effects of the pre-A350XWB LA/MSF subsidies … namely, the enhanced revenue and debt reduction effects", which "enabled Airbus to launch and bring to market all of its existing Airbus LCA programmes".[1590] The Panel, however, considered it "difficult to materially attribute such Financial Effects related to revenues to the A300 and A310 programmes".[1591]

5.578. Finally, in respect of the scope and scale effects, the Panel noted that the United States relied on the findings in the original proceedings "without referring to any specific evidence".[1592] As a result, while the Panel accepted 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", it found that it could give this line of argument only "limited weight".[1593]

5.579. In conclusion, with respect to the indirect effects of pre-A350XWB LA/MSF subsidies, the Panel found that "the *indirect effects* of pre-A350XWB LA/MSF were fundamental to Airbus' ability to launch and develop the A350XWB programme", and had no doubt that it would not have been possible to launch the A350XWB if "Airbus {had} not benefitted from these *indirect effects* of the pre-A350XWB LA/MSF measures".[1594] The Panel found it "apparent" 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*."[1595] Accordingly, the Panel found that its assessment of the "indirect effects" of the pre-A350XWB LA/MSF subsidies on the A350XWB confirmed its 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."[1596]

5.580. On this basis, using all four counterfactual scenarios from the original proceedings concerning the effects of the pre-A350XWB LA/MSF subsidies until the end of 2006 as the starting point of its analysis, the Panel found it "apparent that the A350XWB could not have been launched and brought to market in the absence of LA/MSF"[1597], with the exception of the LA/MSF subsidies provided for the A300 and A310.[1598]

5.6.3.3 Causation under Articles 5(c) and 6.3 of the SCM Agreement

5.581. It is well established that, in disputes involving claims under Part III of the SCM Agreement, a complainant must demonstrate not only the existence of the relevant subsidies and the adverse effects to its interests, but also that the subsidies have *caused* such effects.[1599] The Appellate Body has consistently articulated the causal link required as "a genuine and substantial relationship of cause and effect".[1600] In other words, the subsidies must contribute, in a "genuine" and "substantial" way, to producing or bringing about one or more of the effects, or market phenomena, enumerated in Article 6.3 of the SCM Agreement.[1601] The Appellate Body has noted that the "genuine" nature of the causal link requires a complainant to show that the nexus

[1589] Panel Report, para. 6.1770. The United States argued 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 most likely would not have existed but for the LA/MSF subsidies. (Ibid., para. 6.1761) The Panel also observed, generally, that certain of the financial effects alleged by the United States go beyond the financial effects that the original panel and the Appellate Body articulated in the original proceedings. (Ibid., fn 3223 to para. 6.1761)

[1590] Panel Report, para. 6.1771. (fn omitted)

[1591] Panel Report, fn 3248 to para. 6.1771.

[1592] Panel Report, para. 6.1773.

[1593] Panel Report, para. 6.1773.

[1594] Panel Report, para. 6.1774. (emphasis original)

[1595] Panel Report, para. 6.1775. (emphasis original)

[1596] Panel Report, para. 6.1775. (emphasis original)

[1597] Panel Report, para. 6.1778.

[1598] Panel Report, para. 7.1.d.xiii.

[1599] See Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 913.

[1600] Appellate Body Reports, *US – Upland Cotton*, para. 438; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374; *EC and certain member States – Large Civil Aircraft*, para. 1232; *US – Large Civil Aircraft (2nd complaint)*, para. 913.

[1601] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 913.

between cause and effect is "real" or "true".[1602] As for the "substantial" component of the causal relationship, "this concerns the relative importance of the causal agent (the subsidies at issue) in bringing about the adverse effect(s) in question".[1603]

5.582. The mere presence of other causal factors 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. Indeed, "a panel need not determine {the subsidy} to be the *sole* cause of that effect, or even that it is the *only* substantial cause of that effect".[1604] However, the panel must "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."[1605] Ultimately, a final determination as to whether the requisite causal link has been established can only be made 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."[1606]

5.583. Provided that the panel adheres to the standard for causation described above, "a panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the 'effect' of a subsidy" is one of the effects set out in Article 6.3.[1607] One such methodology is the use of counterfactuals, which, in general terms, "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".[1608] The Appellate Body has noted that a "but for" approach could be a permissible way of conducting a counterfactual analysis[1609] if "the subsidy is both a necessary cause of the market phenomenon *and* a substantial cause".[1610]

5.584. Another methodological issue concerns the collective assessment of the effects of multiple subsidies. As explained by the Appellate Body in *US – Large Civil Aircraft (2nd complaint)*, one way to conduct such a collective assessment is through aggregation, whereby a panel "group{s} 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".[1611] The Appellate Body cautioned that, in each case, "a panel is subject to the

[1602] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, fn 1865 to para. 913. The Appellate Body noted that the dictionary definitions of "genuine" include "{h}aving the character claimed for it: real, true, not counterfeit", and "{n}atural or proper to a person or thing". (Ibid. (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1094))

[1603] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, fn 1866 to para. 913. The Appellate Body noted that the dictionary definitions of "substantial" include "{h}aving solid worth or value, of real significance; solid; weighty; important, worthwhile" and "{o}f ample or considerable amount or size; sizeable, fairly large". (Ibid. (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3088))

[1604] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 914. (emphasis original)

[1605] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 914. (fns omitted) See also Appellate Body Reports, *US – Upland Cotton*, para. 437; *EC and certain member States – Large Civil Aircraft*, para. 1232.

[1606] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 914.

[1607] Appellate Body Reports, *US – Upland Cotton*, para. 436; *EC and certain member States – Large Civil Aircraft*, para. 1376.

[1608] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1110.

[1609] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 375.

[1610] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1233. (emphasis original) In particular, in situations where the subsidy at issue is shown to be a necessary cause, but is very *remote*, and other factors or intervening causes contribute to the occurrence of the market phenomenon in question, then a "but for" approach may not be sufficient to establish the requisite causal link. (Ibid.)

[1611] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1285. Another approach to collective assessment is "cumulation", whereby a panel may begin by analysing the effects of a *single* subsidy, or an *aggregated* group of subsidies, 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

constraint that it must employ an approach that will enable it to take due account of all of the subsidies that provide *a relevant and identifiable competitive advantage* to the recipient and its products in the market and that relate to alleged adverse effects phenomena."[1612]

5.585. Finally, we recall that the original panel in the present dispute conducted a two-step analysis by first examining the existence of certain market phenomena (displacement and lost sales) before analysing whether the subsidies at issue caused serious prejudice in the form of such market phenomena.[1613] Although the Appellate Body proceeded on the same basis in its analysis, it nonetheless noted that it was "difficult to understand the market phenomena described in the various subparagraphs of Article 6.3 in isolation from the challenged subsidies".[1614] Thus, the Appellate Body found that panels may undertake an analysis of serious prejudice under either a unitary or two-step approach[1615], although "a unitary approach that uses a counterfactual will generally be the more appropriate approach".[1616]

5.6.3.4 Findings in the original proceedings and their relevance for these compliance proceedings

5.586. As discussed above, the question of whether the *expired* subsidies cause adverse effects in the post-implementation period is not within the scope of these compliance proceedings in light of our interpretation of Article 7.8 of the SCM Agreement. Nonetheless, findings from the original proceedings in relation to the expired subsidies, in particular those concerning the causal pathway linking those subsidies and the relevant market phenomena, remain relevant for those proceedings insofar as they inform our understanding of the effects of the subsidies existing in the post-implementation period (after 1 December 2011). As the Panel noted, findings by the original panel and the Appellate Body "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".[1617] As such, they inform our understanding of the causal pathway through which the existing subsidies may cause adverse effects in the post-implementation period. With this in mind, we turn to recall the relevant findings from the original proceedings, particularly those concerning the causal pathway linking the LA/MSF subsidies and the alleged market phenomena in the original reference period (2001-2006).

5.587. In the original proceedings, the United States advanced a "product" theory of causation, arguing that "the subsidies had an impact on 'Airbus' ability to launch and bring to the market models of LCA that … would not otherwise have been possible at the time and in the way that it did without the support of those subsidies'."[1618] Under this "product" theory of causation, "market distortion and *adverse effects flow directly from Airbus' entry at a particular time with a particular*

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. (See ibid., para. 1287)

[1612] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1290. (emphasis added)

[1613] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1106.

[1614] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1109.

[1615] Under a unitary approach, the analysis of the particular market phenomena identified in the subparagraphs of Article 6.3 is not conducted separately from the analysis of whether there is a causal relationship between those market phenomena and the challenged subsidies. In contrast, under a two-step approach, the analysis first seeks to identify the market phenomena and then, as a second step, examines whether there is a causal relationship. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1107. See also Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, fn 1855 to para. 910; *US – Upland Cotton*, para. 431; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 354)

[1616] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1109.

[1617] Panel Report, para. 6.1461.

[1618] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1243 (quoting Original Panel Report, para. 7.1877). In the original proceedings, the United States advanced two theories of causation, referred to by the original panel as the "product" and "price" theories of causation. The principal focus of the United States' "price" theory of causation was the argument that the challenged subsidies, and in particular LA/MSF, provided Airbus with the financial means to be flexible with its pricing of LCA in competitions against Boeing, thereby enabling it to win sales, capture market share, and significantly depress and suppress the prices of LCA between the years 2001 and 2006. (Original Panel Report, para. 7.1997) The original panel rejected the United States' "price" theory of causation. The United States did not appeal this aspect of the original panel's analysis. (See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1243 and fn 2670 thereto)

aircraft, which in the United States' view would not have been possible but for the subsidies."[1619] In analysing causation, the original panel began by examining a report prepared by Dr Gary Dorman[1620] (Dorman Report), which simulated the cash flows that would be generated under six hypothetical LCA programmes, in comparison with a base case scenario in which the NPV of the programme was calculated without the LA/MSF subsidies.[1621] The original panel found that the Dorman Report supported the proposition that "Airbus product launches would not have occurred in the absence of LA/MSF"[1622] and demonstrated that "the provision of LA/MSF is likely to change the behaviour of the recipient with respect to a decision to launch a LCA by increasing the likelihood of an affirmative decision to go forward with the launch".[1623]

5.588. The original panel went on to analyse the business cases of various Airbus LCA programmes and the public statements relied on by the United States. For the A300, A310, A320, A330, and A340, the original panel found that LA/MSF was necessary for Airbus to have launched these LCA as originally designed and at the time that it did.[1624] The original panel noted, in particular, the complexities and high risks involved in launching an LCA programme[1625], and the high percentage of the development costs of these models that the LA/MSF subsidies financed.[1626] Moreover, the original panel emphasized 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".[1627] Thus, the original panel found that, for example, "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."[1628]

5.589. With respect to the A330-200 and A340-500/600, the original panel noted that both were "derivative aircraft" whose development was dependent upon the prior production of, respectively, the original A330 and A340.[1629] The original panel considered that, "while the particular grant of LA/MSF specific to the A330-200 may not have been necessary to its launch, on the whole, … 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."[1630] The original panel further considered that "LA/MSF was also essential to the development of the A340-500/600" because it was "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."[1631]

5.590. Finally, with regard to the A380, as further described in section 5.6.3.5 below, the original panel considered various arguments and evidence submitted by both parties, including the Airbus

[1619] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1243 (quoting Original Panel Report, para. 7.1879 (fn omitted)). (emphasis added)

[1620] Gary J. Dorman, NERA, *The Effect of Launch Aid on the Economics of Commercial Airline Programs*, 6 November 2006 (Original Panel Exhibit US-70 (BCI)).

[1621] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1244-1245. The European Communities submitted a critique of the Dorman Report by its own economic expert, Dr Paul Watchel. (Ibid., para. 1246 (referring to Paul Watchel, *Critique of "The Effect of Launch Aid on the Economics of Commercial Airline Programs" by Dr. Gary J. Dorman*, 31 January 2007 (Original Panel Exhibit EC-12) and clarification, 20 May 2007 (Original Panel Exhibit EC-659)))

[1622] Original Panel Report, para. 7.1887.

[1623] Original Panel Report, para. 7.1912.

[1624] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1255 (referring to Original Panel Report, paras. 7.1934, 7.1936, and 7.1938-7.1939).

[1625] The original panel observed that the parties had described the development of LCA as an endeavour that requires huge up-front investments and a commitment of tremendous resources in the face of a business environment that is shaped by factors whose very foreseeability is impossible by definition. (Original Panel Report, para. 7.1933)

[1626] As the original panel found, LA/MSF subsidies accounted for 90% to 100% of the development costs for the A300 and A310, up to 90% for the A320, and between 60% and 90% for the A330 and A340. (Original Panel Report, paras. 7.1934-7.1939)

[1627] Original Panel Report, para. 7.1936. (fn omitted)

[1628] Original Panel Report, para. 7.1938.

[1629] Original Panel Report, paras. 7.1940-7.1941.

[1630] Original Panel Report, para. 7.1940.

[1631] Original Panel Report, para. 7.1941. (emphasis added)

A380 business case, and found that, "the A380 business case suggest{ed}, but by no means demonstrat{ed}, that as a stand-alone proposition the project might have been economically viable even without LA/MSF".[1632] However, noting the "technical capabilities" derived from its development of earlier aircraft models, and the fact that "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", the original panel concluded that "either *directly* or *indirectly*, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380."[1633] Thus, with regard to the "product effects" of the above-mentioned LA/MSF subsidies, the original panel concluded that "Airbus' ability to launch, develop, and introduce to the market, each of its LCA models was dependent on subsidized LA/MSF".[1634]

5.591. The original panel went on to discuss four scenarios "for the LCA industry in the counterfactual world that would {have} exist{ed} in the absence of subsidies to Airbus".[1635] Scenarios 1 and 2, which the original panel considered "plausible", contemplated that a non-subsidized Airbus would have had no market presence in the 2001-2006 period.[1636] Scenarios 3 and 4 were regarded as "unlikely", which envisaged that a non-subsidized Airbus would have been competing in the 2001-2006 period, against either Boeing or Boeing and another US producer. To the original panel, under either of the "unlikely" scenarios, Airbus would have been a "much weaker" company "with at best a more limited offering of LCA models".[1637] In conclusion, the original panel found that, in the absence of the LA/MSF subsidies, Airbus would "not have been able to launch and develop the LCA models it ha{d} actually succeeded in bringing to the market", and 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, {was} clearly an effect of the subsidies" at issue in the original proceedings.[1638]

5.592. The original panel's above analysis regarding the relevant causal pathway of the LA/MSF subsidies remained undisturbed on appeal. On appeal, the Appellate Body examined, in particular, the European Union's claim that the original panel acted inconsistently with Article 11 of the DSU in its causation finding with respect to LA/MSF for the A380.[1639] The Appellate Body dismissed the claim, finding that the original panel had acted within the bounds of its discretion as initial trier of facts.[1640] Moreover, the Appellate Body found that, even in the counterfactual scenario posited by the European Union, in which Airbus would have been able to launch an A320-type LCA in 1987 and an A330-type LCA in 1991, "the {original panel's} conclusion that Airbus would not have been able to launch the A380 in 2000 … but for LA/MSF provided in relation to earlier models of LCA would hold".[1641] The Appellate Body also affirmed its agreement with the original panel's view that "Airbus' technical capabilities were derived in large part from its experience in the development of earlier models of LCA".[1642] Thus, the Appellate Body upheld the original panel's finding that "either directly or indirectly, LA/MSF was a necessary precondition for the launch of the A380 in 2000."[1643]

5.593. In light of the above findings from the original proceedings, the Panel observed that, due to the similar design, structure, and operation of the LA/MSF subsidies in the original

[1632] Original Panel Report, para. 7.1948.
[1633] Original Panel Report, para. 7.1948. (emphasis added)
[1634] Original Panel Report, para. 7.1949.
[1635] Original Panel Report, para. 7.1984.
[1636] Original Panel Report, para. 7.1984. The original panel noted that, under these "plausible" counterfactual scenarios, the LCA industry would have been characterized by the existence of either a Boeing monopoly, or a duopoly involving Boeing and another US LCA producer (possibly, McDonnell Douglas). (Ibid.)
[1637] Original Panel Report, para. 7.1993.
[1638] Original Panel Report, para. 7.1993. See also para. 7.2025.
[1639] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1312-1356. Specifically, the European Union argued that the original panel erred: (i) in its assessment of the A380 business case; (ii) in its evaluation of Airbus' ability to fund the A380 without LA/MSF; and (iii) in its analysis of Airbus' technological capabilities without LA/MSF. (Ibid., para. 1312)
[1640] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1356. Further details of the Appellate Body's findings in the original proceedings on the A380 are discussed in section 5.6.3.5.1 below.
[1641] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1352.
[1642] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1355.
[1643] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1356 (quoting Original Panel Report, para. 7.1948).

proceedings[1644], the original panel conducted an aggregated analysis of the effects of those subsidies on the basis of two types of "product effects" attributable to the such subsidies: "direct effects" and "indirect effects".[1645] Referring to the original panel's findings, the Panel defined "direct effects" as "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".[1646] The Panel defined "indirect effects" as "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."[1647]

5.594. As for the different types of "indirect effects", the Panel explained that, according to findings of the original panel: (i) learning effects "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"[1648]; (ii) economies of scope arise "when, for example, basic aircraft design and components are shared across different models of LCA, making it possible to share inputs (and therefore spread costs) between the production processes of different aircraft"[1649]; and (iii) financial effects "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".[1650]

5.595. Our review of the original panel's findings supports the notion that the "product effects" of the LA/MSF subsidies have at least two dimensions: one concerns Airbus' ability to launch the LCA model that an LA/MSF subsidy directly finances, and the other relates to Airbus' ability to launch other LCA models. As the Panel correctly noted, the original panel's causation findings "were inextricably linked to the 'learning', scope and financial effects of the LA/MSF subsidies *across Airbus' different models of LCA*".[1651] At the same time, we caution that this nomenclature serves only as an analytical tool and does not change the substance of the findings from the original proceedings. In particular, we do not see it as creating a rigid dichotomy between the two kinds of "product effects" of LA/MSF found in the original proceedings. As noted, the original panel found that "either directly or indirectly, LA/MSF was a necessary precondition" for the launch of certain Airbus LCA models such as the A380.[1652] For purposes of the original panel's conclusion regarding the "product effects", it was not necessary for the original panel to have made a separate finding with regard to each of these two dimensions.

5.6.3.5 Whether the Panel erred in its findings on the "product effects" of the LA/MSF subsidies existing in the post-implementation period

5.596. Keeping in mind the above considerations regarding the relevance of the findings from the original proceedings for these compliance proceedings, we turn to review the Panel's findings regarding the effects of the subsidies existing in the post-implementation period (after 1 December 2011), and the European Union's appeal of such findings. We note that, while contending that the pre-A380 LA/MSF subsidies "ceased to exist" before the implementation period and were therefore not within the scope of its compliance obligation[1653], the European Union does not dispute that the A380 LA/MSF subsidies continued to exist during the post-implementation period. Indeed, as the Panel found, one of the 36 "steps" identified in the European Union's

[1644] Panel Report, para. 6.1448.
[1645] Panel Report, para. 6.1446 (referring to Original Panel Report, paras. 7.1935-7.1948; Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1269, 1281, 1352, 1355, and 1356) and para. 6.1492.
[1646] Panel Report, para. 6.1492. (emphasis added)
[1647] Panel Report, para. 6.1492. (emphasis added; fn omitted)
[1648] Panel Report, para. 6.1510.
[1649] Panel Report, para. 6.1510. (fn omitted)
[1650] Panel Report, para. 6.1511. The Panel noted that the original panel did not specifically refer to "direct effects" and "indirect effects" in its findings. Nonetheless, the Panel considered that "the 'direct' and 'indirect' effects nomenclature provides a useful way of understanding the {original} panel's evaluation of the effects of the LA/MSF subsidies." (Ibid., fn 2470 to para. 6.1446)
[1651] Panel Report, para. 6.1509. (emphasis added)
[1652] Original Panel Report, para. 7.1948.
[1653] Panel Report, para. 6.794. See also paras. 6.869 and 6.1069.

Compliance Communication is the "bringing 'to an end'" of all of the subsidies found to have caused adverse effects in the original proceedings, "with the exception of the French, German, Spanish and UK A380 LA/MSF" subsidies.[1654]

5.597. The Panel further found that, subsequent to the original reference period (2001-2006), the European Union granted new LA/MSF subsidies to Airbus for developing its A350XWB family of LCA, and that these subsidies were "closely connected" with the adopted DSB recommendations and rulings from the original proceedings and the European Union's alleged compliance "actions".[1655] The Panel found, in particular, that the A350XWB LA/MSF subsidies are similar in nature to the pre-A350XWB LA/MSF subsidies, and that "the *effects* of A350XWB LA/MSF *could* undermine the European Union's compliance."[1656] Moreover, in evaluating whether the A350XWB LA/MSF constitutes a subsidy under Article 1.1 of the SCM Agreement, the Panel found that, "{o}verall, … 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."[1657] Thus, despite "some pertinent differences", the Panel found that "the A350XWB LA/MSF contracts share the same core features as the LA/MSF measures considered in the original proceeding".[1658] We note that neither participant has disputed these factual findings by the Panel.

5.598. The Panel considered that the same approach used to assess the "product effects" of the LA/MSF subsidies − i.e. through the lenses of their "direct effects" and "indirect effects" − may be equally applicable for its aggregated analysis of the effects of the LA/MSF subsidies in these compliance proceedings.[1659] As noted above in paragraph 5.413, the Panel's aggregated analysis covered all of the challenged LA/MSF subsidies, that is, including the expired subsidies. Pursuant to our interpretation of Article 7.8 of the SCM Agreement, we disagree with the Panel to the extent that it considered the effects of the expired LA/MSF subsidies to be a part of its aggregated assessment. Instead, our review in this section focuses on the Panel's findings relating to a subset of those subsidies, namely, the subsidies existing in the post-implementation period. We recall in this regard 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", so as to 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."[1660] As we understand it, the European Union does not contest that the LA/MSF subsidies for the A380 and the A350XWB are similar in their design, structure, and operation.[1661] For this reason, we consider it appropriate to assess the aggregated effects of the A380 and A350XWB LA/MSF subsidies − i.e. the LA/MSF

[1654] Panel Report, para. 6.14.
[1655] Panel Report, para. 6.150.
[1656] Panel Report, para. 6.149. (emphasis original)
[1657] Panel Report, para. 6.286.
[1658] Panel Report, para. 6.286.
[1659] Panel Report, para. 6.1451.
[1660] Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 1285.
[1661] Panel Report, para. 6.152. See also para. 6.1651.

subsidies that the European Union continued to "grant or maintain" in the post-implementation period – in an integrated causation analysis.[1662]

5.599. As further discussed below, the European Union alleges specific errors regarding the Panel's findings on the "direct" and "indirect" effects of individual LA/MSF subsidies. With respect to the A380, the European Union challenges the Panel's assessment of the "direct effects" of the A380 LA/MSF subsidies on Airbus' ability to bring to market the A380. Similarly, the European Union takes issue with the Panel's assessment of the effects of A350XWB LA/MSF subsidies ("direct effects") and A380 LA/MSF subsidies ("indirect effects") on Airbus' ability to launch the A350XWB as and when it did. While we address these specific aspects of the European Union's appeal below, we note that, under the aggregated approach towards the assessment of all LA/MSF followed by the Panel, it was neither required to find that each subsidy is, *individually*, a genuine and substantial cause of the relevant phenomenon, nor to assess the relative contribution of each subsidy, considered in isolation, within the group to the resulting effects.[1663] Against this background, we turn to the European Union's specific allegations of error with a view to ascertaining whether the Panel's analysis regarding the "product effects" of the subsidies existing in the post-implementation period support a finding of a genuine and substantial causal relationship between these subsidies, taken together, and the market phenomena identified in the post-implementation period.

5.6.3.5.1 "Product effects" of A380 LA/MSF subsidies on the A380

5.600. The European Union claims that, "{t}o the extent" that the Panel found that A380 LA/MSF subsidies resulted in "direct effects", the Panel acted inconsistently with Article 11 of the DSU because any such finding lacks a "sufficient evidentiary basis".[1664] According to the European Union, given the Panel's observation that A380 LA/MSF subsidies were "not critical to {the} very existence" of the A380[1665], there is no basis for its finding that A380 LA/MSF subsidies were a "necessary" cause of the market presence of the aircraft, let alone a "genuine and substantial" cause.[1666] The European Union also highlights that the "the Panel did *not* find that, absent A380 LA/MSF, Airbus would have delayed the launch of the A380, or that the A380 would have been any different in technology."[1667] Alleging that "the Panel's findings are limited to its affirmation that A380 LA/MSF was 'not critical to {the} very existence' of the A380"[1668], the European Union asserts that there "is simply no finding to support the conclusion that A380 LA/MSF resulted in 'direct effects' on 'Airbus' ability to launch and bring to market' the A380."[1669] The United States responds that neither the original panel, nor the Panel, made a finding that the A380 LA/MSF subsidies were not critical to the existence of the A380.[1670] Instead, according to the United States, the findings from the original proceedings establish that the A380

[1662] As noted in paragraphs 5.389-5.390 and footnote 978 above, the European Union submitted two approaches for estimating the "*ex ante*" lives of the LA/MSF subsidies – the "Loan Life" approach and the "Marketing Life" approach. The Panel expressed doubt as to whether the Loan Life approach would be the most appropriate methodology for determining the *ex ante* "lives", and noted that "it would be at least equally appropriate" to utilize the Marketing Life approach. (Ibid., para. 6.878) The Panel, however, did not find it necessary to express a definitive view on which of the two approaches should be accepted. (Ibid., para. 6.879) Ultimately, the Panel found that the LA/MSF subsidies for the A330-200 and the A340-500/600 expired, respectively, in **[BCI]** – that is, after the end of the implementation period – on the basis of the Loan Life approach for assessing the *ex ante* "lives" of subsidies. (Panel Report, fn 1547 to para. 6.879). We note that, under the Marketing Life approach, the LA/MSF subsidy for the A330-200 would have expired by **[BCI]** – that is, before the end of the implementation period – and the LA/MSF subsidy for the A340-500/600 would have expired by **[BCI]**. (Ibid., Table 11: PwC *ex ante* "lives" analysis for LA/MSF) As further discussed in footnote 2030 and paragraph 5.719 below, we do not find *specific* findings and supporting analysis from the original proceedings or in the Panel Report regarding how the "product effects" of these two subsidies contributed to the alleged serious prejudice in the post-implementation period.

[1663] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1285.

[1664] European Union's appellant's submission, para. 884.

[1665] European Union's appellant's submission, para. 880 (quoting Panel Report, para. 6.1507 and referring to fn 2597 thereto).

[1666] European Union's appellant's submission, para. 881.

[1667] European Union's appellant's submission, para. 883. (emphasis original)

[1668] European Union's appellant's submission, para. 883 (quoting Panel Report, para. 6.1507 and referring to fn 2597 thereto).

[1669] European Union's appellant's submission, para. 883 (quoting Panel Report, para. 6.1492).

[1670] United States' appellee's submission, para. 479.

LA/MSF subsidies resulted in "direct effects"[1671] and these findings cannot be challenged as part of the present compliance proceedings.

5.601. As we see it, the crux of the European Union's appeal is its contention that neither the original panel, nor the Panel, found that the A380 LA/MSF subsidies had *any* effect on the Airbus' ability to launch and bring to market the A380 as and when it did.[1672] Before the Panel, the European Union made a similar argument with respect to the original proceedings, claiming that the original panel's causation findings concerning the A380 were based "*not* on the impact of A380 MSF on the launch decision, but solely on the impact of *all* previous MSF".[1673] We therefore understand that, in challenging the Panel's alleged finding on the "direct effects" of A380 LA/MSF, the European Union is taking issue with the manner in which the Panel understood the causal pathway through which A380 LA/MSF, taken alone, affected Airbus' ability to launch, bring to market, and continue developing the A380 as and when it did.

5.602. In paragraph 6.1507 of its Report, the Panel stated that, "where LA/MSF provided for the specific purpose of launching and bringing an aircraft to market is not critical to its very existence, 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."[1674] In a footnote to this statement, the Panel recalled 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.[1675]

The European Union argues that the Panel's statements in paragraph 6.1507 and the footnote thereto of its Report amount to a "finding" that A380 LA/MSF was "not critical to {the} very existence" of the A380 and that, therefore, the LA/MSF for the A380 had no "direct effects".[1676] Moreover, the European Union asserts that neither the original panel, nor the Panel, found that A380 LA/MSF had the effect of advancing the launch of the A380.[1677]

5.603. We have some difficulty in accepting the European Union's reading of the Panel Report. In discussing the dissipation of "direct effects" of an LA/MSF subsidy, the Panel made it clear that an LA/MSF subsidy that was not critical to the very existence of an aircraft could nonetheless have "direct effects", although they may not last the entire marketing life of the aircraft.[1678] The Panel also recalled the original panel's finding 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."[1679] This finding by the original panel does not, however, suggest that A380 LA/MSF had *no effects* on Airbus' ability to launch the A380 *as and when it did*.

[1671] United States' appellee's submission, para. 477 (referring to Panel Report, para. 6.1528).
[1672] European Union's response to questioning at the oral hearing.
[1673] European Union's first written submission to the Panel, para. 981. (emphases original)
[1674] Panel Report, para. 6.1507. (emphasis original; fn omitted)
[1675] Panel Report, fn 2597 to para. 6.1507 (quoting and referring to Original Panel Report, paras. 7.1940 and 7.1948). (emphasis original)
[1676] European Union's appellant's submission, para. 880 (quoting Panel Report, para. 6.1507 and referring to fn 2597 thereto).
[1677] European Union's appellant's submission, para. 883. See also European Union's first written submission to the Panel, para. 981.
[1678] Panel Report, para. 6.1507.
[1679] Panel Report, fn 2597 to para. 6.1507 (quoting and referring to Original Panel Report, paras. 7.1940 and 7.1948). In fact, although the original panel acknowledged that the A380 business case predicted a positive NPV in the absence of LA/MSF, it was "not persuaded that the A380 business case alone demonstrates that Airbus would have launched the A380 even in the absence of LA/MSF". (Original Panel Report, para. 7.1944)

5.604. In this context, we recall that the original panel, having examined the evidence on the record, agreed with the United States that, even if Airbus had been confident that the A380 programme would have been viable without LA/MSF, it would not have been able to fund the programme relying exclusively on its own resources and "outside financing".[1680] The original panel rejected the European Communities' argument that the creation of EADS increased Airbus' financial flexibility. For the original panel, it was not clear how or to what degree the corporate restructuring of Airbus Industrie GIE, Aérospatiale, CASA, and Deutsche Airbus affected the ability of Airbus France (or Airbus SAS) to raise the very large amounts of capital needed for the A380 programme.[1681] Finally, the original panel also observed that the European Communities had "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."[1682] The Appellate Body upheld the original panel's overall conclusion that "either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380"[1683], noting that it was based on multiple considerations, including the A380 business case, evidence of Airbus' ability to fund the A380 in the absence of LA/MSF, and the financial and technological impact of LA/MSF provided in relation to previous models of Airbus LCA.

5.605. We agree with the United States that these findings from the original proceedings reveal that, without A380 LA/MSF, Airbus would have been unable to fund the timely launch of the A380 programme relying exclusively on its own financial resources and outside financing.[1684] This in turn suggests that A380 LA/MSF had "direct effects" on Airbus' ability to launch the A380. We recall that, in these compliance proceedings, the United States bears the burden of establishing that the subsidies granted or maintained by the European Union in the post-implementation period continue to cause adverse effects. Before the Panel, the United States argued that "{s}erial infusions of LA/MSF have enabled Airbus to cover the full spectrum of LCA demand and to replace uncompetitive models with state-of-the-art aircraft".[1685] As further discussed below[1686], the findings by the original panel and the Appellate Body, together with the Panel's findings regarding the A350XWB, indicate to us that, following the original reference period, the LA/MSF subsidies for the A380 allowed Airbus to build on the platform provided by the technical experience and financial resources derived from the grant of LA/MSF subsidies for previous LCA models.

5.606. We note that, pursuant to the Panel's finding regarding the allocation of benefit and expiry of the LA/MSF subsidies, the benefit conferred by the French, German, Spanish, and UK LA/MSF subsidies for the A380 had not expired by the end of the implementation period, that is,

[1680] Original Panel Report, paras. 7.1945-7.1947. The original panel's analysis of "outside financing" available to Airbus included an assessment of the extent to which Airbus could increase its use of risk-sharing supplier arrangements to fund the launch of the A380. (Ibid., paras. 7.1945-7.1947)

[1681] Original Panel Report, para. 7.1947.

[1682] Original Panel Report, para. 7.1947. The original panel acknowledged that Airbus used risk-sharing supplier arrangements, but did not see any indication that it could have increased its use of such arrangements so as to replace the entire amount of financing provided by LA/MSF, which was up to 33% of the development costs of the A380. Furthermore, the original panel did not consider the availability of risk-sharing supplier arrangements in respect of the A340-500/600 to be persuasive in this regard, because those were derivative aircraft that entailed much smaller development costs and a much lower level of risk to Airbus' overall operations. In the original panel's view, the willingness of suppliers to take on some of the risk of that much smaller programme did not demonstrate that any supplier or suppliers would be prepared to do so in respect of up to 33% of the much greater costs of the A380. Finally, the original panel noted that the information in the Airbus A380 business case suggested that the RSPs' involvement in the A380 programme may not have been on strictly market terms for all participants. (Ibid.)

[1683] Original Panel Report, para. 7.1948; Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1356.

[1684] United States' appellee's submission, para. 479 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1256).

[1685] United States' first written submission to the Panel, para. 354.

[1686] See paras. 5.643-5.647 below.

1 December 2011.[1687] Indeed, the Panel observed that 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 proceedings "*with the exception of* the French, German, Spanish and UK A380 LA/MSF measures".[1688] Thus, the European Union acknowledges that the A380 LA/MSF subsidies had not "expired" by the end of the implementation period.

5.607. We further recall that findings from the original proceedings establish that the A380 was launched in 2000, and the amount of the financial contribution under the French, German, Spanish, and UK LA/MSF contracts was found to be, in millions, **[BCI]**, respectively.[1689] Both the original panel and the Appellate Body found that the A380 LA/MSF subsidies conferred a benefit on Airbus within the meaning of Article 1.1 of the SCM Agreement.[1690] The findings from the original proceedings also establish that, unlike the pre-A380 LA/MSF subsidies, which were disbursed decades ago, the disbursements of the A380 LA/MSF subsidies continued well beyond the original reference period. The original panel noted that disbursements under the French A380 LA/MSF contract would be provided to Airbus **[BCI]**[1691], and that the German and Spanish A380 LA/MSF contracts both provided for **[BCI]**.[1692] As the original panel found, in all three cases, the outstanding instalments represented a part of the total (and maximum) amount of funding that it was agreed and planned would be transferred to Airbus for the A380 programme. Thus, the original panel considered it "clear" that "Airbus maintain{ed} a contractual right to receive {the specified funding amounts} at a predetermined moment in the future *so long as it continue*{*d*} *to develop the A380.*"[1693]

5.608. We also consider important the Panel's finding that the A380 programme suffered "extensive" production delays in 2005 and 2006.[1694] The Panel found that these delays resulted in increased development costs for the A380.[1695] They also led to the cancellation of orders for the A380 and gave rise to significant contractual penalty payments to A380 customers.[1696]

[1687] See Panel Report, para. 6.872, Table 11: PwC *ex ante* "lives" analysis for LA/MSF. We also note the Panel's statement that, "{a}ccording 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*." (Ibid., para. 6.16 (referring to European Union's first written submission to the Panel, paras. 205-223) (emphasis original))

[1688] Panel Report, para. 6.14. (emphasis added)

[1689] Original Panel Report, para. 7.380, Table 1: Approximate amount of funding provided for under the challenged LA/MSF measures.

[1690] Original Panel Report, para. 7.490. The original panel found that the differences between the interest rates under the French, German, Spanish, and UK A380 LA/MSF subsidies and the relevant market benchmark ranged from a number that is HSBI to **[BCI]**, respectively. (Original Panel Report, para. 7.488, Table 7: LA/MSF Rates of Return Compared with Market Rates of Return) The Appellate Body, having found several errors in the original panel's analysis and noted that those differences should be lower, nonetheless upheld the original panel's final conclusion that those subsidies conferred a benefit. (See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 923-929)

[1691] Original Panel Report, para. 7.378 (referring to French A380 LA/MSF contract (Original Panel Exhibit US-116 (BCI)), Annexe 3).

[1692] Original Panel Report, para. 7.378 (referring to German A380 LA/MSF contract (Original Panel Exhibit US-72 (BCI) (English translation)), clause 4.2; BT-Drs. 14/10002 (Original Panel Exhibit US-124 (English translation)), p. 3; Spanish A380 LA/MSF contract (Original Panel Exhibit US-73 (BCI)), 3rd clause). The original panel found that all of the funds committed under the UK A380 LA/MSF contract had "already been provided to Airbus". (Original Panel Report, para. 7.377)

[1693] Original Panel Report, para. 7.378. (emphasis added)

[1694] Airbus first announced a six-month delay in the A380 delivery schedule in 2005. 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. Then, three months after unveiling the A350XWB, in October 2006, Airbus announced a third delay in the A380 programme of an additional year. (Panel Report, para. 6.1551) The first A380 was delivered on 12 October 2007. (Ascend database, Deliveries made, data request as of 7 April 2014 (Panel Exhibit EU-512))

[1695] Panel Report, para. 6.1551 (referring to Mario Heinen, Airbus Senior Vice President A380, EADS/Airbus presentation "The A380 Program", presented at the Global Investor Forum, 19-20 October 2006 (Panel Exhibit EU-419), slide 18).

[1696] Panel Report, para. 6.1551 (referring to EADS Press Release, "A350 XWB launch: EADS Gives Go Ahead for Airbus to Launch the A350 XWB", 1 December 2006 (Panel Exhibit USA-569)).

Moreover, because LCA customers generally pay a substantial portion of the sale price upon delivery[1697], the Panel considered that the delays meant that Airbus would realize certain revenues from the A380 later than expected for the A380s that were ultimately delivered.[1698] The Panel noted that EADS documents indicated that earnings before interest and taxes (EBIT) at Airbus "was also negatively affected by €2.5 billion in 2006"[1699], in part due to the A380 difficulties, and a 2007 UK Government report indicated that "{p}artly as a result of cost overruns and late delivery payments to its customers, Airbus reported a loss of £389 million for 2006."[1700] Characterizing these A380 problems as "severe", the Panel observed that they "precipitated a management crisis" that saw the departure of two CEOs in less than four months.[1701] In our view, these findings by the Panel reflect the gravity and severity of the financial implications for Airbus of the extensive production delays suffered by the A380 in 2005 and 2006. During that time, Airbus continued to receive disbursements as part of the French, Spanish, and German A380 LA/MSF contracts.[1702]

5.609. In sum, the original panel's findings indicate that, although the A380 may have been "economically viable" in the absence of A380 LA/MSF, it does not follow from this that A380 LA/MSF had no "direct effects". Instead, the findings from the original proceedings indicate that Airbus could not have launched the A380 as and when it did by relying exclusively on its own financial resources and outside financing. In this sense, A380 LA/MSF had a genuine impact on Airbus' ability to fund the timely launch of the A380. The original panel's findings, together with the Panel's analysis, indicate that these "direct effects" of A380 LA/MSF continued after the original reference period, given that the A380 LA/MSF subsidies had not expired, as well as the fact that Airbus continued to receive significant sums of money as disbursements under the French, German, and Spanish A380 LA/MSF contracts at a time when it was experiencing severe financial difficulties resulting from the extensive production delays in the A380 programme. We therefore disagree with the European Union's claim under Article 11 of the DSU that the Panel's understanding of the "direct effects" of A380 LA/MSF on Airbus' ability to launch, bring to market, and continue developing the A380 *as and when it did* lacks a sufficient evidentiary basis.

5.6.3.5.2 "Product effects" of LA/MSF subsidies on the A350XWB

5.610. Having found that "the A350XWB could not have been launched and brought to market in the absence of LA/MSF"[1703], the Panel reached the conclusion that "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".[1704] The European Union challenges the Panel's findings and analysis of the "product effects" of LA/MSF subsidies on the A350XWB on two grounds. First, the European Union alleges that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU, to the extent that it found that the A350XWB LA/MSF subsidies resulted in "direct effects" on the launch of the A350XWB.[1705] Second, the European Union claims that the Panel erred in its application of Articles 5(c) and 7.8 of the

[1697] Panel Report, para. 6.1551 (referring to Original Panel Report, para. 7.1719).

[1698] Panel Report, para. 6.1551 (referring to A380 Business Case (Panel Exhibit EU-20 (HSBI)), p. 19, section 6.4; Original Panel Report, para. 7.1719).

[1699] Panel Report, para. 6.1551 (quoting "Risk Factors", *EADS Financial Statements and Corporate Governance*, Book 2, 2006, pp. 8-13 (Panel Exhibit USA-496), p. 12). The Panel further noted that an Airbus press release from February 2007 indicates that Airbus reported a negative EBIT for 2006 and, "following the A380 delays, faces significant cash needs and deteriorating profits in the future" (Ibid., fn 2680 to para. 6.1551 (quoting Airbus Press Release, "Power8 prepares way for 'new Airbus'", 20 February 2007 (Panel Exhibit USA-94)))

[1700] Panel Report, para. 6.1551 (quoting 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 (Panel Exhibit USA-25), p. 8).

[1701] Panel Report, para. 6.1551 (quoting Aude Lagorce, "Airbus refuses to rule out state loans on the A350XWB", *MarketWatch*, 4 December 2006 (Panel Exhibit USA-359)).

[1702] See Original Panel Report, para. 7.378. See also para. 5.607 above.

[1703] Panel Report, para. 6.1778.

[1704] Panel Report, para. 7.1.d.xiii. (emphasis original)

[1705] European Union's appellant's submission, para. 896 (referring to Panel Report, para. 7.1.d.xiii).

SCM Agreement in finding that the A380 LA/MSF subsidies had "indirect effects" on Airbus' ability to launch the A350XWB.[1706]

5.611. With respect to the finding of "direct effects" of A350XWB LA/MSF allegedly made by the Panel, the European Union recalls the Panel's statement that, "in the absence of A350XWB LA/MSF …, 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."[1707] The European Union asserts that this statement "by definition preclud{es} a finding that A350XWB LA/MSF resulted in 'direct effects'".[1708] To the extent that the Panel nonetheless made a finding of "direct effects" of A350XWB LA/MSF, the European Union argues that the "only basis"[1709] for it is the Panel's conclusion that there was a "high likelihood" that, without A350XWB LA/MSF, the Airbus company that actually existed in 2006-2010 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".[1710] The European Union claims that, in reaching this conclusion, the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU.[1711] As for the finding of "indirect effects" allegedly made by the Panel, the European Union asserts that, having found that A380 LA/MSF was "not critical" to the very existence of the A380, and therefore did not have "direct effects" on the A380, the Panel erred in its application of Articles 5(c) and 7.8 of the SCM Agreement to the extent that it found that A380 LA/MSF resulted in "indirect effects" on the A350XWB.[1712]

5.612. As with its appeal of the Panel's analysis of the "direct effects" of A380 LA/MSF, we note that the European Union takes issue with the Panel's assessment of the effects of individual LA/MSF subsidies − namely, the A350XWB LA/MSF ("direct effects") and the A380 LA/MSF ("indirect effects") − on Airbus' ability to launch the A350XWB as and when it did. Given the Panel's aggregated assessment of the effects of all LA/MSF, the Panel did not make separate findings that A350XWB LA/MSF and A380 LA/MSF were, individually, a genuine and substantial cause of the launch of the A350XWB. Nor was the Panel required to make such findings.[1713] Instead, the Panel first examined the causal mechanism through which individual subsidies, including the A350XWB LA/MSF and A380 LA/MSF subsidies, affected Airbus' ability to launch the A350XWB as and when it did, before analysing the relationship between the collective effects of all LA/MSF subsidies and the launch of the A350XWB in December 2006.[1714] Given that the Panel was not required to find that each of the LA/MSF subsidies was, individually, a genuine and substantial cause of the launch of the A350XWB, we understand the European Union, in challenging the Panel's findings of "direct effects" and "indirect effects" of the A350XWB LA/MSF and A380 LA/MSF, respectively, to be taking issue with the *manner* in which the Panel understood the causal mechanism through which these existing individual subsidies affected Airbus' ability to launch the A350XWB as and when it did.

5.613. In light of these considerations, and having already recalled the main aspects of the Panel's analysis and findings on the "product effects" of LA/MSF subsidies on the A350XWB[1715], we turn to consider whether the Panel acted inconsistently with Article 11 of the DSU to the extent that it found that the A350XWB LA/MSF subsidies resulted in "direct effects" on the launch of the A350XWB. We then examine whether the Panel erred in its application of Articles 5(c) and 7.8 of

[1706] European Union's appellant's submission, para. 895 (referring to Panel Report, para. 6.1507 and fn 2597 thereto).
[1707] European Union's appellant's submission, paras. 888 and 897 (quoting Panel Report, para. 6.1717 (emphasis original)).
[1708] European Union's appellant's submission, para. 888.
[1709] European Union's appellant's submission, para. 898.
[1710] European Union's appellant's submission, para. 898 (quoting Panel Report, para. 6.1717).
[1711] European Union's appellant's submission, paras. 888 and 896.
[1712] European Union's appellant's submission, para. 895 (quoting Panel Report, para. 6.1507 and referring to fn 2597 thereto).
[1713] See para. 5.599 above.
[1714] As we have explained above, pursuant to our interpretation of Article 7.8 of the SCM Agreement, we disagree with the Panel to the extent that it considered the effects of the expired LA/MSF subsidies to be a part of its aggregated assessment.
[1715] See section 5.6.3.2.2 of this Report. The A350XWB was launched on 1 December 2006 and was therefore not at issue in the original proceedings. Accordingly, there are no findings from the original proceedings concerning the "product effects" of LA/MSF subsidies on the A350XWB.

the SCM Agreement in finding that the A380 LA/MSF subsidies had "indirect effects" on the A350XWB.[1716]

5.6.3.5.2.1 The Panel's assessment of the "direct effects" of the A350XWB LA/MSF subsidies

5.614. As noted above, the Panel's analysis in relation to the "direct effects" of the A350XWB LA/MSF was based, to a large extent, on an examination of the ability of the *subsidized* Airbus company that *actually existed* during the 2006-2010 period to launch the A350XWB as and when it did.[1717] The European Union claims that the Panel acted inconsistently with Article 11 of the DSU in concluding that, without A350XWB LA/MSF, there was a "high likelihood" that the Airbus company that actually existed in 2006-2010 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".[1718] The European Union advances three related lines of arguments in support of its Article 11 claim. First, the European Union argues that the Panel did not cite any evidence, or offer any reasoning, to support its "probabilistic" conclusion.[1719] For the European Union, the Panel's conclusion therefore "lacks a sufficient evidentiary basis".[1720] Second, the European Union points out that a number of the Panel's intermediate findings, and several pieces of evidence, "strongly indicate that Airbus would not have found a compromise on timing or features of the A350XWB to be commercially viable", thereby contradicting the Panel's "speculation" that, absent LA/MSF, compromises would have been made on the timing or technology of the A350XWB.[1721] Finally, the European Union avers that the Panel did not examine whether an alternative aircraft with anything less than the features of the A350XWB, offered on the market later in time than the A350XWB, would have been viable or commercially attractive for Airbus, thereby "vitiat{ing}" the Panel's "probabilistic" conclusion.[1722]

5.615. The United States responds that the Panel made numerous findings and cited extensive evidence in support of the conclusion challenged by the European Union.[1723] For the United States, the European Union's insistence that the Panel paid too little attention to the evidence showing that timing or feature compromises would have made the A350XWB unattractive and unviable, if correct, only proves that Airbus as it *actually existed* would not have launched the A350XWB at all in the absence of A350XWB LA/MSF.[1724]

5.616. We begin with the European Union's assertion that the Panel did not cite any evidence, or offer any reasoning, in support of its conclusion that, without A350XWB LA/MSF, there was a "high likelihood" that the Airbus company that actually existed in 2006-2010 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".[1725] The United States asserts that the Panel's analysis of the "direct effects" of A350XWB LA/MSF includes a number of intermediate findings, not challenged on appeal, that support and "inexorably" lead to the Panel's ultimate conclusion challenged by the European Union.[1726] We note that, before reaching this conclusion, the Panel analysed, in considerable detail, Airbus' ability to fund effectively the A350XWB programme with

[1716] We note that the Panel began its analysis by assessing the "direct effects" of A350XWB LA/MSF, before turning to the "indirect effects" of pre-A350XWB LA/MSF. In its appellant's submission, the European Union reverses this order of analysis, challenging first the Panel's finding of "indirect effects" and then turning to its "direct effects" finding. This is because, in challenging the Panel's finding of "indirect effects" of the A380 LA/MSF subsidies, the European Union relies heavily on its arguments concerning the "direct effects" of the same subsidies, which are contained in the last section of its claims concerning the Panel's analysis of the effects of pre-A350XWB LA/MSF. In our analysis, we follow the Panel's sequence of analysis because it helps in understanding the analytical framework adopted by the Panel for examining the effects of A350XWB LA/MSF.

[1717] See para. 5.567 above.

[1718] European Union's appellant's submission, para. 898 (quoting Panel Report, para. 6.1717).

[1719] European Union's appellant's submission, para. 899.

[1720] European Union's appellant's submission, para. 888. See also paras. 912-913.

[1721] European Union's appellant's submission, paras. 901 and 907.

[1722] European Union's appellant's submission, para. 900.

[1723] United States' appellee's submission, paras. 495-501.

[1724] United States' appellee's submission, para. 505.

[1725] European Union's appellant's submission, para. 898 (quoting Panel Report, para. 6.1717).

[1726] United States' appellee's submission, para. 499 (referring to Panel Report, para. 6.1539).

financing on market terms.[1727] The Panel recalled that the European Union did not argue that, in the absence of A350XWB LA/MSF, Airbus could have "effectively funded" the A350XWB programme *on its own*, but only that it could have done so with the help of its parent company, EADS.[1728] Having found that EADS would have, in principle, been willing to involve itself in the financing of the A350XWB[1729], the Panel turned to examine the *extent* of the financial resources available to Airbus and EADS, and considered evidence pertaining to the following specific sources of funding: (i) increased use of RSPs; (ii) disposal of non-core assets; (iii) increased profitability and cash generation; (iv) a reduction in shareholder distributions; (v) equity-related financing; (vi) cash reserves; and (vii) increased debt.[1730]

5.617. Regarding the extent to which Airbus could have involved a greater number of RSPs in the A350XWB programme in the absence of LA/MSF, although the Panel acknowledged that this was theoretically possible, it was not persuaded that Airbus could have, *in practice*, relied on RSPs to a level that would have come anywhere close to doubling their involvement compared to the actual situation, as claimed by the European Union.[1731] In reaching its conclusion, the Panel identified certain risks associated with the enhanced use of RSPs.[1732] As to the disposal of non-core assets by EADS, while the Panel accepted that this may have been an option for EADS, it concluded that 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 was "speculative".[1733] Turning to increased profitability and cash generation, the Panel considered it far from clear 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.[1734] With respect to the potential reduction in shareholder distributions by EADS, the Panel accepted that this may have been an option for EADS, but concluded that the extent to which this was a credible source of funding remained "speculative".[1735] The Panel reached a similar conclusion as to the possibility of raising additional funds via equity-related financing.[1736]

5.618. Regarding EADS' cash reserves, the Panel looked at the actual and projected net cash positions and concluded that, moving forward from either the time of launch or the First Contract Date, EADS had "significant cash" that it could have diverted to the A350XWB programme. Given the uncertainties surrounding EADS' future cash positions at each of these dates, however, and given the competing pressures on EADS' cash reserves, the Panel considered that doing so would have entailed "significant risks" for EADS − risks that unsecured, back-loaded, and

[1727] The Panel analysed Airbus' ability to fund the programme on market terms in the context of its discussion of the "viability" of the A350XWB in the absence of A350XWB LA/MSF. (See Panel Report, paras. 6.1636-6.1638)

[1728] Panel Report, para. 6.1640.

[1729] Panel Report, paras. 6.1644-6.1645.

[1730] Panel Report, para. 6.1645. See also paras. 6.1646-6.1700.

[1731] Panel Report, para. 6.1656.

[1732] The Panel recalled its earlier statements indicating that Airbus appeared to enhance aggressively 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. (Panel Report, para. 6.1650) For the Panel, this demonstrated 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". (Ibid. (referring to para. 6.500 et seq. of its Report)) The Panel also found 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" (Ibid., para. 6.1651), and 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". (Ibid., para. 6.1653 (fn omitted))

[1733] Panel Report, para. 6.1657.

[1734] Panel Report, para. 6.1659.

[1735] Panel Report, para. 6.1664. The Panel also saw "little reason" to doubt the United States' evidence or argument that such a decision to reduce shareholder distributions would have been, at least in part, interpreted as an indicator of EADS' financial fragility by the market. Thus, the *extent* to which EADS would have felt comfortable reducing shareholder distributions such as dividends to help fund the A350XWB programme remained "unclear" to the Panel. (Ibid., para. 6.1663) The Panel also detected no evidence of a historic practice by EADS of sacrificing shareholder distributions to help finance specific projects. (Ibid.)

[1736] Panel Report, para. 6.1668. Although the Panel accepted that this may have been an option for EADS, it considered that the extent to which this was a credible source of funding remained "somewhat speculative". (Ibid.)

success-dependent instruments like LA/MSF tend to shift away from EADS.[1737] In reaching this conclusion, the Panel made a number of intermediate findings. Discussing the relevance of the net cash position, it appeared "likely" to the Panel 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.[1738] However, the Panel cautioned that the face value of these net cash positions did not actually represent the amount of cash that EADS could or would have directed to the A350XWB programme. In this regard, the Panel considered the record to reflect that EADS was "hesitant to substantially deplete its cash reserves during the relevant times".[1739] Based on the evidence before it, the Panel saw "compelling reasons" as to why EADS would be hesitant to deplete its cash reserves to a significant degree.[1740] Therefore, the Panel considered that 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. The Panel also considered it "reasonably clear" that at least a portion of EADS' net cash positions would have to be held in reserve to maintain a proper balance between its ability to raise debt and its maintenance of an acceptable credit rating.[1741] Finally, turning to EADS' debt capacity as a potential source of funding, the Panel detected "little evidence" that EADS would have had *no* appreciable debt-raising capacity in the relevant time periods in the absence of A350XWB LA/MSF, and thus accepted that this was likely an option that could have been pursued to at least some material degree.[1742]

5.619. Our review of the Panel's assessment of each of the individual sources of funding reveals that, in determining the availability and extent of each individual funding source, the Panel identified the specific limitations and risks associated with each source. We note that, on appeal, the European Union does not take issue with the above aspects of the Panel's analysis. The Panel considered that *any single one* of the potentially available funding options would have been insufficient, on its own, to replace either the absolute monetary value or the relative financial security provided through the generally back-loaded, unsecured, and success-dependent repayment terms of A350XWB LA/MSF.[1743] Having addressed each of the individual sources of funding, the Panel found that, "on balance", the assortment of financial resources that Airbus, via

[1737] Panel Report, para. 6.1690.

[1738] Panel Report, para. 6.1673. The Panel explained that 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". (Ibid.) For the Panel, 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 MSF assistance but also all its other relevant cash needs. In this regard, the Panel noted 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 exceeded the total amount of monies to which Airbus was entitled under the A350XWB LA/MSF measures. The net cash projections contained in the 2007 and 2009 Operating Plans likewise indicated to the Panel 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". (Ibid. (referring to CompetitionRx Report (Panel Exhibit EU-127 (BCI/HSBI)), Tables 36 and 39, and Annex G.1 (Table 2)))

[1739] Panel Report, para. 6.1674.

[1740] Panel Report, para. 6.1675. The Panel explained, e.g. that 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. In this regard, the Panel recalled 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. The Panel also recalled that the A350XWB programme itself carried significant risks, the occurrence of which would put further strain on EADS' financial resources. (Ibid.)

[1741] Panel Report, para. 6.1676 (referring to CompetitionRx Report (Panel Exhibit EU-127 (BCI/HSBI)), Annex G.1, para. 14).

[1742] Panel Report, para. 6.1700. The Panel accepted that the presence of "undrawn funds" to the tune of EUR 1.5 billion and EUR 500 million under the Euro Medium-term Note (EMTN) programme at approximately the time of launch and the First Contract Date, respectively, suggested EADS' "ability to raise at least some additional debt in the relevant time-periods". (Ibid., para. 6.1696)

[1743] Panel Report, para. 6.1715. The Panel considered this to be supported by the European Union's statements regarding how the A350XWB programme would have been funded in the absence of A350XWB LA/MSF. (Ibid., fn 3068 thereto (referring to and quoting 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 by the Panel)))) The Panel further explained that this was especially the case because none of the potentially available funding options would have provided Airbus with the same significant "risk-sharing" features as did LA/MSF. (Ibid., para. 6.1715)

EADS, had at its disposal would have been, "collectively", sufficient to replace effectively the monies that Airbus is entitled to under the actual A350XWB LA/MSF contracts.[1744] However, the Panel did not share the European Union's "optimism" regarding how easily EADS could have martialled these resources for the purpose of the A350XWB programme.[1745] In this regard, the Panel stated that each of the potentially available – and "to some degree speculative" – funding options would have "carried its own risks, costs and/or difficulties".[1746] Besides referring to the specific risks associated with each funding option discussed above[1747], the Panel also recalled its analysis of: (i) the LA/MSF negotiations; (ii) the UK Appraisal; and (iii) the European Commission State Aid Decisions.[1748] With respect to the LA/MSF negotiations, the Panel recalled that its analysis of the record evidence suggested that EADS' desire for LA/MSF measures for the A350XWB stemmed from the "lack of other options".[1749] Turning to the UK Appraisal[1750], terming it as the "most credible source" of analysis in the record regarding EADS' ability to proceed with the A350XWB in the absence of A350XWB LA/MSF[1751], the Panel found that the Appraisal "strongly supports the proposition that it would have been very difficult for Airbus and EADS to effectively fund the A350XWB programme … in the absence of A350XWB LA/MSF".[1752] Finally, recalling its analysis of the State Aid Decisions discussing the challenges for aerospace companies in accessing market financing for projects[1753], the Panel found that the 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".[1754]

5.620. Furthermore, the Panel stated that it could not assess the availability of each funding option in a "vacuum" and considered that the implementation of one option would have "generally limited the availability of others".[1755] In this regard, the Panel recalled several findings from its examination of Airbus' ability to fund the programme: (i) reducing EADS' cash reserves could have put EADS' credit rating at further risk[1756]; (ii) enhancing RSP involvement could have invited 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[1757]; and (iii) cutting dividends may have shaken investor confidence in the company, making it more difficult to raise debt or equity.[1758] Moreover, the Panel noted that EADS' financial situation, at the time of launch and through the period during which the A350XWB LA/MSF contracts were entered into, displayed "considerable problems".[1759] The Panel thus concluded that "EADS would have faced significant challenges when assembling and implementing a combination of the funding options that were potentially available to it for a programme with the risk profile of the A350XWB programme".[1760]

[1744] Panel Report, para. 6.1715.
[1745] Panel Report, para. 6.1715.
[1746] Panel Report, para. 6.1715. (fn omitted)
[1747] Panel Report, fn 3067 to para. 6.1715 (referring to para. 6.1640 et seq. of its Report).
[1748] Panel Report, fn 3067 to para. 6.1715.
[1749] Panel Report, fn 3067 to para. 6.1715 (referring to para. 6.1588 et seq. of its Report). See also, para. 6.1598.
[1750] Panel Report, fn 3066 to para. 6.1715 (referring to para. 6.1600 et seq. of its Report).
[1751] Panel Report, fn 3066 to para. 6.1715.
[1752] Panel Report, para. 6.1609. (fn omitted)
[1753] Panel Report, fn 3067 to para. 6.1715 (referring to para. 6.1613 et seq. of its Report).
[1754] Panel Report, para. 6.1623.
[1755] Panel Report, para. 6.1715.
[1756] Panel Report, para. 6.1715 (referring to para. 6.1676 of its Report).
[1757] Panel Report, para. 6.1715 (referring to para. 6.1646 et seq. of its Report). See also para. 5.617 above.
[1758] Panel Report, para. 6.1715 (referring to para. 6.1660 et seq. of its Report). See also para. 5.617 above.
[1759] Panel Report, para. 6.1715 and fn 3073 thereto (referring to para. 6.1550 et seq. of its Report (Airbus/EADS financial position pre-launch), para. 6.1580 et seq. (Airbus/EADS financial position post-launch), para. 6.1600 et seq. (discussing the UK Appraisal that contains certain relevant HSBI assessments of EADS' financial position), and para. 6.1689 (discussing significant limitations of the EADS Operating Plans' financial projections that existed during these times)).
[1760] Panel Report, para. 6.1716.

5.621. Thus, in addition to determining whether each of the individual funding options available to Airbus was, on its own, sufficient to fund the launch of the A350XWB, the Panel also undertook a collective assessment of whether an assortment of funding sources would be sufficient to replace the monies that Airbus was entitled to under the A350XWB LA/MSF contracts. In finding that "EADS would have faced significant challenges when assembling and implementing a combination of the funding options that were potentially available to it for a programme with the risk profile of the A350XWB programme"[1761], the Panel acknowledged the interrelationship between the different funding sources and considered that the implementation of one option would have "generally limited the availability of others".[1762] Moreover, in carrying out its collective assessment, the Panel recalled the risks identified by it with respect to each funding option, as well as the overall risks and complications associated with the A350XWB programme.

5.622. In the Panel's view, all these reasons suggested that, had EADS pursued the A350XWB programme at any relevant time in the absence of either (i) assurances from the member States regarding their willingness to help finance the programme, or (ii) 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 … considerable, risk".[1763] This, in turn, led the Panel to believe that "it {was} 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".[1764] In a footnote to this statement, the Panel explained that "{m}aking such compromises would … be a way to reduce costs and/or risk associated with the programme".[1765] In the same footnote, the Panel "note{d} several pieces of evidence in the record indicating how financial troubles may delay an LCA programme".[1766] The Panel thus considered that pursuing the programme in the absence of A350XWB LA/MSF would have been "a more complicated, more costly and riskier endeavour".[1767] It was "{o}n this basis" that the Panel found that, although the Airbus company that *actually existed* in the 2006 to 2010 period would, in the absence of A350XWB LA/MSF, "have been able to launch and bring to market the A350XWB or an A350XWB-type aircraft", it could have done so only by a "narrow margin" and 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".[1768]

5.623. Our review above renders it clear that, as part of its analysis of the LA/MSF negotiations, the UK Appraisal, and the European Commission State Aid Decisions, as well as the ability of

[1761] Panel Report, para. 6.1716.
[1762] Panel Report, para. 6.1715.
[1763] Panel Report, para. 6.1716
[1764] Panel Report, para. 6.1716. (fn omitted)
[1765] Panel Report, fn 3074 to para. 6.1716.
[1766] Panel Report, fn 3074 to para. 6.1716. The full text of the footnote reads:
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 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 **[BCI]** even in the presence of the assumed receipt of the Launch Financing Instrument, but also outlining costs of such a delay)).
[1767] Panel Report, para. 6.1717.
[1768] Panel Report, para. 6.1717.

Airbus to fund the programme, the Panel identified and explained several risks, costs, and complications for the A350XWB programme that would arise in the absence of A350XWB LA/MSF.[1769] It was the Panel's understanding of these "considerable" risks, costs, and complications for the launch and development of the A350XWB in the absence of A350XWB LA/MSF that led it to conclude that there was a high likelihood that Airbus would, to some degree, have had to make certain compromises with respect to the timing and/or features of the aircraft. The Panel explained that making such compromises would, in its view, be "a way" to reduce the costs and/or risk associated with the programme.[1770] In support, the Panel expressly cited several pieces of evidence that, in its view, "indicat{ed} how financial troubles may delay an LCA programme".[1771]

5.624. While the European Union summarily challenges the Panel's conclusion as lacking a sufficient evidentiary basis, it does not identify or allege any specific errors in the Panel's extensive assessment of the risks, costs, and complications that would arise for the A350XWB programme in the absence of A350XWB LA/MSF.[1772] In its appellant's submission, the European Union also does not provide an explanation of why the evidence cited by the Panel, indicating how financial troubles may delay an LCA programme, does not support its view that making compromises on the timing and/or features of the A350XWB would be "a way" to manage or mitigate the costs and/or risks associated with the programme. In response to questioning at the oral hearing, the European Union clarified that the evidence cited by the Panel concerned the LCA industry, in general, and did not specifically address the likelihood of compromises with respect to the A350XWB.[1773]

5.625. We note that, in addition to citing several pieces of evidence relating to how financial troubles may generally delay an LCA programme, the Panel referred to the UK Appraisal as well as a UK Government report from March 2010, entitled "Full Speed ahead: maintaining UK excellence in motorsport and aerospace".[1774] Given the apparent rigour of its underlying analysis, timeliness, and objective context, the Panel considered the UK Appraisal to be the "most credible source" of analysis on the record regarding EADS' ability to proceed with the A350XWB in the absence of A350XWB LA/MSF.[1775] As to the UK Government report, the Panel considered it to "strongly suggest{} 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*'".[1776] Conversely, the Panel's understanding of the documents in this manner suggests that, without A350XWB LA/MSF, the A350XWB programme would not be able to proceed on the

[1769] Panel Report, fn 3067 to para. 6.1715. See also paras. 6.1588 et seq., 6.1600 et seq., 6.1613 et seq., and 6.1640 et seq.

[1770] Panel Report, fn 3074 to para. 6.1716.

[1771] Panel Report, fn 3074 to para. 6.1716.

[1772] As noted above, the Panel discussed these aspects as part of its analysis of, *inter alia*, the LA/MSF negotiations, the UK Appraisal, and the State Aid Decisions, as well as the ability of Airbus to fund the programme.

[1773] European Union's response to questioning at the oral hearing.

[1774] Panel Report, fn 3074 to para. 6.1716 (referring to, *inter alia*, UK Appraisal (Panel 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 (Panel Exhibit USA-44), para. 18). The Panel also referred to the A350XWB Business Case Presentation (Panel Exhibit EU-130 (HSBI)). (Ibid)

[1775] Panel Report, fn 3066 to para. 6.1715. The Panel also rejected the European Union's argument that, insofar as these documents were prepared by and for UK governmental agencies, they could be seen as being limited to a much narrower question, namely, whether the A350XWB programme would go ahead in the United Kingdom without a UK MSF loan. Instead, the Panel considered it:

> 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 … 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.

(Ibid., para. 6.1605 (referring to UK Appraisal (Panel Exhibit EU-(Article 13)-34 (HSBI)), paras. 4 and 16) (emphasis original))

[1776] Panel Report, para. 6.1609. (emphasis added)

scale and in the *timeframe* specified, thus supporting a finding of a high likelihood of compromises with respect to the features and timing of the A350XWB without LA/MSF. On appeal, the European Union does not explain why the Panel's understanding of these documents, which focus specifically on Airbus and the A350XWB programme, and the weight it attached to them amounts to an error under Article 11 of the DSU. We therefore disagree with the European Union's view that the Panel did not cite any evidence, or offer any reasoning, to support its "probabilistic" conclusion.[1777]

5.626. We now turn to consider the European Union's second argument that a number of the Panel's factual findings, and several pieces of evidence, "strongly indicate that Airbus would not have found a compromise on timing or features of the A350XWB to be commercially viable", thereby contradicting the Panel's "subsequent speculation" that, absent LA/MSF, compromises would have been made on the timing or features of the A350XWB.[1778] Referring to the Panel's statement that "the A350XWB was not born in a vacuum"[1779], the European Union points out that the A350XWB was born in a competitive environment in which Boeing had gained a competitive edge that required an "urgent competitive response" from Airbus and any launch delay would have undermined the effectiveness of such a response.[1780] For the European Union, these statements confirm that the "commercial viability of the A350XWB was inherently tied to the timing of the aircraft's launch, and that compromises by Airbus with respect to timing would have undermined the viability of the A350XWB as a competitive response to the 787".[1781] Turning to the features of the aircraft, the European Union notes the Panel's observation that the large number of improvements that Airbus offered on the A350XWB, compared to the Original A350[1782], were key to the aircraft's ability to compete with the 787 and the 777.[1783] "Conversely", the European Union argues, any compromise on the features of the aircraft would have "prejudiced the new aircraft's competitive position" and undermined its commercial viability.[1784]

5.627. We agree with the European Union that several of the Panel's findings and observations underscore the importance of the features and timing of the A350XWB for its competitiveness in the twin-aisle LCA market. Discussing the origins of the A350XWB programme, the Panel observed that the Original A350 was rejected by customers "as not being able to match the weight savings and fuel efficiency" of the Boeing 787.[1785] Compared to the Original A350, the Panel noted that the A350XWB was expected to have a wider and composite fuselage, larger composite wings, higher cruise speed, and more powerful engines, in order to compete effectively with the Boeing 777 and 787.[1786] The Panel also considered it apparent that "time was of the essence", given that sales of the A330 and A340 were suffering "significant setbacks" due to competition from Boeing and the launch of the 787, which would have a "developmental head start" of around two years on any Airbus LCA that could replace the Original A350.[1787] The importance of the timing of the A350XWB is also evident from the Panel's observation that 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 to the extensive use of composite materials in the new aircraft.[1788] To make a formal launch decision, Airbus thus developed a new and accelerated "front-loaded design and production process" for the A350XWB that would ensure

[1777] European Union's appellant's submission, para. 899.
[1778] European Union's appellant's submission, paras. 901 and 907.
[1779] European Union's appellant's submission, para. 902 (quoting Panel Report, para. 6.1542).
[1780] European Union's appellant's submission, para. 902 (referring to Panel Report, paras. 6.1362-6.1544). See also para. 903.
[1781] European Union's appellant's submission, para. 904. See also para. 906.
[1782] Airbus A350 aircraft design proposed between 2004 and 2006. (Panel Report, paras. 6.1542-6.1543)
[1783] European Union's appellant's submission, para. 905 (referring to Panel Report, para. 6.1546).
[1784] European Union's appellant's submission, para. 905.
[1785] Panel Report, para. 6.1543 (quoting European Union's first written submission to the Panel, para. 1113 (fns omitted)).
[1786] Panel Report, para. 6.1546.
[1787] Panel Report, para. 6.1544. The Panel recalled the European Union's explanation 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. (Ibid. (referring to European Union's first written submission to the Panel, para. 1108))
[1788] Panel Report, para. 6.1547 (referring to A350XWB Chief Engineering Statement (Panel Exhibit EU-18 (BCI/HSBI) paras. 14-15 and 43)).

that the aircraft was technically feasible and attained "a given level of maturity of the aircraft design much earlier than Airbus had achieved in previous aircraft developments".[1789]

5.628. In fact, in our view, the Panel's analysis establishes the importance of the timing and the features of the A350XWB not only for the competitiveness of that aircraft against the Boeing 777 and 787 in the twin-aisle LCA market, but also for ensuring "Airbus' continued relevance as a healthy competitor to Boeing in all market segments at least through the foreseeable future".[1790] We recall in this regard the Panel's discussion of the problems with the production of the A380, which it termed as being "particularly serious".[1791] The A380 programme suffered three "extensive" production delays around the time when Airbus publicly unveiled the A350XWB in July 2006.[1792] As discussed in greater detail above[1793], the Panel found that these delays resulted in increased development costs for the A380, cancellation of orders for the A380, significant contractual penalties for the delays, as well as the deferred realization of revenues for the A380s that were ultimately delivered.[1794] Given the significance that the Panel attached to these problems, a successful and timely launch of the A350XWB appears to have been important to ease the pressure on Airbus' ability to bring to market and sell the A380.

5.629. While we agree that the Panel considered that the features and timing of the A350XWB were crucial for its competitiveness and commercial success, we fail to see how this aspect of the Panel's analysis "contradict{s} the speculation underlying any finding of 'direct effects'", as alleged by the European Union.[1795] The extent to which the features and timing of the A350XWB had an impact on its competitiveness is distinct from the issue of whether the A350XWB LA/MSF subsidies had an impact on Airbus' ability to launch the A350XWB as and when it did. As we see it, the fact that a compromise on the timing or features of the A350XWB would have undermined its competitiveness and commercial viability[1796] simply illustrates *why* Airbus would have sought to avoid such compromises. Indeed, the Panel identified several considerations that would have provided Airbus "with a strong *commercial incentive* to go ahead with the A350XWB programme, *assuming that it could find appropriate financing*".[1797] That Airbus would, therefore, ideally wish to avoid any such compromises does not answer the question of whether, absent A350XWB LA/MSF, Airbus would, *in fact*, have been able to launch the A350XWB as and when it did. This was the question the Panel set out to address in its analysis of the "direct effects" of A350XWB LA/MSF.[1798] As discussed above, based on its review of alternative sources of funding available to Airbus, the Panel concluded that, without A350XWB LA/MSF, the Airbus company that actually existed could have pursued the A350XWB 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".[1799]

5.630. We thus agree with the United States that[1800], rather than suggesting a contradiction in the Panel's reasoning, the Panel's view that the competitiveness of the A350XWB was tied closely to its features and timing supports its ultimate understanding of the "direct effects" of A350XWB LA/MSF. Indeed, the Panel's analysis suggests that even a slight delay in the launch of the A350XWB could have had significant implications for Airbus' competitiveness, particularly in light of the developmental head start that the Boeing 787 had over the A350XWB, as well as the serious financial difficulties for Airbus and EADS in the pre-launch period. Moreover, the Panel considered

[1789] Panel Report, para. 6.1548 (quoting A350XWB Chief Engineering Statement (Panel Exhibit EU-18 (BCI/HSBI)), para. 33).
[1790] Panel Report, para. 6.1572.
[1791] Panel Report, para. 6.1551.
[1792] Panel Report, para. 6.1551.
[1793] See para. 5.608 above.
[1794] Panel Report, para. 6.1551 (referring to Mario Heinen, Airbus Senior Vice President A380, EADS/Airbus presentation "The A380 Program", presented at the Global Investor Forum, 19-20 October 2006 (Panel Exhibit EU-419), slide 18; EADS Press Release, "A350 XWB launch: EADS Gives Go Ahead for Airbus to Launch the A350 XWB", 1 December 2006, (Panel Exhibit USA-569); A380 Business Case, p. 19, section 6.4 (Panel Exhibit EU-20 (HSBI)); Original Panel Report, para. 7.1719).
[1795] European Union's appellant's submission, para. 901.
[1796] European Union's appellant's submission, para. 907.
[1797] Panel Report, para. 6.1713. (emphasis added)
[1798] Panel Report, para. 6.1539.
[1799] Panel Report, para. 6.1717.
[1800] United States' appellee's submission, paras. 505-506.

the A350XWB to be a "very expensive" programme[1801], with "high risks and uncertainties".[1802] In such an environment, the Panel's findings indicate that A350XWB LA/MSF provided Airbus with increased confidence and certainty to embark successfully on a programme with the risk profile, costs, and ambition of the A350XWB, thereby enabling its timely launch.

5.631. Finally, we also have difficulty accepting the European Union's third and related argument that the Panel, in reaching its conclusion, did not examine whether an *alternative* aircraft with anything less than the features of the A350XWB, offered on the market later in time than the A350XWB, would have been commercially viable or attractive for Airbus to have launched.[1803] As discussed above, the question before the Panel, based on the United States' claim, was whether, in the absence of A350XWB LA/MSF, Airbus had the ability to launch the A350XWB *as and when it did*.[1804] In answering this limited question, the Panel sufficiently engaged with the arguments and evidence submitted by the parties, and conducted a detailed analysis as outlined above. Moreover, the European Union refers to several statements by the Panel, discussed above[1805], that highlight the strategic importance for Airbus to have launched the A350XWB with the features and at the time it had planned. As we see it, these statements by the Panel support the view that the Panel considered that an alternative aircraft with fewer features and/or offered later in time would not have been as competitive as a timely launched A350XWB.[1806]

5.632. The Appellate Body has underscored that a claim under Article 11 of the DSU must not be "vague or ambiguous".[1807] Instead, a challenge under Article 11 of the DSU "must be clearly articulated and substantiated with specific arguments".[1808] In these compliance proceedings, the European Union summarily alleges that the Panel's conclusion lacks a sufficient evidentiary basis. The European Union has not engaged with the Panel's detailed reasoning leading up to that conclusion, or the evidence cited by the Panel, so as to explain the basis of its allegation. While we agree that the Panel considered that the features and timing of the A350XWB were crucial for its competitiveness and commercial success, we fail to see how this aspect of the Panel's analysis contradicts its ultimate conclusion, as alleged by the European Union. We therefore do not consider that the European Union has substantiated its claim under Article 11 of DSU with the specificity and precision that is required under this provision. In light of the foregoing, we find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU in concluding that, "*without* A350XWB LA/MSF, the Airbus company that *actually existed* {in 2006-2010} 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."[1809]

5.6.3.5.2.2 The Panel's assessment of the "indirect effects" of the A380 LA/MSF subsidies

5.633. We now turn to the European Union's claim that the Panel erred in its application of Articles 5(c) and 7.8 of the SCM Agreement in finding that the A380 LA/MSF subsidies had "indirect effects" on Airbus' ability to launch the A350XWB as and when it did. Recalling its argument that the Panel did not find that the A380 LA/MSF subsidies had "direct effects" on the A380[1810], the European Union submits that "where LA/MSF {subsidies} for an aircraft do not result in 'direct effects' with respect to that aircraft, those {subsidies} are incapable of resulting in 'indirect effects' on a subsequently-launched aircraft."[1811] According to the European Union, where

[1801] Panel Report, para. 6.1567.
[1802] Panel Report, para. 6.1705.
[1803] European Union's appellant's submission, para. 900.
[1804] Panel Report, para. 6.1539. We note that before the Panel, the United States alleged that A350XWB LA/MSF, "enabled" Airbus to launch the A350XWB, "when and as it was". (United States' first written submission to the Panel, para. 395)
[1805] See paras. 5.626-5.628 above.
[1806] Panel Report, paras. 6.1542-6.1544.
[1807] Appellate Body Report, *US – Steel Safeguards*, para. 498. See also Appellate Body Report, *US – Zeroing (EC)*, para. 253.
[1808] Appellate Body Report, *US – Steel Safeguards*, para. 498. See also Appellate Body Report, *US – Zeroing (EC)*, para. 253.
[1809] Panel Report, para. 6.1717. (emphasis original)
[1810] European Union's appellant's submission, para. 886.
[1811] European Union's appellant's submission, para. 894.

LA/MSF subsidies are found not to have "direct effects", the aircraft funded by those subsidies "would, by definition, have existed (in its present form and at the time it was launched) absent the {subsidies}".[1812] In these circumstances, the European Union submits that any "learning", "scope and scale", or "financial effects" flowing from the A380 programme would have existed absent the A380 LA/MSF subsidies, and therefore cannot be attributed to them.[1813] The United States responds that the original panel's findings conclusively resolved that the A380 LA/MSF subsidies had "direct effects" on the A380.[1814] Moreover, the United States considers the European Union's assertion that a finding of no "direct effects" of the A380 LA/MSF subsidies means, by definition, that the aircraft funded by those subsidies would have existed as and when it did without the LA/MSF to be a "fallacy" because it ignores the indirect effects of previous LA/MSF subsidies.[1815]

5.634. We note that the European Union's appeal does not take issue with the substantive aspects of the Panel's "indirect effects" analysis. Instead, the European Union's claim of error is premised entirely on its argument that the Panel found that the A380 LA/MSF had no "direct effects" on the A380.[1816] According to the European Union, having found that the A380 LA/MSF subsidies were not critical to the very existence of the A380, the Panel erred in finding that those subsidies resulted in "indirect effects" on the A350XWB.[1817]

5.635. As discussed in greater detail above[1818], the original panel analysed the manner in which the A380 LA/MSF subsidies contributed to Airbus' ability to launch the A380 as and when it did. In our view, the reasoning and analysis by the original panel establishes that the A380 LA/MSF subsidies had "direct effects" on the A380, in the sense that those subsidies contributed in a genuine way to Airbus' ability to launch the A380 as and when it did. Given the original panel's findings identifying the "direct effects" of the A380 LA/MSF subsidies on Airbus' ability to launch the A380 as and when it did[1819], we see no reason why the Panel was precluded from examining the "indirect effects" of the A380 LA/MSF subsidies on the A350XWB. This view is further supported by our earlier conclusion that the Panel's findings establish that the A380 LA/MSF subsidies continued to have effects on Airbus' ability to bring to market and to continue developing the A380 *after* the original reference period. We therefore reject the European Union's argument that the Panel erred in finding that the A380 LA/MSF subsidies resulted in "indirect effects" on the A350XWB.[1820]

5.636. Having rejected the European Union's argument, and given that our focus is on the effects of the subsidies existing in the post-implementation period, we consider it useful to recall briefly the Panel's "indirect effects" analysis, particularly as it relates to the "indirect effects" of the existing A380 LA/MSF subsidies on the A350XWB. The Panel found that the "indirect effects" of the pre-A350XWB LA/MSF subsidies were "fundamental" to Airbus' ability to launch the A350XWB as and when it did.[1821] In reaching this finding, the Panel examined the evidence and arguments

[1812] European Union's appellant's submission, para. 894.
[1813] European Union's appellant's submission, paras. 886 and 893.
[1814] United States' appellee's submission, para. 483.
[1815] United States' appellee's submission, para. 484 (referring to Original Panel Report, para. 7.1940).
[1816] European Union's appellant's submission, paras. 886 and 890.
[1817] European Union's appellant's submission, para. 895 (referring to Panel Report, para. 6.1507 and fn 2597 thereto).
[1818] See section 5.6.3.5.1 of this Report.
[1819] We recall that the Appellate Body upheld the original panel's overall conclusion with respect to the A380 programme. (See para. 5.604 above)
[1820] We would, however, disagree with the Panel insofar as its analysis of the "indirect effects" of the expired LA/MSF subsidies served as the basis for its ultimate conclusion in respect of Airbus' ability to launch the A350XWB as and when it did. As explained above, the European Union is not under an obligation to take appropriate steps to remove the adverse effects caused by the expired subsidies. We acknowledge, however, that understanding the mechanism through which expired subsidies caused the effects found in the original proceedings provides useful background for our analysis of the issue at hand, that is, the causal link between the subsidies existing in the post-implementation period – including the A380 LA/MSF – and the relevant market phenomena.
[1821] Panel Report, para. 6.1774.

presented by the parties in the context of two broad categories of "indirect effects", namely, "learning effects" and "financial effects".[1822]

5.637. Assessing the extent of the "learning effects" from Airbus' previous subsidized LCA programmes on Airbus' ability to launch the A350XWB, the Panel considered the evidence to demonstrate that the "A350XWB programme significantly benefitted from Learning Effects arising from previous, subsidized Airbus LCA programmes, especially (but not only) the A380 programme".[1823] In reaching its conclusion, the Panel identified several specific types of "learning effects" that it considered as "materially benefit{ing}" the A350XWB.[1824] First, the Panel found that Airbus gained managerial know-how from its previous subsidized LCA programmes. In this regard, the Panel referred to, *inter alia*, evidence that "Airbus would change its design and testing processes to avoid problems it had encountered on the A380."[1825] Second, the Panel found that the A350XWB "benefitted somewhat" from Airbus' pre-existing infrastructure and engineering resources used for previous subsidized LCA programmes.[1826] Third, the Panel considered that the A350XWB benefitted from Airbus' evolutionary experience with composite materials and structures.[1827] Fourth, the Panel identified several specific structural features of the A350XWB that benefitted from Airbus' prior LCA experience.[1828] In this context, the Panel noted that the A350XWB Chief Engineering Statement concedes that the A350XWB wings' "high-lift system bears similarities to the A380's".[1829] Similarly, the Panel considered that certain of the A350XWB's on-board systems benefitted from Airbus' prior LCA experience.[1830] Specifically, the Panel found that Airbus' experience from the A380 benefitted the A350XWB's hydraulic pressure levels and flight control architecture, amongst others.[1831] Indeed, the Panel explained that the specific A350XWB components and systems that it considered 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".[1832] Finally, the Panel had "little doubt" that Airbus benefitted from its prior LCA experience in the form of being able to market effectively its LCA including the A380.[1833] The above review indicates that, even though the Panel considered the extent to which Airbus benefitted from the technological platform provided by all of its previous subsidized LCA programmes, it was of the view that the A350XWB significantly benefitted from the "learning effects" of the A380 in particular.

5.638. Turning to the "financial effects", the Panel found the evidence before it to demonstrate 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".[1834] The Panel also recalled the original panel's finding that the A380 LA/MSF measures were subsidies and that replacing them with market financing would therefore have been more expensive for Airbus. The Panel concluded 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.[1835] In our view, these findings by the Panel indicate that A380 LA/MSF had "financial effects" on Airbus' ability to launch the A350XWB as and when it did.

[1822] Panel Report, para. 6.1725. With respect to the third kind of "indirect effects", namely, "scope and scale effects", the Panel gave them "limited weight" given the fact that the United States did not specifically identify such effects in relation to the A350XWB. (Ibid., para. 6.1773)
[1823] Panel Report, para. 6.1747.
[1824] Panel Report, para. 6.1753.
[1825] Panel Report, para. 6.1754. The Panel noted, e.g. that the cracks on the wings of the A380 "alerted Airbus to the general risks posed by thermal problems to new wing designs". (Ibid., fn 3201 thereto)
[1826] Panel Report, para. 6.1755.
[1827] Panel Report, para. 6.1756.
[1828] Panel Report, para. 6.1757.
[1829] Panel Report, para. 6.1757 (referring to A350XWB Chief Engineering Statement (Panel Exhibit EU-18 (BCI/HSBI)), para. 107).
[1830] Panel Report, para. 6.1758.
[1831] Panel Report, para. 6.1758 and fns 3218-3219 thereto.
[1832] Panel Report, fn 3222 to para. 6.1760.
[1833] Panel Report, para. 6.1759.
[1834] Panel Report, para. 6.1771. (fn omitted)
[1835] Panel Report, para. 6.1769.

5.6.3.5.2.3 Conclusion on the "product effects" of existing LA/MSF subsidies on the A350XWB

5.639. In addressing the European Union's appeal of the Panel's analysis of the "direct effects" of the A350XWB LA/MSF subsidies on the A350XWB, we have found above that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the concluding that, "*without* A350XWB LA/MSF, the Airbus company that *actually existed* {in 2006-2010} 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."[1836] We have also rejected the European Union's claim that the Panel erred in finding that the A380 LA/MSF subsidies had "indirect effects" on the A350XWB. In doing so, we recalled several findings by the Panel indicating that, in launching the A350XWB, Airbus significantly benefitted from the "learning effects" and "financial effects" flowing from the subsidized A380 programme. The Panel's findings regarding the "direct effects" of the A350XWB LA/MSF subsidies, read together with its findings concerning the "indirect effects" of the A380 LA/MSF subsidies, indicate to us that, without the aggregated "product effects" of the existing LA/MSF subsidies for the A380 and A350XWB programmes, Airbus would not have been able to launch the A350XWB as and when it did.

5.6.3.6 Overall conclusion

5.640. Upon examining the "product effects" of LA/MSF subsidies, the Panel found that "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".[1837] The Panel further found that "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".[1838]

5.641. The errors alleged by the European Union regarding the Panel's findings on the "product effects" of the pre-A350XWB LA/MSF subsidies on the market presence of the A320 and A330 families of Airbus LCA concern primarily the LA/MSF subsidies that were found by the Panel to have expired before the end of the implementation period – namely, the subsidies for the A300, A310, A320, A330, and A340. We recall that, under our interpretation of Article 7.8 of the SCM Agreement, the European Union does not bear a compliance obligation with respect to the subsidies that were found by the Panel to have expired by the end of the implementation period. Thus, to the extent that some subsidies have expired, a further examination of the removal of the effects of those subsidies would not be necessary. In other words, it is not pertinent to examine whether the Panel's findings on the "product effects" of the *expired* subsidies can support its ultimate conclusion of non-compliance under Article 7.8 of the SCM Agreement. In line with this view, we do not consider it necessary to make separate findings on the European Union's claims on appeal insofar as they concern the Panel's alleged failure to assess properly the passage of time and the events during that time in reaching its findings on the "product effects" of the expired subsidies. In addition, we disagree with the Panel insofar as its reference to the aggregated LA/MSF subsidies in the above findings includes the expired subsidies.[1839]

5.642. Rather, as we have explained above, the pertinent question for purposes of these compliance proceedings is whether the subsidies existing in the post-implementation period (i.e. after 1 December 2011) cause adverse effects. The Panel found, and the European Union does not disagree, that the French, German, Spanish, and UK A380 LA/MSF subsidies had not expired by the end of the implementation period.[1840] Furthermore, the Panel found that,

[1836] Panel Report, para. 6.1717. (emphasis original)
[1837] Panel Report, para. 7.1.d.xii. (emphasis original) See also para. 6.1534.
[1838] Panel Report, para. 7.1.d.xiii. (emphasis original) See also para. 6.1778.
[1839] Having said that, we recall that the expired subsidies remain relevant as part of a matrix of analysis that seeks to identify the effects of the subsidies existing in the post-implementation period, in respect of which the European Union continues to have a compliance obligation. Findings from the original proceedings concerning the design, structure, and operation of the expired subsidies, as well as how those subsidies affected Airbus' operations until the end of 2006, can help in understanding the extent to which the existing subsidies may cause adverse effects in the post-implementation period.
[1840] Panel Report, para. 6.14.

subsequent to the original reference period (2001-2006), the European Union granted new LA/MSF subsidies to Airbus for developing its A350XWB family of LCA, and that these subsidies were "closely connected" with the adopted recommendations and rulings of the DSB and the European Union's alleged compliance "actions".[1841] Given the scope of these compliance proceedings, we have therefore focused our review on the Panel's analysis and findings regarding the effects of subsidies existing in the post-implementation period − namely, the A380 LA/MSF and the A350XWB LA/MSF subsidies − and the European Union's appeal thereof, to determine whether those findings support the Panel's ultimate conclusion regarding serious prejudice.

5.643. As part of our analysis above, we have disagreed with the European Union's claim under Article 11 of the DSU that the Panel's understanding of the "direct effects" of A380 LA/MSF on Airbus' ability to launch, bring to market, and continue developing the A380 *as and when it did* lacks sufficient evidentiary basis. Furthermore, we have found that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU in reaching its conclusion that, "*without* A350XWB LA/MSF, the Airbus company that *actually existed* {in 2006-2010} 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."[1842] We have also rejected the European Union's claim that the Panel erred in finding that the A380 LA/MSF subsidies had "indirect effects" on the A350XWB.

5.644. In these compliance proceedings, the Panel's findings with respect to the A380 and A350XWB programmes indicate that Airbus' competitiveness gained through earlier LA/MSF subsidies was renewed and sustained beyond the original reference period and into the post-implementation period due in significant part to the subsidies that it continued to receive after the original reference period and that still existed in the post-implementation period. The Panel's findings reveal that the years following the original reference period were a period of considerable uncertainty for Airbus. As the Panel noted, Airbus witnessed "particularly serious" problems with the A380 programme subsequent to the original reference period, including three "extensive" delays during 2005 and 2006.[1843] These delays resulted in cancellation of orders for the A380, Airbus having to pay contractual penalties, and a delayed realization of revenues from A380 deliveries.[1844] For the Panel, these problems had "severe" implications for Airbus.[1845] As noted above, Airbus ultimately delivered its first A380 in October 2007.[1846]

5.645. The Panel's findings establish that, around the same time as Airbus grappled with delays in the A380 programme, the Original A350, launched in December 2004, "had fallen into the market's disfavour".[1847] The Boeing 787 was outcompeting Airbus aircraft in the twin-aisle LCA market and had a "developmental head start" of roughly two years on any Airbus LCA programme that might replace the Original A350.[1848] The Panel further found that Airbus' decision to terminate the Original A350 programme in favour of the A350XWB − which could effectively compete with Boeing's 787 and 777 − was "too expensive to be taken lightly".[1849] The Panel's findings also establish that Airbus publicly unveiled the A350XWB concept in July 2006 without having yet

[1841] Panel Report, para. 6.150. We also note that neither participant disputes the Panel's finding that "the A350XWB LA/MSF contracts share the same core features as the LA/MSF measures considered in the original proceeding". (Ibid., para. 6.286)

[1842] Panel Report, para. 6.1717. (emphasis original)

[1843] Panel Report, para. 6.1551.

[1844] See para. 5.608 above.

[1845] Panel Report, para. 6.1551 (referring to Aude Lagorce, "Airbus refuses to rule out state loans on the A350XWB", *MarketWatch*, 4 December 2006 (Panel Exhibit USA-359)).

[1846] Ascend database, Deliveries made, data request as of 7 April 2014 (Panel Exhibit EU-512). See also *supra* fn 1694.

[1847] Panel Report, para. 6.1543.

[1848] Panel Report, para. 6.1544. We also note the Panel's finding that sales of the A330 and A340 were suffering "significant setbacks" at this time due to competition from Boeing. (Ibid.) The European Union explained to the Panel 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. (Ibid. (referring to European Union's first written submission to the Panel, para. 1108)) The Panel found that such developments had "significant implications" for Airbus' overall sales performance. (Ibid. (referring to "Time for a new, improved model: Airbus gets to work on its medium-sized aircraft, but deeper problems remain", *The Economist*, 20 July 2006 (Panel Exhibit USA-28)))

[1849] Panel Report, para. 6.1545.

achieved "sufficient certainty" that it had the technical expertise to build the A350XWB[1850], given that it was a "major" and "dramatic" redesign of the Original A350, and envisioned extensive use of composite materials.[1851] Thus, Airbus was faced not only with the financial strain of replacing the Original A350 with an expensive new aircraft as soon as possible, but also with the technological challenges in launching an aircraft as innovative as the A350XWB. Ultimately, Airbus launched the A350XWB on 1 December 2006.[1852]

5.646. The above findings by the Panel on the issues surrounding the Original A350 and the launch of the A350XWB, together with its findings on the severe implications of the extensive delays with the A380 programme, establish that Airbus was faced with considerable overall uncertainty in the years following the original reference period. As discussed above, the original panel's findings, together with the Panel's analysis, indicate that A380 LA/MSF had "direct effects" on Airbus' ability to launch, bring to market, and continue developing the A380 *as and when it did*, given that the A380 LA/MSF subsidies had not expired, as well as the fact that Airbus continued to receive disbursements under the French, German, and Spanish LA/MSF contracts at a time when it was experiencing severe financial difficulties resulting from the extensive production delays in the A380 programme. The Panel's findings regarding the "direct effects" of the A350XWB LA/MSF, read together with its findings concerning the "indirect effects" of the A380 LA/MSF, also indicate that, without the aggregated "product effects" of the existing LA/MSF subsidies for the A380 and A350XWB programmes, Airbus would not have been able to launch the A350XWB *as and when it did*. In other words, the existing LA/MSF subsidies that Airbus continued to receive made it possible to proceed with the timely launch of the A350XWB – a high-risk and expensive programme of considerable strategic importance to Airbus – and to bring to market the A380, which had suffered extensive delays.

5.647. In sum, our discussion of the Panel's findings reveals that the LA/MSF subsidies existing in the post-implementation period – i.e. the A380 and A350XWB LA/MSF subsidies – enabled Airbus to proceed with the timely launch and development of the A350XWB, and to bring to market and to continue developing the A380. Both these events, as the above analysis shows, were crucial to renew and sustain Airbus' competitiveness in the post-implementation period.

5.6.4 Lost sales, displacement, and impedance

5.6.4.1 Introduction

5.648. Having examined the "product effects" of the LA/MSF subsidies, the Panel turned to consider "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" alleged by the United States.[1853] In respect of lost sales, the Panel concluded that:

> all of the orders identified in Table 19 {of the Panel Report} 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.[1854]

[1850] Panel Report, para. 6.1507 (referring to A350XWB Chief Engineering Statement (Panel Exhibit EU-18 (BCI/HSBI)), paras. 14-15 and 43).

[1851] Panel Report, para. 6.1546 (quoting Goldman Sachs Investment Analysis, A350: Not an option but essential for Airbus' future, in our view, 21 November 2006 (Panel exhibit USA-30), pp. 20-22; G. Norris, "Airline criticism of Airbus A350 forces airframer to make radical changes to fuselage, wing and engines", *Flight International*, 8 May 2006 (Panel Exhibit USA-26)).

[1852] Panel Report, para. 6.1568.

[1853] Panel Report, para. 6.1779.

[1854] Panel Report, para. 6.1798. As further described below, Table 19 of the Panel Report lists orders for Airbus' A320, A380, and A350XWB families of LCA in 2012 and 2013, which were 150 and 225, respectively. (Ibid., para. 6.1781, Table 19: United States' "Lost Sales" Claims in the Post-Implementation Period)

5.649. With respect to displacement and impedance in the relevant markets, the Panel concluded 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.[1855]

5.650. The European Union contends that the Panel erred in its interpretation and application of Articles 5(c), 6.3, and 7.8 of the SCM Agreement in finding causation for lost sales and "displacement and/or impedance" in the relevant markets, and raises two main grounds of appeal in respect of the Panel's above conclusions. The first concerns the causal link between the "product effects" of LA/MSF subsidies and these market phenomena. Specifically, the European Union contends that the Panel failed to account for: (i) the differences in the degree of competition between the relevant LCA at issue in the particular instances of lost sales, displacement, and impedance alleged by the United States; and (ii) the market-specific and sale-specific non-attribution factors referred to by the European Union.[1856] The second ground of appeal relates to alleged errors arising from the Panel's treatment of displacement and impedance as "interchangeable and indistinguishable" concepts[1857], and from the Panel's failure to examine a sufficiently large data set and to engage with the sales volume and market share data that were before it for purposes of analysing the United States' claims of displacement and/or impedance.[1858]

5.651. As noted in Section 5.6.3.3 above, the Appellate Body has indicated that generally the "more appropriate approach" to assess the effect of a subsidy under Article 6.3 of the SCM Agreement is through a unitary counterfactual analysis, whereby a panel conducts a single, integrated analysis of both the *existence* of the relevant market phenomena and whether these phenomena have been *caused* by the subsidies at issue.[1859] Indeed, as the Appellate Body noted in the original proceedings, "it is difficult to understand the market phenomena described in the various subparagraphs of Article 6.3 in isolation from the challenged subsidies."[1860] Although the Panel explained that it would adopt a "unitary" approach to causation[1861], we note that its analysis progressed in two stages: (i) first, the Panel concluded that the "product effects" of LA/MSF subsidies were such that the market presence of the A320, A330, A380, and A350XWB would not have been possible without the challenged LA/MSF subsidies[1862]; and (ii) the Panel then found that such "product effects" led to the serious prejudice allegedly suffered by the US LCA industry in the form of lost sales and "displacement and/or impedance".[1863]

5.652. In the preceding section, we have reviewed the European Union's appeal of the Panel's conclusion on "product effects" insofar as they relate to the LA/MSF subsidies existing in the post-implementation period. We have found that the Panel's findings with respect to the A380 and A350XWB programmes indicate that Airbus' competitiveness, gained through the pre-A380 LA/MSF subsidies, was renewed and sustained beyond the original reference period and into the post-implementation period due to the subsidies that it continued to receive after the original reference period and that still existed during the post-implementation period. In that context, we have emphasized that the European Union does not have a compliance obligation with regard to those subsidies that expired before 1 June 2011. At the same time, findings from the original proceedings regarding the design, structure, and operation of the expired subsidies, as well as how

[1855] Panel Report, para. 6.1817.
[1856] European Union's appellant's submission, paras. 914-916.
[1857] European Union's appellant's submission, para. 977.
[1858] European Union's appellant's submission, paras. 968, 1024, and 1026.
[1859] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1109. See also Appellate Body Reports, *US – Upland Cotton*, para. 431; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 354. In contrast, under a two-step approach, the analysis first seeks to identify the market phenomena and then, as a second step, examines whether there is a causal relationship. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1107)
[1860] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1109.
[1861] Panel Report, para. 6.1453.
[1862] Panel Report, paras. 6.1534 and 6.1778.
[1863] Panel Report, paras. 6.1779-6.1818.

those subsidies affected Airbus' operations until the end of 2006, together with the Panel's findings in relation to the subsidies provided since then and into the post-implementation period, inform our understanding of whether the existing subsidies may cause adverse effects in the post-implementation period. In keeping with the "unitary" approach to causation, and in light of the fact that the Panel's findings on "product effects" formed the basis for its subsequent findings on serious prejudice, our analysis in the preceding section remains pertinent to our review of the European Union's appeal of the Panel's findings on lost sales and "displacement and/or impedance".

5.653. We begin with a brief overview of the Panel's findings on lost sales and "displacement and/or impedance", as well as the claims and arguments raised on appeal. We then consider the European Union's appeal of the Panel's interpretation of the concepts of "displacement" and "impedance" under Articles 6.3(a) and 6.3(b) of the SCM Agreement. Subsequently, we address the European Union's claim that the Panel failed to take into account the "closeness of competition" among relevant LCA in reaching its serious prejudice findings[1864], and its allegation that the Panel failed to examine a sufficiently large data set in reaching its findings of displacement and impedance. Thereafter, we examine the Panel's findings of lost sales and "displacement and/or impedance" in each of the three market segments identified by the Panel − single-aisle LCA; twin-aisle LCA; and VLA markets − in light of specific errors alleged by the European Union, namely, its argument that the Panel failed to analyse properly market-specific and sale-specific non-attribution factors referred to by the European Union as well as its argument that the Panel failed to engage with the sales volume and market share data that were before it in reaching its findings of "displacement and/or impedance". Finally, we consider the United States' request to complete the legal analysis of "displacement and/or impedance", to the extent that we reverse the relevant findings by the Panel.[1865]

5.6.4.2 Summary of Panel findings

5.654. The Panel recalled its finding that the "product effects" of the challenged LA/MSF subsidies continued to be a genuine and substantial cause of the current market presence of the A320, A330, A380, and A350XWB families of Airbus LCA. The Panel also recalled its conclusion 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".[1866] The Panel considered that its task was therefore to determine whether the LA/MSF subsidies, through their continued "product effects", were a genuine and substantial cause of the lost sales, and market impedance and displacement alleged by the United States. The Panel added that it would limit its assessment to evaluating the merits of the United States' claims in light of the findings it had made with respect to the "product effects" of LA/MSF under the "plausible" counterfactual scenarios because, according to the Panel, findings under such scenarios provided a sufficient basis for conducting an "objective assessment of the matter" as required under Article 11 of the DSU.[1867]

5.6.4.2.1 Findings on significant lost sales

5.655. Before the Panel, the United States argued that in light of the continued "product effects" of the challenged LA/MSF subsidies and the conditions of competition in the LCA industry, orders made by eight airlines for Airbus LCA "*after* 1 December 2011 constitute 'lost sales' within the meaning of Article 6.3(c) of the SCM Agreement".[1868] Furthermore, the United States argued that "because of the allegedly strategic importance of many of these sales to both Boeing and Airbus

[1864] European Union's appellant's submission, fn 1041 to para. 968.
[1865] United States' appellee's submission, para. 573.
[1866] Panel Report, para. 6.1779. (emphasis original)
[1867] Panel Report, para. 6.1779.
[1868] Panel Report, para. 6.1781 (referring to United States' first written submission to the Panel, para. 413; second written submission to the Panel, paras. 699-709; response to Panel questions No. 67 and No. 162; Summary Table of US Significant Lost Sales (Panel Exhibit USA-164); Ascend database, Boeing and Airbus Deliveries in Units 2001-2013 (Q1), Commercial Operators, data request as of 27 April 2013 (Panel Exhibit USA-546)). (emphasis original) Recalling its discussion regarding the reference period for its adverse effects analysis, the Panel explained that it would "examine only claims of 'lost sales' occurring in the post-implementation period". (Ibid., fn 3258 thereto (referring to para. 6.1444 of its Report). See also fns 3260 and 3261 to Table 19 of the Panel Report)

and their monetary value of billions of USD", the "lost sales" were also "'significant'".[1869] The Panel identified the United States' lost sales claims occurring in the post-implementation period in Table 19 of its Report, which recorded orders of Airbus LCA by eight airlines in 2012 and 2013, including the sales of 271 single-aisle LCA, 50 twin-aisle LCA, and 54 VLA.[1870]

5.656. At the outset of its analysis, the Panel briefly recalled the meaning of the terms "significant" "lost sales" in Article 6.3(c) of the SCM Agreement, noting that they refer to "important, notable or consequential" sales that suppliers of the complaining Member "failed to obtain" and that instead were won by suppliers of the respondent Member.[1871] The Panel agreed with the European Union that, to demonstrate that the "product effects" of the LA/MSF subsidies 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".[1872] Having considered the facts surrounding the nature of competition from potential new entrants in the current duopoly involving Airbus and Boeing, the Panel found that, in the "plausible" counterfactual scenarios[1873], "it would have been highly unlikely for a non-United States producer to have entered the LCA market"[1874], and that, even if there were such a new entrant, such an entity "would have only been able to enter the single-aisle segment with aircraft that … could only impose weak competitive constraints on Boeing".[1875]

5.657. Given the above considerations, the Panel considered that it "necessarily follow{ed} that the sales won by Airbus in the twin-aisle and {VLA} markets were 'lost sales' to the United States' industry in both 'plausible' counterfactual scenarios" in the post-implementation period.[1876] As for the "numerous, allegedly 'non-subsidy'"[1877] reasons that the European Union advanced for explaining why Airbus won sales in the twin-aisle LCA and VLA markets[1878], the Panel found that Airbus would not have had any of those advantages in the campaigns for twin-aisle LCA and VLA in the "plausible" counterfactual scenarios, "because it simply would not have existed".[1879] The Panel also dismissed the non-attribution factor relating to Singapore Airlines' wish to split its order for twin-aisle LCA between Airbus and Boeing, finding instead that the airline would have had to choose from LCA producers in the US LCA industry as Airbus would not have existed in the "plausible" counterfactual scenarios.[1880]

5.658. The Panel next turned to the alleged "lost sales" in the single-aisle LCA market. The Panel noted that the Airbus aircraft actually purchased – namely, the A320 and A321 – offered a seating capacity that was "in excess of what a new entrant could have reasonably offered" and further that "200 of the 271 individual aircraft ordered were new generation aircraft – A320neos".[1881] In the Panel's view, it stood to reason that, in the two "plausible" counterfactual scenarios, US LCA producers would have had a very strong competitive advantage over any new entrant in all three sales campaigns, as they could have offered single-aisle LCA with characteristics that closely matched those demanded and ultimately chosen by the relevant customers.

[1869] Panel Report, para. 6.1781 (referring to United States' first written submission to the Panel, paras. 413-414; second written submission to the Panel, paras. 699-709).

[1870] Panel Report, para. 6.1781, Table 19: United States' "Lost Sales" Claims in the Post-Implementation Period.

[1871] Panel Report, para. 6.1780 (quoting Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 1052; *EC and certain member States – Large Civil Aircraft*, para. 1220).

[1872] Panel Report, para. 6.1784. (emphasis original)

[1873] We recall that, according to the original panel, in the "plausible" counterfactual scenarios, the LCA industry would have been characterized by the existence of either a Boeing monopoly, or a duopoly involving Boeing and another US LCA producer. (Original Panel Report, para. 7.1984. See also Panel Report, para. 6.1466.)

[1874] Panel Report, para. 6.1787.

[1875] Panel Report, para. 6.1788.

[1876] Panel Report, para. 6.1789.

[1877] Panel Report, para. 6.1789.

[1878] Panel Report, para. 6.1790.

[1879] Panel Report, para. 6.1791.

[1880] Panel Report, para. 6.1792. The European Union argued that one of the reasons for splitting orders was to secure a large number of aircraft over a particular period of time. (Ibid.)

[1881] Panel Report, para. 6.1793.

5.659. As for the "allegedly 'non-subsidy' reasons"[1882], the Panel found that, because "Airbus would not have existed in the post-implementation period in the absence of the effects of the LA/MSF subsidies", the European Union's arguments relating to Airbus' product offering or actual experiences in the sales campaigns were "of no relevance".[1883] The Panel also dismissed the non-attribution factor regarding Norwegian Air Shuttle's wish to split its order between Airbus and Boeing single-aisle offerings.[1884] The Panel considered that the non-US LCA producer that might have entered the market would not have been able to compete effectively with US LCA producers in the post-implementation period and, therefore, could not have prevented US LCA producers from winning the relevant sales in the absence of Airbus.[1885]

5.660. The Panel further considered that the original panel's description of the significance of losing LCA sales to a rival LCA producer − which was not specifically appealed or otherwise disturbed by the Appellate Body − remained, on the whole, an accurate depiction of the significance of losing LCA sales to a rival LCA producer in the post-implementation period, and thus incorporated it *mutatis mutandis*.[1886] The Panel saw no reason not to characterize the lost sales in the post-implementation period as "significant". Accordingly, the Panel concluded by stating:

> 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.[1887]

5.6.4.2.2 Findings on displacement and impedance

5.661. Before the Panel, the United States argued that, in light of the "product effects" of the challenged LA/MSF subsidies and the conditions of competition in the LCA industry, the US LCA industry suffered "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".[1888] In support, the United States adduced evidence of Airbus' and Boeing's delivery volumes and market shares in all relevant markets for each year from 2001 to 2013.[1889] The United States argued 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."[1890]

5.662. The European Union responded that the United States had 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."[1891]

[1882] Panel Report, para. 6.1794.

[1883] Panel Report, para. 6.1795.

[1884] Panel Report, para. 6.1796. The European Union argued that splitting orders would allow the company to "hedge their bets … with regard to new and different technologies". (Ibid., quoting European Union's second written submission to the Panel, para. 1301)

[1885] Panel Report, paras. 6.1796-6.1797.

[1886] Panel Report, para. 6.1798.

[1887] Panel Report, para. 6.1798.

[1888] Panel Report, para. 6.1801. The Panel also noted that the United States made a conditional request that, were the Panel to reject its present serious prejudice claims in the European Union single-aisle LCA market, the Panel should find that "the United States' LCA industry {was} *threatened* with displacement and/or impedance in … that market". (Ibid., fn 3288 thereto (referring to United States' first written submission to the Panel, para. 514; second written submission to the Panel, para. 720; response to Panel question No. 162) (emphasis original))

[1889] Panel Report, para. 6.1801.

[1890] Panel Report, para. 6.1801 (referring to United States' first written submission to the Panel, paras. 520-532).

[1891] Panel Report, para. 6.1802 (referring to European Union' first written submission to the Panel, paras. 845, 851, 854, 855-951, 955, 959, 963, 1061, 1063, 1067, 1073, 1077, and 1079; second written submission to the Panel, paras. 1562, 1600-1606, 1612, 1619, 1624, 1628, 1638, 1646, 1647, 1655-1656,

5.663. The Panel began 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.[1892] Specifically, the Panel recalled the Appellate Body's finding that:

> the 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.[1893]

5.664. The Panel considered that 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: (i) remained stagnant; (ii) decreased; (iii) increased; or (iv) fluctuated.[1894] The Panel was not persuaded by the European Union's contention that "the United States' displacement and impedance claims may succeed *only* if the relevant data clearly demonstrated the second of these four possibilities".[1895] The Panel reasoned that to accept the European Union's contention would imply that there could 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.[1896]

5.665. The Panel recalled the Appellate Body's observation that the original panel had "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".[1897] While recognizing that the Appellate Body had faulted parts of the original panel's displacement analysis for its "failure to identify *trends* showing *declining* market shares"[1898], the Panel noted that the Appellate Body made these findings only after having: (i) "explained that the identification of *declining trends* was a necessary element of the *first part* of the panel's *two-step* approach to causation"[1899]; and (ii) "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'".[1900] The Panel, however, explained that, as it was "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 proceedings "{did} not appear to be entirely relevant to the situation at hand".[1901]

5.666. Turning to the "appropriate{} representative period", the Panel noted that the United States had submitted data for the period from 2001 to 2013.[1902] The Panel considered that the extent to which the United States had established its claims of serious prejudice would be

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1658, 1661, 1667, 1674, 1678, 1681, 1685, 1688, and 1691; comments on the United States' response to Panel question No. 162). (emphasis original)

[1892] Panel Report, para. 6.1799.

[1893] Panel Report, para. 6.1800 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1163).

[1894] Panel Report, para. 6.1803. (emphasis original)

[1895] Panel Report, para. 6.1803. (emphasis original)

[1896] Panel Report, para. 6.1803.

[1897] Panel Report, fn 3293 to para. 6.1804 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1179).

[1898] Panel Report, para. 6.1804 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1188-1190 and 1193-1198). (emphasis original)

[1899] Panel Report, para. 6.1804 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1170 and 1188). (emphasis original)

[1900] Panel Report, para. 6.1804 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1179). (emphasis original)

[1901] Panel Report, para. 6.1804. (emphasis original; fn omitted)

[1902] Panel Report, para. 6.1805 (referring to United States' response to Panel questions No. 40 and No. 162; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI))).

"focused on the most recent market data presented by the parties in this dispute from the *post-implementation period*", as it was only with respect to "the effects found to exist in the period *after* 1 December 2011" that the European Union and the four member States could "be found to have failed to comply with {the} obligation to 'take appropriate steps to remove the adverse effects' by the end of the implementation period".[1903]

5.667. The Panel next tabulated "the volume of deliveries and market share" data for each of the different country and product markets at issue.[1904] The Panel found that, in light of the two "plausible" counterfactual scenarios, it was 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 US LCA industry would have been higher than its actual level.[1905] The Panel considered that: (i) "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"; and (ii) while it was 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", it had "strong doubts about whether such a new entrant could have also made *deliveries* over {those} years".[1906] The Panel was thus satisfied that no new non-US LCA producer entering the market after the end of 2006 could have *delivered* a single-aisle LCA between 1 December 2011 and the end of 2013.

5.668. Finally, with regard to the non-attribution factors asserted by the European Union, the Panel was of the view that these factors were "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".[1907] Having found that, in the "plausible" counterfactual scenarios, Airbus would not have existed at the relevant times, the Panel considered that the LA/MSF subsidies must therefore be a "genuine and substantial" cause of the post-implementation period deliveries.[1908]

5.669. For these reasons, the Panel found 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".[1909] Accordingly, the Panel concluded 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.[1910]

5.6.4.3 Claims and arguments on appeal

5.670. The European Union contends that the Panel erred in its application of Articles 5(c), 6.3, and 7.8 of the SCM Agreement in finding causation for serious prejudice, because the Panel failed to account for the differences in the degree of competition between the relevant LCA at issue. The European Union submits that, given the "extremely broad interpretation that the Panel adopted for the term 'market'" and the "consequent identification of product markets within which

[1903] Panel Report, para. 6.1444. (emphasis original)
[1904] Panel Report, para. 6.1805, Tables 20-22.
[1905] Panel Report, para. 6.1806.
[1906] Panel Report, para. 6.1806. (emphasis original) The Panel recalled that deliveries of new LCA would lag their order date by "typically *at least* three years, and usually many more years in respect of *newly launched* aircraft". (Ibid. (emphasis original))
[1907] Panel Report, para. 6.1814.
[1908] Panel Report, paras. 6.1814-6.1816.
[1909] Panel Report, para. 6.1817.
[1910] Panel Report, para. 6.1817. In light of these findings, the Panel refrained from making any findings concerning the United States' conditional claim of "*threat* of displacement and impedance in the market for single-aisle LCA in the European Union". (Ibid., para. 6.1818 (emphasis original))

there would be 'weaker and stronger competitive relationships'", it was important for the Panel, in its causation analysis, "to account for these differences in the degree of competition".[1911] The European Union considers this failure to be "all the more troubling" because the Panel noted the "*absence* of close competitive relationships between the products it placed into the same product market".[1912] Therefore, the European Union argues, the Panel should have "assessed 'the specific circumstances and dynamics of competition occurring in the relevant geographic market and the demands of customers in that market' to ensure that it arrive{d} at 'meaningful findings of' displacement, impedance or lost sales"[1913], but it failed to do so.[1914] Instead, the Panel based its findings of serious prejudice on its theory that "Airbus would not have been able to offer its current range of aircraft in a counterfactual absent the subsidies"[1915], and "ignored the 'genuine and substantial' causation standard" in Articles 5(c) and 6.3 of the SCM Agreement.[1916]

5.671. The European Union further contends that the Panel failed to take into account the market-specific and sale-specific non-attribution factors that the European Union demonstrated caused (or contributed to causing) the observed market phenomena[1917], notwithstanding the Panel's recognition that "an LCA customer's decision will be influenced by a *host of non-price factors*".[1918] Rather, the Panel "characterised every Airbus sale as a lost sale to Boeing, and every delivery of an Airbus LCA to a market at issue as a basis for its findings of 'displacement and/or impedance'".[1919] With regard to lost sales, the European Union submits that the Panel rejected its arguments concerning several non-attribution factors relating to advantages enjoyed by Airbus vis-à-vis Boeing, noting instead that "Airbus would not have had any of these advantages … in the 'plausible' counterfactual scenarios because it simply would not have existed."[1920] Similarly, the European Union argues, the Panel rejected the non-attribution factors raised by the European Union in relation to displacement and impedance on the ground that Airbus would not have existed "but for" the LA/MSF subsidies.[1921] Referring to the Panel's rejection of the European Union's request to seek information under Article 13 of the DSU for purposes of examining non-attribution factors, the European Union contends that the Panel simply "pre-judged" the relevance of non-attribution factors.[1922]

5.672. Finally, the European Union alleges errors of interpretation and application of Articles 6.3(a) and 6.3(b) of the SCM Agreement in respect of the Panel's findings of displacement and/or impedance. First, the European Union contends that the Panel erred in its interpretation of Articles 6.3(a) and 6.3(b) of the SCM Agreement because it made "undifferentiated findings of 'displacement and/or impedance' for the country and product markets at issue", thereby "conflating the two concepts of 'displacement' and 'impedance'".[1923] The European Union also contends that the Panel erred in interpreting Articles 6.3(a) and 6.3(b) to permit a finding of displacement "without any engagement with the sales volume and market share data", and "without a finding of clearly discernible and identifiable declining trends in sales volume or market shares for each of the country and product markets at issue".[1924] Second, the European Union alleges that the Panel erred in its application of Articles 5(c), 6.3(a), 6.3(b), and 7.8 of the SCM Agreement because: (i) the Panel failed to adopt a large enough number of data points to investigate "trends" in a meaningful manner[1925]; and (ii) the Panel erred "by failing to engage with the data, and by instead making findings of displacement entirely divorced from

[1911] European Union's appellant's submission, para. 939.
[1912] European Union's appellant's submission, para. 925. (emphasis original)
[1913] European Union's appellant's submission, para. 928 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1136).
[1914] European Union's appellant's submission, para. 929.
[1915] European Union's appellant's submission, para. 941.
[1916] European Union's appellant's submission, para. 942.
[1917] European Union's appellant's submission, para. 916.
[1918] European Union's appellant's submission, para. 946 (quoting Panel Report, para. 6.1186). (emphasis added by the European Union)
[1919] European Union's appellant's submission, para. 947.
[1920] European Union's appellant's submission, para. 950 (quoting Panel Report, paras. 6.1791 and 6.1795).
[1921] European Union's appellant's submission, paras. 951-954.
[1922] European Union's appellant's submission, para. 956.
[1923] European Union's appellant's submission, para. 967.
[1924] European Union's appellant's submission, para. 1014. See also paras. 1017 and 1022.
[1925] European Union's appellant's submission, para. 1024.

the data".[1926] With respect to the Panel's findings of impedance, the European Union submits that the Panel repeated "essentially the same errors"[1927], that is, "in the Panel's view, impedance may be found without any assessment of sales volume and market share data, and without a finding of a trend that is clearly discernible and identifiable".[1928]

5.673. The United States responds that there is no support in the text of the SCM Agreement or the Appellate Body's guidance for the proposition that "the 'closeness of competition' between products *must*, as a general rule, be examined twice: first in the product market inquiry and then in the evaluation of whether displacement, impedance, or lost sales of the like product in the relevant market was the 'effect of the subsidy' to the subsidized product".[1929] Thus, the United States argues that, "by properly taking the nature and degree of competition into account in delineating the product markets, the Panel protected against reaching subsequent adverse effects findings that were not meaningful".[1930] Moreover, the United States submits that the Panel recognized the "need to properly take into account whether a competitive relationship is 'at most, indirect or remote'", and did not, as the European Union alleges, find that "all products that have some competitive relationship, regardless of the nature or degree of that relationship, must be placed in the same market for the purposes of Article 6.3".[1931] The United States also contends that the Panel "did … examine 'the existence, nature and degree of competition between the relevant aircraft' … in exhaustive detail in its analysis of the appropriate product markets".[1932] Furthermore, the United States asserts that the European Union has not identified a specific product relationship in this dispute that was not properly captured by the Panel's analysis of product markets and that should have been addressed at the causation stage.[1933] According to the United States, where the parties had argued that particular aspects of competition were relevant to specific sales campaigns or geographic markets, the Panel examined such issues in the course of its analyses of "the {United States'} lost sales and displacement/impedance claims".[1934] In sum, the United States contends that "there are no product-related causation issues that the Panel left unaddressed in its analyses of product markets and causation and, therefore, no errors for the Appellate Body to correct."[1935]

5.674. The United States further contends that the Panel's treatment of the European Union's non-attribution arguments is both a logically sound extension of its counterfactual analysis and completely consistent with Articles 5(c), 6.3, and 7.8 of the SCM Agreement.[1936] The United States submits that, with respect to lost sales, the Panel explicitly considered each of the European Union's non-attribution factors and rejected most of them because they were premised on the existence and market presence of Airbus in the post-implementation period, a scenario the Panel found to be "unlikely".[1937] In the United States' view, such factors were not "valid" non-attribution factors because Airbus would not have existed under the "plausible" counterfactual and, as the Appellate Body stated, it "would be pointless to attempt delineating the features of something that would not have existed without the subsidies".[1938] The United States also maintains that, contrary to the European Union's arguments, the Panel assessed the non-attribution factors individually where they were unique to a customer. With regard to "displacement and/or impedance", the United States contends that the Panel's analysis of the proposed non-attribution factors follows logically the line of reasoning that, under the "plausible" counterfactual, Airbus

[1926] European Union's appellant's submission, para. 1026.
[1927] European Union's appellant's submission, para. 1037.
[1928] European Union's appellant's submission, para. 1045 (referring to Panel Report, paras. 6.1802-6.1804).
[1929] United States' appellee's submission, para. 520. (emphasis original)
[1930] United States' appellee's submission, para. 511.
[1931] United States' appellee's submission, para. 515 (referring to European Union's appellant's submission, paras. 550, 559, 602, 614, 618, and 922).
[1932] United States' appellee's submission, para. 516 (referring to Panel Report, paras. 6.1157-6.1416).
[1933] United States' appellee's submission, para. 528.
[1934] United States' appellee's submission, para. 516 (referring to sections VIII.E.2.a-b of its submission).
[1935] United States' appellee's submission, para. 529.
[1936] United States' appellee's submission, para. 532.
[1937] United States' appellee's submission, para. 535 (referring to Panel Report, paras. 6.1790 and 6.1792-6.1797, and quoting Panel Report, para. 6.1478).
[1938] United States' appellee's submission, para. 535 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1264).

would not have existed in the reference period, absent the effects of the LA/MSF subsidies.[1939] Furthermore, according to the United States, the Panel did not summarily reject any factor, but instead analysed how each factor would affect the behaviour of market participants in the counterfactual, and properly dismissed the European Union's arguments on that basis.[1940] The United States submits that the Panel rejected the European Union's request to seek information pursuant to Article 13 of the DSU, because it correctly concluded that "the requested information is not necessary for its evaluation of the United States' allegations of lost sales and displacement."[1941]

5.675. As for the specific interpretative errors of Articles 6.3(a) and 6.3(b) alleged by the European Union, the United States contends that "{e}very aspect of the Panel's unitary analysis demonstrates that it considered displacement and impedance as separate and distinct concepts."[1942] The United States adds that the fact that the Panel "made findings of displacement and impedance linked by the term 'and/or' confirms that it considered these product effects to be discrete concepts."[1943] The United States further recalls that the Appellate Body, in interpreting Articles 6.3(a) and 6.3(b), has explained that "panels may discern or identify displacement or impedance based on evidence of trends in import or export volumes and market shares".[1944] However, the United States also recalls the Appellate Body's finding that, "because 'impedance may not be a visible phenomenon, evidence of trends may not be dispositive, or may hold less probative value, for a finding of impedance.'"[1945] In the United States' view, a comparison of the actual and counterfactual situations demonstrated that imports (or exports) and market share of US LCA would have been greater in each of the relevant product markets, because "under the counterfactual scenarios, Airbus volume of deliveries and market share information would not have existed in any of the relevant product markets."[1946] Thus, the United States submits that the Panel correctly interpreted the terms "displacement" and "impedance" in Article 6.3 of the SCM Agreement.[1947]

5.676. For these reasons, the United States requests us to reject the European Union's challenges to the Panel's analysis.[1948] However, in the event that we find that the Panel erred in its assessment of the evidence related to displacement and impedance, or that the Panel should have more explicitly addressed trends, the United States requests that we complete the legal analysis of displacement and/or impedance based on relevant data from the period 2001-2013.[1949]

5.6.4.4 Whether the Panel erred in its interpretation of "displacement" and "impedance"

5.677. We begin our analysis with the text of Article 6.3 of the SCM Agreement, which states, in relevant part:

> Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:
>
> (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

[1939] United States' appellee's submission, para. 539 (referring to Panel Report, paras. 6.1455-6.1479).
[1940] United States' appellee's submission, paras. 540-546.
[1941] United States' appellee's submission, para. 549 (quoting Panel Report, Annex E-2, para. 2).
[1942] United States' appellee's submission, para. 563.
[1943] United States' appellee's submission, para. 565 (quoting Panel Report, paras. 6.1817 and 7.1.d.xiv-xv; referring to Panel Report, *US – Cotton Yarn*, fn 277 to para. 7.88).
[1944] United States' appellee's submission, para. 568 (referring to Appellate Body Reports, *US – Upland Cotton*, para. 478; *EC and certain member States – Large Civil Aircraft*, paras. 1166-1167 and 1170; *US – Large Civil Aircraft (2nd complaint)*, para. 1086).
[1945] United States' appellee's submission, para. 568 (quoting Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1086).
[1946] United States' appellee's submission, para. 571.
[1947] United States' appellee's submission, para. 572.
[1948] United States' appellee's submission, paras. 551 and 572.
[1949] United States' appellee's submission, para. 573 (referring to United States' response to Panel questions No. 40 and No. 162; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI))).

(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; …

5.678. We note that Article 6.3(a) and Article 6.3(b) of the SCM Agreement both use the conjunction "or" to separate the terms "displace" and "impede". The text of Article 6.3 does not elaborate further on these concepts. In the original proceedings, the Appellate Body explained that, in order to come to a finding that the *effect of a subsidy* is "to displace or impede", "the counterfactual analysis would involve estimating what the sales of the complaining Member would have been in the absence of the challenged subsidy", and thereafter comparing "{t}he counterfactual sales of the complaining Member … to its actual sales".[1950] The Appellate Body concluded that the *effect of a subsidy* is "to displace or impede" 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."[1951] That said, regardless of the methodology used to undertake an analysis of serious prejudice under Article 6.3, the market phenomenon must be shown to be the effect of the challenged subsidy.

5.679. Specifically, in relation to displacement, the Appellate Body construed that concept "as relating to, and arising out of, competitive engagement between products in a market".[1952] Displacement, as the Appellate Body explained, "is a situation where imports or exports of a like product are replaced by the sales of the subsidized product"[1953] – i.e. "there is a substitution effect between the subsidized product and the like product of the complaining Member".[1954] A determination of whether the effect of a subsidy is to displace involves a fact-specific analysis that can be made only on a case-by-case basis and in light of the particularities of the market concerned. To the extent that a complainant can demonstrate through arguments and evidence that actual sales or market shares of the like product have declined during the reference period, this may be indicative of displacement caused by the subsidy within the meaning of Articles 6.3(a) and 6.3(b).[1955] To that extent, while a market trend analysis – e.g. regarding whether there has been a change in relative shares of the market to the disadvantage of the like product – may carry relevance, it is not determinative of the existence of serious prejudice.

5.680. The term "impede", as the Appellate Body found, "connotes a broader array of situations than the term 'displace'".[1956] The Appellate Body explained that impedance "refers to 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".[1957] Evidence that sales would have increased more or declined less than they did in the absence of the subsidy would

[1950] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1163.

[1951] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1163. The Appellate Body added that "{t}he identification of displacement *under this approach*" (i.e. the two-step approach) should focus on "clearly identifiable" trends in the markets, "looking at both volumes and market shares". (Ibid., para. 1170 (emphasis added)) We recall that, in the context of the two-step approach to causation adopted by the original panel, the Appellate Body explained that, "where a complainant puts forward a case based on the existence of displacement as a *directly observable phenomenon*", displacement can be found to exist where the "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". (Ibid. (emphasis added)) In contrast, under a unitary approach, the analysis of the particular market phenomena identified in the subparagraphs of Article 6.3 is not conducted separately from the analysis of whether there is a causal relationship between those market phenomena and the challenged subsidies. (Ibid., para. 1107)

[1952] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1119. (fn omitted) The Appellate Body has explained that the following characteristics would "*normally* be necessary" before a panel can reach a finding of displacement under Article 6.3(b): "first, that at least a portion of the market share of the exports of the like product of the complaining Member must have been taken over or substituted by the subsidized product"; and "second, it must be possible to discern trends in volume and market share". (Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1082 (emphasis added; fn omitted))

[1953] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1119.

[1954] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1160. (fn omitted)

[1955] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1162.

[1956] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1161. (fn omitted)

[1957] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1161.

indicate the existence of impedance within the meaning of Articles 6.3(a) and 6.3(b).[1958] The Appellate Body further explained that "impedance" can also refer to a situation where "the exports or imports of the like product of the complaining Member did not materialize at all because production was held back by the subsidized product".[1959] As in the case of displacement, a determination of whether the effect of a subsidy is to "impede" involves a fact-specific analysis that can be made only on a case-by-case basis and in light of the particularities of the market concerned.

5.681. We recall, in the original proceedings, that the Appellate Body acknowledged that "{t}here … could be situations where displacement and impedance overlap"[1960] and that "it may be difficult to draw a clear demarcation"[1961] between these concepts. The Appellate Body indicated, for example, how a particular factual situation could give rise to the phenomena of both displacement and impedance. Specifically with respect to situations where the imports or exports of the like product "are declining" and where they "are declining by more than they otherwise would", the Appellate Body noted that, "{t}o the extent that there is an observable decline in the imports or exports, it could be considered a situation of displacement."[1962] At the same time, the Appellate Body stated that "there is an aspect of the decline that is not directly observable − the decline is sharper than it would otherwise have been", in which case, the "situation could be considered one of impedance".[1963]

5.682. With these considerations in mind, we turn to address the issues raised by the European Union on appeal, beginning with the European Union's claim that the Panel treated "displacement" and "impedance" as interchangeable concepts and therefore erred. As noted, the European Union asserts that "the Panel made undifferentiated findings of 'displacement *and/or* impedance' with respect to all of the country and product markets at issue".[1964] The European Union contends that "a proper reading" of the Appellate Body's guidance reveals that the Appellate Body "matche{d} (i) the concept of 'displacement' with a situation where, absent the subsidies, 'the sales of the complaining Member would have declined less', and (ii) the concept of 'impedance' with a situation where, absent the subsidies, 'the sales of the complaining Member … would have been higher'."[1965] The European Union further submits that "the Panel failed to specify whether it had found (i) both displacement and impedance in all country and product markets, or instead (ii) had found one or the other of these two distinct effects in any given market."[1966]

5.683. The United States responds by recalling that both "displacement and impedance" were present in most of the product markets and the only product and geographical markets in which the United States did *not* allege "displacement and/or impedance, or the threat thereof"[1967], were the EU twin-aisle LCA market; the China VLA market; and the United Arab Emirates VLA market. Instead, the United States has claimed only impedance in these markets.[1968] Therefore, according to the United States, "the Panel's simultaneous analysis of both concepts represents a logical approach to assessing the {United States'} claims."[1969] The United States submits that "{t}he Appellate Body has clarified that a single factual scenario (namely evidence of declining

[1958] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1162.
[1959] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1161. (fn omitted) The Appellate Body further noted that impedance "presupposes the existence of an economic mechanism by which a subsidized product hinders, obstructs, or holds back sales of a like product in the relevant product market". (Ibid., fn 2465 to para. 1119)
[1960] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, fn 2548 to para. 1161.
[1961] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1162.
[1962] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, fn 2550 to para. 1162.
[1963] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, fn 2550 to para. 1162.
[1964] European Union's appellant's submission, para. 979. (emphasis original)
[1965] European Union's appellant's submission, para. 998 (quoting Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1163).
[1966] European Union's appellant's submission, para. 979.
[1967] United States' appellee's submission, fn 1025 to para. 564 (referring to United States' response to Panel question No. 162, paras. 14-15, 24, and 32).
[1968] United States' appellee's submission, paras. 579, 591, and 603 (referring to United States' response to Panel question No. 162, paras. 16, 24, and 32, respectively; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI)), pp. 3, 9, and 15, respectively).
[1969] United States' appellee's submission, para. 564 (referring to Panel Report, para. 6.1801; United States' response to Panel question No. 162, paras. 13-31).

sales) could demonstrate the existence of both effects."[1970] Thus, the United States asserts that it is "inaccurate to suggest … that the Appellate Body 'matched' the concepts of displacement and impedance with an exhaustive set of specific, and mutually exclusive, factual scenarios."[1971]

5.684. The Panel, as we recall, noted the United States' contention that the US LCA industry "suffer{ed} serious prejudice in the form of displacement and/or impedance … in all three relevant product markets in the European Union, and in 11 third country product markets".[1972] The Panel reviewed the guidance provided by the Appellate Body "on how to determine whether the effect of a subsidy is to impede *or* displace the imports or exports of a like product".[1973] The Panel quoted, in particular, the Appellate Body's finding that, "{w}hile there may be some overlap between the concepts, 'displacement' and 'impedance' are therefore not interchangeable concepts."[1974] The Panel further recalled the "framework" laid down by the Appellate Body in order to "evaluate a claim of impedance *or* displacement".[1975]

5.685. The Panel noted that the United States had "introduced evidence of Airbus and Boeing delivery volumes and market shares in all relevant product markets for each year from 2001 to 2013" to support its claim 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."[1976] The Panel added that a finding of displacement or impedance can be made "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".[1977]

5.686. As discussed above, the Appellate Body has indicated that, generally, the "more appropriate approach" to assess the effect of a subsidy under Article 6.3 is through a "unitary" counterfactual analysis.[1978] 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", and thereafter its comparison with the "actual sales".[1979] 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."[1980] We understand the Panel to have sought to apply this framework when it turned to assess whether 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"[1981] in the absence of the "product effects" of the LA/MSF subsidies.

5.687. Furthermore, we have noted that there could be situations of overlap, in the sense that a given situation may give rise to both displacement and impedance, and that the Appellate Body has cautioned against drawing a bright line distinction between these concepts. It is conceivable that, depending on the facts of a given case, for a particular product and geographic market, a

[1970] United States' appellee's submission, para. 566 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1162).

[1971] United States' appellee's submission, para. 567.

[1972] Panel Report, para. 6.1801. The Panel also noted that the United States made a "conditional claim", in the event that the Panel were to reject its present serious prejudice claims in the single-aisle LCA market in the European Union, that "the United States' LCA industry {was} *threatened* with displacement and/or impedance in … that market". (Ibid., fn 3288 thereto (referring to United States' first written submission to Panel, para. 514; second written submission to the Panel, para. 720; response to Panel question No. 162) (emphasis original))

[1973] Panel Report, para. 6.1799. (emphasis added)

[1974] Panel Report, para. 6.1799 (quoting Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1071, in turn referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1119, 1160-1161, 1165-1166, and 1170).

[1975] Panel Report, para. 6.1800. (emphasis added)

[1976] Panel Report, para. 6.1801 (referring to United States' first written submission to the Panel, paras. 520-532).

[1977] Panel Report, para. 6.1803.

[1978] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1109.

[1979] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1163.

[1980] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1163.

[1981] Panel Report, para. 6.1817. (emphasis added)

panel may find that the effect of a subsidy is: displacement; or impedance; or displacement and impedance. Although it is not entirely clear what the Panel meant when it used the term "displacement and/or impedance", as we see it, the Panel's finding 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 {relevant geographic} markets for single-aisle LCA …; twin-aisle LCA …; and {VLA}"[1982] is informed by the manner in which the United States framed its claims.[1983] We do not read the Panel's use of the term "displacement and/or impedance", when summing up its serious prejudice findings for the relevant markets at issue, as suggesting that the Panel found the existence of these serious prejudice phenomena in an undifferentiated manner with respect to one and the same product and country market. Therefore, contrary to what the European Union appears to suggest, it does not necessarily follow from the Panel's use of the term "displacement and/or impedance" that the Panel treated "displacement" and "impedance" as interchangeable and indistinguishable concepts for purposes of its adverse effects analysis.[1984]

5.6.4.5 Whether the Panel failed to examine the "closeness of competition"

5.688. As noted above, the European Union claims that the Panel erred in its application of Articles 5(c), 6.3, and 7.8 of the SCM Agreement in finding causation because the Panel failed to account for the differences in the degree of competition between LCA in the relevant product and country markets at issue. According to the European Union, given the broad interpretation that the Panel adopted for the term "market", and the Panel's identification of product markets within which "there would be *'weaker and stronger competitive relationships*' (or in some instances, no competitive constraint imposed by one product on another within the same product market)"[1985], it was important for the Panel, in its causation analysis, to account for these differences in the degree of competition. The European Union further asserts that, "even where there does exist 'some' competition between two products, that fact does not conclusively establish whether subsidies to one product result in adverse effects for the other".[1986]

5.689. We recall that, in section 5.6.2 above, we have addressed the European Union's appeal concerning the Panel's product market findings, including its assertion that the Panel erred in failing to assess the nature and degree of competition between products. We have concluded that the Panel's assessment of the relevant product markets in these compliance proceedings was based on a proper analysis of the nature and degree of competition between products that the Panel found to demonstrate sufficient substitutability.[1987] Accordingly, we have found no error in the Panel's findings in this regard.

[1982] Panel Report, para. 6.1817. (emphasis added)

[1983] For instance, the United States has claimed that in the single-aisle LCA market in India, the "severe decline in market share demonstrates the displacement and/or impedance of Boeing LCA exports". (United States' appellee's submission, para. 593 (referring to United States' response to Panel question No. 162, para. 25; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI)), p.10)) Similarly, in the single-aisle LCA market in Australia, "Boeing LCA are being displaced and/or impeded". (Ibid., para. 583 (referring to Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI)), p.5)) However, in respect of the single-aisle LCA market in China, "the displacement found by the Appellate Body is continuing, and Boeing's 737 exports are also being impeded". (Ibid., para. 587 (referring to United States' response to Panel question No. 162, para. 21; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI)), p.7)) Similarly, in the VLA market in Korea, "the A380 has displaced and impeded the 747-8I". (Ibid., para. 597 (referring to United States' response to Panel question No. 162, para. 28; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI)), p. 12)) Finally, in respect of the twin-aisle LCA market in the European Union and the VLA markets in China and the United Arab Emirates, the Unites States claimed the existence of only impedance. (Ibid., paras. 579, 591, and 603 (referring to United States' response to Panel question No. 162, paras. 16, 24, and 32, respectively; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI)), pp. 3, 9, and 15, respectively))

[1984] European Union's appellant's submission, para. 977. We review the Panel's findings of serious prejudice in the relevant markets at issue in section 5.6.4.6 of this Report.

[1985] European Union's appellant's submission, para. 939. (emphasis added) See also Panel Report, para. 6.1416.

[1986] European Union's appellant's submission, para. 934.

[1987] See section 5.6.2 of this Report. See also Panel Report, paras. 6.1292, 6.1294, and 6.1372; Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.

5.690. That said, we agree with the European Union to the extent that it argues that a panel's assessment and identification of relevant product market(s) on the basis of actual or potential competition between products forms only a part of a panel's overall analysis of whether a given subsidy contributes in a genuine and substantial way to producing or bringing about one or more of the adverse effects enumerated in Article 6.3 of the SCM Agreement. Indeed, as the Appellate Body has stated, a panel's evaluation of "whether the alleged subsidized and like products compete in the same market or multiple markets … is a *prerequisite* for assessing whether displacement {or impedance} within the meaning of Articles 6.3(a) and 6.3(b) could be found to exist".[1988] However, an assessment of the nature and degree of competition in the relevant product market(s) does not, in and of itself, answer the question of whether the subsidies existing in the post-implementation period are a genuine and substantial cause of adverse effects in the relevant market(s). We will bear these considerations in mind as we continue to review the Panel's findings.

5.6.4.6 Whether the Panel erred in its findings of significant lost sales and "displacement and/or impedance"

5.6.4.6.1 The data set examined by the Panel

5.691. Before reviewing the Panel's findings of serious prejudice, we address a preliminary issue raised by the European Union concerning the size of the data set examined by the Panel in reaching its findings of "displacement and/or impedance". The European Union contends that "the Panel failed to adopt a large enough number of data points to meaningfully investigate 'trends'"[1989] and, "{b}y virtue of its choices", the Panel was "effectively left with two data points – annual data for the years 2012 and 2013".[1990] According to the European Union, "{t}he data for the single month, December 2011, would present the problem of 'sales {being} sporadic and volumes relatively small, making identification of any trends more difficult'"[1991] and that "there would be no meaningful way to compare data pertaining to a single month to data pertaining to full years".[1992]

5.692. The Panel, as we recall, considered that "a panel tasked with reviewing the merits of claims" made under Articles 6.3(a), 6.3(b), and 6.3(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*"[1993], or "'*under current factual conditions*'".[1994] The Panel noted the parties' agreement that, as far as the findings in these compliance proceedings were concerned, it may have been possible and even appropriate for the Panel to examine data from a historical period that predated the end of the implementation period. The Panel shared this view and considered that its "duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU would be best served" if it 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".[1995] However, while the Panel did not see the "need to make any *a priori* choice of reference period", it considered that the United States would only succeed in its non-compliance claims if it could establish "the existence

[1988] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1128. (emphasis added)
[1989] European Union's appellant's submission, para. 1024.
[1990] European Union's appellant's submission, para. 1025.
[1991] European Union's appellant's submission, fn 1114 to para. 1025 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1188).
[1992] European Union's appellant's submission, fn 1114 to para. 1025.
[1993] Panel Report, para. 6.1443 (referring to Panel Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.18; *EC and certain member States – Large Civil Aircraft*, paras. 7.1694 and 7.1714). (emphasis original)
[1994] Panel Report, para. 6.1443 (quoting Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 10.104 and 10.248 (emphasis added)).
[1995] Panel Report, para. 6.1444.

of *present* serious prejudice to its interests … *in the post-implementation period*, that is, *present* serious prejudice in the period *after 1 December 2011*".[1996]

5.693. As noted, while evidence pointing to changes in relative market shares may be indicative of displacement or impedance, it does not, without more, establish that the effect of a particular subsidy is to displace or impede imports or exports of a like product of another Member within the meaning of Articles 6.3(a) and 6.3(b). Article 6.4 of the SCM Agreement stipulates, in this regard, that displacement or impedance "shall include any case in which … 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 (*over an appropriately representative period sufficient to demonstrate clear trends* in the development of the market for the product concerned, which, *in normal circumstances, shall be at least one year)*".[1997] Although a plain reading of Article 6.4 suggests that, under normal circumstances, trends in the market can be established even on the basis of data from a one-year reference period, this will depend on the nature of the product and the particularities of the market at issue and the number of data points available in the chosen reference period. The Appellate Body has stated that "{t}he identification of a trend will be more accurate the larger the data set used in the analysis".[1998] At the same time, the Appellate Body has explained that "too strict a requirement concerning the size of the data set could preclude a Member from timely challenging subsidies that cause adverse effects to its interests".[1999] Moreover, in the context of compliance proceedings, a panel may be called upon to adjudicate a claim of non-compliance following what may have been a relatively short reasonable period of time for implementation. We also note the particular nature of the LCA industry where instances of sales and volumes of deliveries are generally much lower than in the case of consumer goods.

5.694. In our view, these considerations are apt and instructive in the context of these compliance proceedings. We do not understand the Panel to have *a priori* excluded from consideration relevant evidence and information that had been put before it. In the circumstances of the present case, given that it recognized that "the United States {would} only succeed in its non-compliance claims if it {could} establish the existence of *present* serious prejudice … *in the post-implementation period*"[2000], we see no error in the Panel's decision to focus on the "most recent market data presented by the parties in this dispute from the *post-implementation period*".[2001] While we acknowledge that the data on the volume of deliveries and market shares from the post-implementation period in this case appear to have been rather limited, we see no basis to rule out *a priori*, without further analysis, the possibility that such data could support a finding as to the existence of adverse effects in the post-implementation period.

5.695. We now turn to examine the Panel's findings of alleged lost sales[2002] and "displacement and/or impedance" in the post-implementation period, beginning with its findings for the single-aisle LCA market.

[1996] Panel Report, para. 6.1444. (emphasis original) Accordingly, for the purposes of assessing the United States' claims of lost sales, and "displacement and/or impedance", the Panel took into account market data for the period December 2011 through December 2013. (Ibid., para. 6.1781, Table 19, and para. 6.1805, Tables 20-22)

[1997] Emphasis added.

[1998] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1167. (fn omitted)

[1999] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1167.

[2000] Panel Report, para. 6.1444. (emphasis original)

[2001] Panel Report, para. 6.1444. (emphasis original)

[2002] Before the Panel, the United States submitted evidence of 115 orders for approximately 1300 Airbus LCA made between 2001 and 2013, arguing that all such orders represented "lost sales" to the US LCA industry within the meaning of Article 6.3(c). The United States further argued that all of these orders should have been considered for the purpose of establishing whether the European Union has complied with the recommendations and rulings of the DSB. The Panel, however, decided to examine only claims of "lost sales" occurring in the post-implementation period. (Panel Report, fn 3258 to para. 6.1781) This approach by the Panel has not been appealed by either of the parties to the dispute.

5.6.4.6.2 The single-aisle LCA market

5.696. The Panel identified the following "lost sales" alleged by the United States in the single-aisle LCA market in the post-implementation period, all of which concerned the sales of Airbus' A320 family of LCA:

Table 8: 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	

Source: Panel Report, para. 6.1781, Table 19.

5.697. As noted above, the Panel considered that, under either "plausible" counterfactual scenario, competition from potential new non-US entrants would have been limited to the single-aisle LCA market.[2003] However, the Panel found it difficult to see how any new non-US entrant could have developed "a credible single-aisle LCA offering" that could compete with Boeing (or a duopoly of Boeing with another US LCA producer) in the sales campaigns in question.[2004]

5.698. Furthermore, we recall that the United States has claimed the existence of displacement and/or impedance in the markets for single-aisle LCA in Australia, China, and India.[2005] For the EU single-aisle LCA market, the United States has claimed the existence of "impedance"[2006], and in the alternative, threat of displacement and impedance.[2007] The Panel identified "the volume of deliveries and market share" data for each of the different single-aisle LCA markets in Table 20 of its Report (reproduced in Table 9 below). All of the deliveries by Airbus reflected in Table 9 involved deliveries of the A320 family of LCA.[2008]

[2003] Panel Report, paras. 6.1787-6.1788.
[2004] Panel Report, para. 6.1793.
[2005] United States' appellee's submission, paras. 583, 587, and 593.
[2006] United States' appellee's submission, para. 575.
[2007] United States' appellee's submission, para. 577 (referring to United States' response to Panel question No. 162, para. 14; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI)), p.2). The Panel however made no determination of the United States' claim of threat of displacement and/or impedance in this market given that "the United States requested the Panel to consider this claim only if {it} rejected {the United States'} claims of *present* serious prejudice". (Panel Report, para. 6.1818 (referring to United States' first written submission to the Panel, para. 514; second written submission to the Panel, para. 720; response to Panel question No. 162) (emphasis original))
[2008] Panel Report, para. 6.1805, Table 20: Market for single-aisle LCA (containing data from Ascend database, Deliveries made, data request as of 7 April 2014 (Panel Exhibit EU-512)) See also Ascend database, Boeing and Airbus Deliveries in Units (2001-2013), Commercial Operators, data request as of 30 March 2014 (Panel Exhibit USA-577), referred to in Panel Report, fn 2313 to para. 6.1368.

Table 9: 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	59	29	4	21	14	4	73	123	1	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	60	71	1	6	13	8	102	97	2	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%

5.699. Following this table in its Report, the Panel stated that, "{i}n the light of the two 'plausible' counterfactual scenarios", it was evident 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."[2009] The Panel also expressed "strong doubts" about whether a new non-US LCA producer of single-aisle LCA "could have … made *deliveries* over these years".[2010] Accordingly, the Panel found the United States to have demonstrated the existence of displacement and/or impedance in the single-aisle LCA markets in the European Union, Australia, China, and India.[2011]

5.700. Thus, in reaching its findings of adverse effects in the single-aisle LCA market, the Panel relied on the proposition that Airbus would not have been able to sell or deliver its A320 family of LCA in the absence of the "product effects" of the challenged LA/MSF subsidies. As explained above, the Panel's findings regarding the "product effects" of LA/MSF subsidies on the A320 concerned primarily the effects of those subsidies that had expired prior to the end of the implementation period.[2012] We have found, however, that the European Union has no compliance obligation in respect of those expired subsidies. Rather, the pertinent question is whether the subsidies existing in the post-implementation period cause adverse effects, such that the European Union has failed to comply with its obligation under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects".

5.701. In this respect, we do not find any analysis made by the Panel as to whether, and to what extent, Airbus' competitiveness in the single-aisle LCA market, gained through the pre-A380 LA/MSF subsidies, was renewed and sustained beyond the original reference period as a result of the subsidies that the European Union maintained or granted after the original reference period (2001-2006) and into the post-implementation period. The Panel did acknowledge that the A350XWB programme was of "significant strategic importance" to Airbus in order for it "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".[2013] The Panel, however, did not explore or elaborate upon how the "product effects" of the subsidies existing in the post-implementation period, particularly those for the A350XWB and A380 that we have reviewed above, may have contributed to Airbus' competitiveness in respect of its single-aisle LCA offerings in the post-implementation period, such that the alleged adverse effects in the single-aisle LCA market

[2009] Panel Report, para. 6.1806.
[2010] Panel Report, para. 6.1806. (emphasis original)
[2011] Panel Report, para. 6.1817.
[2012] We recall that all LA/MSF subsidies granted for LCA up to and including the A320 were found by the Panel to have expired. (See paras. 5.402 and 5.552 above. See also Panel Report, para. 6.876 and fn 1567 thereto.)
[2013] Panel Report, para. 6.1713. (emphasis added)

could be linked in a genuine and substantial way to the LA/MSF subsidies existing in the post-implementation period.[2014]

5.702. On the basis of the above considerations, we are not convinced that, insofar as the single-aisle LCA market is concerned, the Panel's analysis provides a sufficient basis to sustain its conclusion that "the orders identified in Table 19 {in the single-aisle LCA market} 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".[2015] Similarly, we are not convinced that, with regard to the various country markets for single-aisle LCA, the Panel's analysis is sufficient to sustain its conclusion that "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".[2016] We therefore reverse the above findings of the Panel under Articles 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement insofar as they relate to the single-aisle LCA market.

5.703. Consequently, we do not consider it necessary to address the European Union's arguments that: (i) the Panel failed to take into account the market-specific and sale-specific non-attribution factors that allegedly caused (or contributed to causing) the observed market phenomena[2017]; (ii) "whatever number of data points it chose", the Panel made findings of displacement and impedance "entirely divorced from the data"[2018] in those markets; (iii) the Panel failed to determine whether the data revealed a discernible or clear trend of substitution in the case of displacement[2019]; and (iv) the Panel failed to identify actual trends, construct counterfactual trends, or undertake a comparison between the two in the case of impedance.[2020]

5.6.4.6.3 The twin-aisle LCA market

5.6.4.6.3.1 Significant lost sales

5.704. We recall that, at the outset of its analysis of lost sales, the Panel recapitulated the meaning of the terms "significant" and "lost sales" in Article 6.3(c) of the SCM Agreement as interpreted in past disputes. As the Panel noted, the term "significant" means "important, notable or consequential", and has both quantitative and qualitative dimensions.[2021] The Panel further noted the Appellate Body's finding that "lost sales" "are sales that suppliers of the complaining Member 'failed to obtain' and that instead were won by suppliers of the respondent Member", and that the "the most appropriate approach to assess whether lost sales are the *effect* of the challenged subsidy is through a unitary counterfactual analysis", which 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".[2022] The interpretation of the terms "significant" "lost sales" within the meaning of Article 6.3(c) is not disputed on appeal.

[2014] We note that the Panel found that the non-subsidized post-launch investments in Airbus' A320 and A330 families of LCA 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". (Panel Report, para. 6.1524) The Panel, however, did not consider that such investments had diluted the genuine and substantial link between the pre-A350XWB LA/MSF subsidies − most of which had expired − and the market presence of the existing A320 and A330 families of Airbus LCA. (Ibid.) The European Union contends on appeal that the Panel erred in reaching this finding. (See para. 5.551 above) For the reasons stated above, we have not examined these arguments by the European Union. (See paras. 5.410-5.411, and 5.552-5.553 above.)

[2015] Panel Report, para. 6.1798.

[2016] Panel Report, para. 6.1817.

[2017] European Union's appellant's submission, para. 916.

[2018] European Union's appellant's submission, para. 1026.

[2019] European Union's appellant's submission, para. 1029.

[2020] European Union's appellant's submission, para. 1053.

[2021] Panel Report, para. 6.1780 (quoting Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 1052).

[2022] Panel report, para. 6.1780 (quoting Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1220). (emphasis original)

5.705. In Table 19 of the Panel Report, the Panel identified the following "lost sales" alleged by the United States in the twin-aisle LCA market, all of which involved sales of Airbus' A350XWB family of LCA.

Table 10: United States' "Lost Sales" Claims in the Post-Implementation Period

Product Market / Customer	LCA model	No. of Orders 2012	No. of Orders 2013
Twin-Aisle			
Cathay Pacific Airways	A350XWB-1000	10	
Singapore Airways	A350XWB-900		30
United Airlines	A350XWB-1000		10

Source: Panel Report, para. 6.1781, Table 19.

5.706. The Panel recalled its 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. For the Panel, "it must necessarily follow that the sales {of the A350XWB} won by Airbus in the twin-aisle ... market{} were 'lost sales' to the United States' industry in both 'plausible' counterfactual scenarios."[2023] The Panel also rejected the "non-subsidy" reasons alleged by the European Union to explain why Airbus won the sales in the twin-aisle LCA market, because, for the Panel, it was apparent that "almost all of those reasons" were, in fact, "based on the effects of the LA/MSF subsidies because they {were} premised on Airbus being present in all {three} of the relevant sales campaigns {in the twin-aisle LCA market} as exactly the same competitor selling identical aircraft to those it markets today".[2024] In other words, a key basis for the Panel's finding on lost sales in the twin-aisle LCA market was its finding that, in the absence of the "product effects" of the challenged LA/MSF subsidies, Airbus would not have been in a position to launch the A350XWB as and when it did.

5.707. We recall that, at the outset of its analysis of lost sales, displacement, and impedance, the Panel explained that it would limit its assessment to evaluating the merits of the United States' claims in light of its findings with respect to the "product effects" of LA/MSF subsidies under the "plausible" counterfactual scenarios, in which a non-subsidized Airbus would not have existed.[2025] Nonetheless, we recall that the Panel's analysis of the "product effects" of LA/MSF subsidies on the A350XWB was *not* limited to the "plausible" counterfactual scenarios alone. Rather, as discussed in section 5.6.3.5.2 above, the Panel carried out its analysis, in large part, on the basis of the parties' arguments regarding the extent to which the Airbus, as it *actually existed* during the 2006-2010 period, could have launched the A350XWB as and when it did, so as to evaluate the "direct effects" of the A350XWB LA/MSF subsidies.[2026]

5.708. Specifically, the Panel's analysis regarding the "product effects" of LA/MSF subsidies on the A350XWB first sought to determine whether Airbus – as it actually existed in December 2006 – could have launched the A350XWB as and when it did in the absence of the "direct effects" of A350XWB LA/MSF subsidies. In section 5.6.3. above, we have agreed with the Panel's findings in that context, and in particular its conclusion that, without the A350XWB LA/MSF subsidies, there was a high likelihood that the Airbus company that actually existed in 2006 would, to some degree, have had to make certain compromises with respect to the pace of the A350XWB programme and/or the features of the aircraft.[2027] We have also agreed with the Panel's assessment as to the "indirect effects" of the A380 LA/MSF subsidies on the A350XWB.[2028] We emphasize that, pursuant to our interpretation of Article 7.8 of the SCM Agreement, we disagree with the Panel to the extent that it considered the effects of the expired LA/MSF subsidies as part of its aggregated assessment. Instead, our review in section 5.6.3 above focuses on the Panel's findings regarding the subsidies existing in the post-implementation period. These Panel

[2023] Panel Report, para. 6.1789.
[2024] Panel Report, para. 6.1789.
[2025] Panel Report, para. 6.1779.
[2026] Panel Report, para. 6.1537.
[2027] Panel Report, para. 6.1717.
[2028] See section 5.6.3.5.2 of this Report.

findings highlight the fact that, in the twin-aisle LCA market, Airbus' competitiveness, gained through earlier LA/MSF subsidies, was renewed and sustained beyond the original reference period as a result of the subsidies that the European Union maintained or granted after the original reference period and into the post-implementation period.

5.709. Our review of the Panel's findings on the product effects of LA/MSF subsidies on the A350XWB thus indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A350XWB at the time it did and with the features that the A350XWB contained. In other words, in the absence of these subsidies, Airbus would not have been able to be "present in all {three} of the relevant sales campaigns as exactly the same competitor selling identical aircraft" in the post-implementation period.[2029]

5.710. We next consider whether the Panel's finding that the sales of the A350XWB in the post-implementation period constituted "lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement is supported by relevant Panel findings regarding the competitive dynamics between Boeing's and Airbus' respective product offerings in the twin-aisle LCA market. The twin-aisle LCA market, as the Panel found, comprises the Boeing 767, 777, and 787, on the one hand, and the Airbus A330 and A350XWB, on the other hand.[2030] The Panel found 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".[2031] In reaching this conclusion, the Panel considered that 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" suggested that "it must have expected potential customers to be interested in learning about the relative performance characteristics of *all three aircraft*".[2032] The Panel further noted that, "since it was launched, Airbus … continued to market the A350XWB family as an alternative to both the 787 *and the 777*".[2033] The Panel considered that the fact that the evidence before it "seeks to highlight the '*competitiveness*' of the technologically advanced A350XWB by focusing on its relative performance advantages over the 787, 777, and 767" was consistent with the fact 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 characteristics of, at least, all three families of Boeing aircraft".[2034]

5.711. Evidence examined by the Panel regarding specific sales campaigns involving the A350XWB further supports its view that Airbus' A350XWB product offering was in direct competition with Boeing's twin-aisle LCA. With respect to the sales of the A350XWB to Cathay Pacific Airways, the Panel found that "the HSBI evidence submitted by the United States very clearly and explicitly demonstrate{d} that Cathay Pacific was interested in considering different combinations of Airbus and Boeing twin-aisle LCA" to meet its delivery preferences.[2035] Furthermore, the Panel stressed, "the fact that one aircraft may have been chosen over one or

[2029] See Panel Report, para. 6.1789.

[2030] Panel Report, paras. 6.1293-6.1370. We note that findings in the original proceedings established that the A340-500/600, also an Airbus twin-aisle LCA, was a derivative aircraft of the A340 family of LCA, and LA/MSF for the A340 granted to Airbus by the French and Spanish governments had been fully disbursed before the establishment of the original panel. (Original Panel Report, paras. 7.376-7.377 and 7.1622) We further recall that, in these compliance proceedings, the Panel found that the LA/MSF subsidies for the A340-500/600 had expired, at the latest, in **[BCI]**. (Panel Report, fn 1547 to para. 6.879) The Panel also found that the market presence of the A340 came to an end before the beginning of the post-implementation period when Airbus terminated the A340 programme in November 2011. (Ibid., fn 2188 to para. 6.1293) However, there are no *specific* findings and supporting analysis in the Panel Report regarding how the "product effects" of the A340-500/600 subsidies contributed to the alleged serious prejudice in the twin-aisle LCA market in the post-implementation period.

[2031] Panel Report, para. 6.1370.

[2032] Panel Report, para. 6.1307. (emphasis original)

[2033] Panel Report, para. 6.1308. (emphasis original)

[2034] Panel Report, para. 6.1309 (referring to Sophie Pendaries, Head of A350XWB Marketing, Airbus, "Statement on the Market Significance of Technological Innovations to the A350XWB Programme", 5 July 2012 (Panel exhibit EU-17) (BCI)). (emphasis original)

[2035] Panel Report, para. 6.1360.

more others because of its *availability* reflect{ed} its competitive advantage".[2036] We recall, in this regard, the Panel's analysis of the "direct effects" of the A350XWB LA/MSF, which suggests that even a slight delay in the launch of the A350XWB could have had significant implications for Airbus' competitiveness, particularly in light of the developmental head start that the Boeing 787 had over the A350XWB.

5.712. The Panel reviewed a number of non-attribution factors alleged by the European Union in respect of lost sales in the twin-aisle LCA market. The European Union argued that Airbus' pre-existing commonality advantages and other product-related advantages over Boeing helped to explain its sales of the A350XWB-1000 in 2012 and 2013.[2037] More specifically, in the competition that led Cathay Pacific Airways to order ten A350XWB-1000 aircraft in 2012, the European Union submitted that Airbus had pre-existing commonality advantages and certain other product-related advantages over Boeing. In the campaign that led Singapore Airlines to order 30 A350XWBs in 2013, the European Union argued that Airbus had an advantage over Boeing because: (i) there was uncertainty about the specifications, performance, and availability of the Boeing 787-10 relative to the A350XWB-900; (ii) the A350XWB had an advantage in terms of "the delivery positions themselves"; and (iii) the terms of Airbus' offer provided Singapore Airlines with higher benefits of commonality and lower fleet complexity in the long run in case "Singapore Airlines would opt for the A350XWB-1000".[2038] Similarly, the European Union maintained 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 requirements at the relevant time.

5.713. The Panel disagreed that these non-attribution factors undermine the causal nexus between the LA/MSF subsidies and lost sales in the twin-aisle LCA market, noting that "Airbus would not have had any of these advantages in the above campaigns" had it not been for the "product effects" of LA/MSF subsidies.[2039] The Panel noted that one non-attribution factor alleged by the European Union did not appear to be directly-linked with Airbus' competitiveness gained through its launches of subsidized aircraft, namely, Singapore Airlines' wish to split orders between Airbus and Boeing.[2040] The Panel reasoned, however, that, due to Airbus' ability to offer the A350XWB, the airline was presented with the option to split its orders in this manner − an option that would not have been available in the absence of LA/MSF.[2041]

5.714. As noted, the Panel's relevant findings on "product effects" concerning the A350XWB indicate that, in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would have been unable to launch the A350XWB or an A350XWB-type aircraft by the end of 2006. Thus, we share the Panel's view that most of the alleged non-attribution factors with regard to lost sales in the twin-aisle LCA market described above, including Airbus' pre-existing commonality advantages and other product-related advantages over Boeing, are not factors "unrelated" to the LA/MSF subsidies existing in the post-implementation period. Like the Panel, we have doubts as to whether Airbus' pre-existing commonality advantages and other product-related advantages over Boeing (to the extent that they resulted from the provision of LA/MSF subsidies) could be characterized as non-attribution factors that could be said to "dilute" the causal link between the LA/MSF subsidies existing in the post-implementation period and the relevant market effects. Similarly, we agree with the Panel's assessment of the non-attribution factor concerning Singapore Airlines' wish to split orders between Boeing and Airbus. Indeed, the fact that Airbus was in a position to offer the A350XWB in a timely manner was, in itself, largely due to LA/MSF subsidies and their effect on the pace of the programme and the features of the A350XWB. Therefore, insofar as lost sales in the twin-aisle LCA market are concerned, we are not convinced by the European Union's argument that the Panel's failure to take into account market-specific and sale-specific non-attribution factors is contrary to the Appellate Body's guidance that panels

[2036] Panel Report, para. 6.1360. (emphasis original)
[2037] Panel Report, para. 6.1790.
[2038] Panel Report, para. 6.1790. (fn omitted)
[2039] Panel Report, para. 6.1791.
[2040] 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 so as "to secure the delivery of a larger number of aircraft over a particular period of time". (Panel Report, para. 6.1792)
[2041] Panel Report, para. 6.1792.

"must ensure that the effects of other factors are not improperly attributed to the challenged subsidies".[2042]

5.715. The Panel's findings reviewed above support the conclusion that the sales of the A350XWB identified in Table 19 of the Panel Report represent "significant lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' timely launch of the A350XWB, and the existence of sufficient substitutability between Boeing's and Airbus' twin-aisle product offerings.

5.716. In light of our interpretation of Article 7.8 of the SCM Agreement[2043], however, we disagree with the Panel's conclusion on "significant lost sales" in the twin-aisle LCA market to the extent that its conclusion was based on the effects of the challenged LA/MSF subsidies that the Panel found to have expired. We therefore modify the Panel's conclusion in paragraph 6.1798 of the Panel Report, and find instead that the orders identified in Table 19 in the twin-aisle LCA market represent significant lost sales to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period are a genuine and substantial cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement.

5.6.4.6.3.2 "Displacement and/or impedance"

5.717. We recall that the United States has claimed the existence of displacement and/or impedance in the twin-aisle LCA markets in China, Korea, and Singapore.[2044] For the European Union twin-aisle LCA market, the United States has claimed the existence only of impedance.[2045] The Panel identified the volume of deliveries and market share data for each of these twin-aisle LCA markets in Table 21 of its Report (reproduced in Table 11 below). All of the deliveries by Airbus reflected in Table 11 involved deliveries of the A330 family of LCA.[2046]

Table 11: 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	8	15	1	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	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%

[2042] European Union's appellant's submission, para. 944 (quoting Appellate Body Report, *US – Upland Cotton*, para. 437).
[2043] See section 5.4.2.2 of this Report.
[2044] United States' appellee's submission, paras. 589, 595, and 599.
[2045] United States' appellee's submission, para. 579.
[2046] Panel Report, para. 6.1805, Table 21: Market for twin-aisle LCA (containing data from Ascend database, Deliveries made, data request as of 7 April 2014 (Panel Exhibit EU-512)). See also Ascend database, Boeing and Airbus Deliveries in Units (2001-2013), Commercial Operators, data request as of 30 March 2014 (Panel exhibit USA-577), referred to in Panel Report, fn 2313 to para. 6.1368.

5.718. The Panel found 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."[2047] The Panel also recalled that "any new non-US LCA competitor would have only entered the market with a *single-aisle* LCA, implying that the twin-aisle … market{} would have been supplied by the United States' industry alone".[2048]

5.719. As noted, the Panel's task was to assess how the LA/MSF subsidies existing in the post-implementation period, in the aggregate, contributed to Airbus' competitiveness in respect of its twin-aisle LCA offerings in the post-implementation period, such that these subsidies had the effect of substituting and/or hindering like Boeing LCA in the markets at issue. We note that, according to the Panel, the LA/MSF subsidies for the A330-200 expired no later than **[BCI]**[2049], i.e. in the post-implementation period. We recall, however, that findings from the original proceedings established that the A330-200 − a derivative of the A330 − was launched in 1995, and that the LA/MSF for this programme granted by the French Government had been fully disbursed as of the date of the establishment of the original panel.[2050] We also note the original panel's finding 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.[2051] Moreover, unlike for the A380 and A350XWB LA/MSF subsidies, there are no *specific* findings by the Panel relating to the issue of whether and how the "product effects" of the A330-200 LA/MSF subsidies continued beyond 2006 and into the post-implementation period.

5.720. As we have explained above, our review of the Panel's findings on the "product effects" of LA/MSF subsidies on the A350XWB indicates that, in the absence of the LA/MSF subsidies for the A380 and A350XWB existing in the post-implementation period, Airbus would not have been able to offer the A350XWB at the time it did and with the features that the A350XWB contained. As also discussed above, the Panel's analysis concerning the relevant product markets established that Airbus' A350XWB product offering was in direct competition with Boeing's twin-aisle LCA. The Panel's analysis in that section of its Report focuses, however, on the degree of substitutability of various Airbus and Boeing models in the twin-aisle LCA market; it does not, and is not meant to, address the role of the LA/MSF subsidies existing in the post-implementation period in causing displacement or impedance to the Boeing LCA models at issue. Nevertheless, given Airbus' competitiveness in the twin-aisle LCA market brought about by the existing subsidies, and in light of the competitive dynamics between Boeing and Airbus models or variants in the twin-aisle LCA market, we do not exclude the possibility that sales of Boeing's twin-aisle LCA may have been substituted or hindered by sales of the subsidized A350XWB, i.e. a newer model of twin-aisle LCA by Airbus.[2052]

5.721. We note, however, that the United States framed its claim of displacement and/or impedance in the twin-aisle LCA market on the basis of data concerning market shares and *deliveries* of the A330 and relevant Boeing LCA during the period 2001-2013.[2053] There were no

[2047] Panel Report, para. 6.1806.

[2048] Panel Report, para. 6.1806. (emphasis original)

[2049] Panel Report, fn 1547 to para. 6.879. As noted in paras. 5.389-5.390 and fn 978 of this Report, the European Union submitted two methodologies for estimating the *ex ante* lives of the LA/MSF subsidies − the Loan Life approach and the Marketing Life approach. The Panel expressed doubt as to whether the Loan Life approach would be the most appropriate methodology for determining the "*ex ante*" lives, and noted that "it would be at least equally appropriate" to utilize the Marketing Life approach. (Ibid., para. 6.878) Ultimately, the Panel found that the *ex ante* life of the A330-200 expired in **[BCI]** on the basis of the Loan Life approach, even though, under the Marketing Life approach, the *ex ante* life of the A330-200 LA/MSF would have expired by **[BCI]**, that is, *before* the end of the implementation period. (Ibid., para. 6.872, Table 11: PwC *ex ante* "lives" analysis for LA/MSF, and fn 1547 to para. 6.879)

[2050] Original Panel Report, paras. 7.371 and 7.376-7.377; Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, paras. 829, 925, and 929. The original panel found that the amount of financial contribution was 330 million French francs. (Original Panel Report, para. 7.380, Table 1: Approximate amount of funding provided for under the challenged LA/MSF measures (fn omitted))

[2051] Original Panel Report, para. 7.1940.

[2052] For references to order data, including for the A350XWB described in various sections of the Panel Report, see Panel Report para. 6.1781 and fn 3258 thereto. See also paras. 6.561 and 6.681.

[2053] Panel Report, para. 6.1805. The Panel noted that the United States had submitted data over the period 2001-2013. However, the Panel considered that its examination of serious prejudice should focus on the

deliveries of the A350XWB during that period.[2054] Thus, for purposes of the claim of displacement and/or impedance in the twin-aisle LCA market, the Panel relied on market shares and delivery data relating to the A330, rather than on orders of the A350XWB, in its analysis. The Panel made no specific findings based on order data in this connection. We recall, in this regard, that the Panel's findings regarding the "product effects" of LA/MSF subsidies on the A330 concerned primarily the effects of subsidies that had expired.[2055] We have found, however, that the European Union has no compliance obligation in respect of those expired subsidies. Rather, the pertinent question is whether the subsidies existing in the post-implementation period cause adverse effects, such that the European Union has failed to comply with its obligation under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects". However, given the way the claims of displacement and/or impedance were raised before the Panel and the Panel's approach to assessing those claims, the Panel did not explore, and made no findings on, the issue of whether and, if so, how the A380 and A350XWB LA/MSF subsidies existing in the post-implementation period may have contributed to the deliveries of the A330 occurring during that period.

5.722. In these circumstances, we are not convinced that the Panel's analysis provides a sufficient basis to sustain the conclusion that the effect of the LA/MSF subsidies existing in the post-implementation period was to displace or impede US LCA in the twin-aisle LCA market in the European Union and relevant third country markets. We therefore reverse the Panel's conclusion, in paragraph 6.1817 of the Panel Report, that "the United States ha{d} 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 … twin-aisle LCA in the European Union, China, Korea and Singapore". Having done so, we see no reason to further address the European Union's additional arguments regarding the Panel's conclusion, as set out in paragraph 5.703 above.

5.6.4.6.4 The VLA market

5.6.4.6.4.1 Significant lost sales

5.723. In Table 19 of its Report, the Panel identified the following "lost sales" alleged by the United States in the VLA market, all of which involved sales of the Airbus A380.

Table 12: United States' "Lost Sales" Claims in the Post-Implementation Period

Product Market / Customer	LCA model	No. of Orders 2012	No. of Orders 2013
Very Large Aircraft			
Emirates	A380		50
Transaero Airlines	A380	4	

Source: Panel Report, para. 6.1781, Table 19.

alleged market phenomena occurring in the post-implementation period, i.e. from December 2011. (Ibid., fn 3258 to para. 6.1781, and para. 6.1805)

[2054] Before the Panel, the United States argued that an examination of order data is "appropriate for assessing claims of significant lost sales and threat of displacement or impedance, while the texts of Articles 6.3(a) and 6.3(b) on displacement or impedance require a focus on market shares and volumes derived from delivery data." (United States' first written submission to the Panel, para. 299 (referring to Original Panel Report, paras. 7.1748-7.1750); see also para. 514) However, the United States did not claim threat of impedance or displacement with respect to the twin-aisle LCA market. We further note that, with respect to the single-aisle LCA market in the European Union, the United States requests that we "conduct a threat analysis of displacement and impedance based on order data" to the extent that we find that "there is no impedance of Boeing single-aisle LCA based on the delivery data". (United States' appellee's submission, para. 577 (referring to Panel Report, para. 6.1818)) We address the United States' claim concerning the threat of displacement and impedance in the single-aisle LCA market in the European Union in section 5.6.4.7 of this Report.

[2055] We recall that all LA/MSF subsidies granted for LCA up to and including the A330 were found by the Panel to have expired. (See paras. 5.402 and 5.552 above). With respect to the A330-200 LA/MSF subsidies, see para. 5.719 above and fns thereto.

5.724. Like its finding with regard to lost sales in the twin-aisle LCA market, the Panel first recalled its finding that any market presence of a new entrant operating in the "plausible" counterfactual scenarios would be, if anything, limited to the market for *single-aisle LCA* in the post-implementation period. For the Panel, "it must necessarily follow" that the sales of the A380 won by Airbus in the VLA market "were 'lost sales' to the United States' industry".[2056] As with its finding regarding lost sales in the twin-aisle LCA market, the Panel rejected the "non-subsidy" reasons alleged by the European Union to explain why Airbus won the sales in the VLA market, because, for the Panel it was apparent that "almost all of those reasons" were, in fact, "based on the effects of the LA/MSF subsidies because they {were} premised on Airbus being present in {both} of the relevant sales campaigns {in the VLA market} as exactly the same competitor selling identical aircraft to those it markets today".[2057] In other words, a key basis for the Panel's finding on lost sales in the VLA market was its finding that, in the absence of the "product effects" of LA/MSF subsidies, Airbus would not have been in a position to offer the A380 as and when it did.

5.725. As discussed in section 5.6.3 above, findings from the original proceedings indicate that, in launching the A380 − which was financed in part by LA/MSF for the A380 − Airbus was able to utilize technical experience and financial advantage gained through past subsidies, and to acquire competitiveness in the VLA market. Moreover, we have found that the Panel's findings with respect to the A380 and A350XWB programmes indicate that Airbus' competitiveness in the VLA market, gained through earlier LA/MSF subsidies, was renewed and sustained beyond the original reference period and into the post-implementation period due to the subsidies it continued to receive after the original reference period and into the post-implementation period. We reiterate that, pursuant to our interpretation of Article 7.8 of the SCM Agreement, we disagree with the Panel to the extent that it considered the effects of the expired LA/MSF subsidies to be a part of its aggregated assessment. Instead, our review in section 5.6.3 above focuses on findings from the original proceedings and by the Panel in relation to subsidies existing in the post-implementation period. As noted, such subsidies enabled Airbus to bring the A380 to market and continue its development in the face of extensive production delays. We also recall, in particular, that the disbursements of the A380 LA/MSF subsidies were anticipated to continue until **[BCI]** in the case of French LA/MSF subsidy and until **[BCI]** in the case of German and Spanish LA/MSF subsidies.[2058]

5.726. Our review of the Panel's findings, as well as the relevant findings from the original proceedings, indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did. In other words, in the absence of these subsidies, Airbus would not have been able to be "present in {both} of the relevant sales campaigns as exactly the same competitor selling identical aircraft" in the post-implementation period.[2059]

5.727. We now turn to examine whether the Panel's finding that the sales of the A380 in the post-implementation period constituted "lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement is supported by relevant Panel findings regarding the competitive dynamics between Boeing's and Airbus' respective product offerings in the VLA market. The VLA market, as the Panel found, comprises the Boeing 747-8 and the Airbus A380. The Panel noted in particular that, as the only two aircraft capable of flying well over 400 passengers on long-haul routes, "it {was} 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".[2060] Indeed, as noted by the Panel, "Airbus ha{d} consistently maintained the view that the potential customers of the A380 {would} also be likely to seriously consider the 747-8I in a

[2056] Panel Report, para. 6.1789.
[2057] Panel Report, para. 6.1789.
[2058] Original Panel Report, para. 7.378 (referring to French A380 contract (Original Panel Exhibit US-116 (BCI)), Annexe 3; German A380 LA/MSF contract (Original Panel Exhibit US-72 (BCI) (English translation)), clause 4.2; BT-Drs. 14/10002 (Original Panel Exhibit US-124 (English translation)), p. 3; Spanish A380 LA/MSF contract (Original Panel Exhibit US-73 (BCI)), 3rd clause).
[2059] Panel Report, para. 6.1789.
[2060] Panel Report, para. 6.1408.

segment of the LCA market that {was} covered by no other aircraft."[2061] Moreover, "given that there {would} 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."[2062]

5.728. Turning to specific sales campaigns, the Panel considered that 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" suggested that "**[BCI]**".[2063] The Panel found this to be consistent with "not only the evidence showing that Airbus considered competition for the British Airways' sales to be 'intense'", but also the evidence it had reviewed from four other sales campaigns (Asiana Airlines, Hong Kong Airlines, Skymark, and Qantas), in which it was "apparent that Boeing presented the 747-8I as an alternative to the A380 with a view to winning sales from the relevant customers".[2064] Moreover, in its analysis of the 2011 sales campaigns to Transaero Airlines, the Panel considered that, notwithstanding the evidence suggesting that the airline purchased the A380 and the 747-8I to fill different capacity segments of its operations, this alone did not imply the absence of effective competition.[2065] The Panel's analysis regarding the conditions of competition in the VLA market thus confirms that Airbus' and Boeing's respective VLA products − the A380 and the 747 − are sufficiently substitutable. Such competitive dynamics, in our view, provide further support to the proposition that the sales won by Airbus in the VLA market were at the expense of the US LCA producer.

5.729. As with the Panel's finding of lost sales in the other market segments, the European Union alleges that the Panel failed to take into account several non-attribution factors. The European Union argued before the Panel that Transaero Airlines and Emirates Airlines 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.[2066] However, similar to our analysis in the context of lost sales in the twin-aisle LCA market, we do not view these factors as unrelated to the effects of the subsidies. Rather, our review of findings from the original proceedings and the Panel's findings shows that, absent the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to launch and bring to market the A380 at the time it did. Therefore, like the Panel, we have doubts as to whether Airbus' pre-existing commonality advantages and other product-related advantages over Boeing could be characterized as non-attribution factors that could be said to "dilute" the causal link between the LA/MSF subsidies existing in the post-implementation period and the relevant market phenomena.

5.730. Thus, the Panel's findings reviewed above support the conclusion that the sales of the A380 identified in Table 19 of the Panel Report represent "significant" "lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement, and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' continued offering of the A380, and the existence of sufficient substitutability between Boeing's and Airbus' VLA product offerings.

5.731. In light of our interpretation of Article 7.8 of the SCM Agreement[2067], however, we disagree with the Panel's conclusion on "significant lost sales" in the VLA market to the extent that its conclusion was based on the effects of the challenged LA/MSF subsidies that the Panel found to have expired. We therefore modify the Panel's conclusion in paragraph 6.1798 of the Panel Report,

[2061] Panel Report, para. 6.1383.
[2062] Panel Report, para. 6.1408.
[2063] Panel Report, para. 6.1409.
[2064] Panel Report, para. 6.1409.
[2065] Panel Report, paras. 6.1404 (referring to European Union's response to Panel question No. 55, fn 440 and para. 263) and 6.1405. See also European Union's second written submission to the Panel, paras. 1551-1552.
[2066] Panel Report, para. 6.1790.
[2067] See section 5.4.2.2 of this Report.

and find instead that the orders identified in Table 19 of the Panel Report in the VLA market represent "significant lost sales" to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period are a genuine and substantial cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement.

5.6.4.6.4.2 Displacement and/or impedance

5.732. We recall that the United States has claimed the existence of displacement and/or impedance in the VLA markets in the European Union, Australia, Korea, and Singapore.[2068] For the VLA markets in China and the United Arab Emirates, the United States has claimed the existence only of impedance.[2069] The Panel identified the volume of deliveries and market share data for each of these VLA markets in Table 22 of its Report (reproduced in Table 13 below). All of the deliveries by Airbus reflected in Table 13 involved deliveries of the A380 family of LCA.[2070]

Table 13: 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	0	0	1	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	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	11	13
Airbus Market Share	-	100%	100%	-	100%	-	100%	100%	100%

5.733. Having tabulated the volume of deliveries and market share data for each of these VLA markets, the Panel considered it evident 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."[2071] The Panel also recalled that "any new non-US LCA competitor would have only entered the market with a *single-aisle* LCA, implying that the … VLA market{} would have been supplied by the United States' industry alone."[2072]

5.734. As discussed above[2073], our review of the Panel's findings, as well as relevant findings from the original proceedings, indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did. We also recall that, as the Panel's analysis of the competitive dynamics in the VLA market shows,

[2068] United States' appellee's submission, paras. 581, 585, 597, and 601.
[2069] United States' appellee's submission, paras. 591 and 603.
[2070] Panel Report, para. 6.1805, Table 22: Market for very large LCA (containing data from Ascend database, Deliveries made, data request as of 7 April 2014 (Panel Exhibit EU-512)). See also Ascend database, Boeing and Airbus Deliveries in Units (2001-2013), commercial operators, data request as of 30 March 2014 (Panel Exhibit USA-577), referred to in Panel Report, fn 2313 to para. 6.1368.
[2071] Panel Report, para. 6.1806.
[2072] Panel Report, para. 6.1806. (emphasis original)
[2073] See paras. 5.725-5.726 above.

Boeing's and Airbus' respective product offerings – the 747 and the A380 – are sufficiently substitutable.[2074]

5.735. The European Union submits that the Panel wrongly rejected its contention that the United States had failed to "account for the effect of the development and production delays affecting … the 747-8 on the limited number of sales achieved by Boeing".[2075] We recall that the Panel did not see these delays "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 VLA.[2076] We also note the Panel's observation that "there is evidence that the larger versions of the 777 may also at times challenge for sales in the market for {VLA}".[2077] Thus, the Panel's reasoning that, in the absence of Airbus' VLA offerings, customers would have turned to other Boeing LCA products – for instance, the larger versions of the 777 – appears to us to be reasonable.[2078] Consequently, we see no reason to disturb the Panel's finding that this non-attribution factor would not be capable of diluting the genuine and substantial relationship of cause and effect between LA/MSF subsidies and the alleged market phenomena.

5.736. We now turn to examine the Panel's analysis of the volume of deliveries and market share data for the post-implementation period for each of the VLA markets at issue to determine whether its analysis supports its ultimate finding of serious prejudice in this market segment. As noted, the European Union contends that in reaching its findings of "displacement and/or impedance", the Panel failed to engage properly with the sales volume and market share data that was before it.[2079] We observe that, in the EU VLA market, while Boeing made five deliveries in each of 2012 and 2013, Airbus made four deliveries for each said year. Thus, for both 2012 and 2013, Boeing maintained a market share of 55.6%. The evidence indicates that there was no actual decline in Boeing's volume of deliveries and market share. In finding displacement in this market segment, the Panel's assessment lacks an explanation as to whether there was a demonstrated substitution of the 747-8 by the A380. In respect of the VLA markets in Australia, Korea, and Singapore, Boeing did not make any deliveries and consequently had no market share in the post-implementation period in these markets.

5.737. We recall that a trend analysis may be relevant and indicative, although not necessarily determinative, for purposes of a finding of displacement. In our view, however, the Panel did not examine whether there existed any discernible trends in volumes and market shares in the VLA markets at issue, including whether or not there existed declining trends that could have supported the Panel's findings. In these circumstances, we consider that the Panel should have engaged with the evidence before it in order to explain sufficiently the basis for its finding that the LA/MSF subsidies had the effect of displacing US LCA in these VLA markets in the post-implementation period. We therefore disagree to the extent that the Panel found that "the United States ha{d} established that the 'product' effects of the challenged LA/MSF subsidies are a 'genuine and substantial' cause of displacement … of United States LCA in the markets for … {VLA} in the European Union, Australia, … Korea, {and} Singapore".[2080]

5.738. Turning to impedance, we recall that the phenomenon of impedance "refers to 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".[2081] In the EU VLA market, we note from Table 13 above that, while Boeing made five deliveries in each of 2012 and 2013, Airbus made four deliveries for each said year. Thus, for both 2012 and 2013, Boeing had a constant market share of 55.6%. In China and Korea, we observe that Boeing made no deliveries

[2074] See paras. 5.727-5.728 above. See also Panel Report, paras. 6.1371-6.1410.
[2075] Panel Report, para. 6.1813. (fn omitted) See also European Union's appellant's submission, paras. 951 and 953-956.
[2076] Panel Report, para. 6.1816.
[2077] Panel Report, fn 3326 to para. 6.1816.
[2078] Panel Report, para. 6.1816.
[2079] European Union's appellant's submission, para. 968.
[2080] Panel Report, para. 6.1817. We recall that, for the VLA markets in China and the United Arab Emirates, the United States claims only impedance. (See *supra* fn 1984) We therefore understand that the Panel's finding on displacement does not cover these two markets.
[2081] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1161.

and consequently held no market share during the post-implementation period. Airbus, however, made deliveries in both 2012 and 2013 for each of these markets. In the Australian VLA market, neither Boeing nor Airbus made any deliveries in the years 2012 and 2013, although the Panel noted that Airbus made a single delivery in December 2011. With respect to the VLA market in Singapore, while Boeing did not make any deliveries in the post-implementation period, Airbus made five deliveries in 2012, retaining 100% of the market share that year. Finally, in the United Arab Emirates, we observe that Airbus made 11 deliveries in December 2012 and 13 deliveries in 2013. As for Boeing, we note that, while the United States claimed before the Panel that Boeing made no deliveries in the post-implementation period, the European Union claimed that Boeing made one delivery in 2012.[2082]

5.739. The European Union asserts that, for the VLA markets in Australia, China, Korea, and Singapore, sales were sporadic and volumes relatively small, which in turn made the identification of trends more difficult and thus precluded a finding of impedance.[2083] We are not persuaded by the European Union's argument. As explained, given the particular nature of the LCA industry − especially for VLA like the 747-8 and the A380, where instances of sales and volumes of deliveries are generally much lower than in the case of consumer goods − we do not consider that the volumes of deliveries that the Panel considered could not have supported a finding of impedance. In any event, to find impedance, evidence of trends may not always be dispositive.

5.740. As explained above, our review of the Panel's findings with respect to the A380 and A350XWB programmes, as well as relevant findings from the original proceedings, indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did. Furthermore, we recall that, as the Panel's analysis of the competitive dynamics in the VLA market shows, Boeing's and Airbus' respective product offerings − the 747-8 and the A380 − are sufficiently substitutable. Therefore, the Panel's conclusion regarding impedance, insofar as the VLA market is concerned, is supported by its findings on the "product effects" − including those of the A380 LA/MSF subsidies existing in the post-implementation period − and by the data concerning the deliveries of the subsidized Airbus LCA − the A380 − that hindered the sales of competing US LCA in the VLA markets concerned. Thus, contrary to the situation regarding alleged impedance in the twin-aisle LCA market, the "product effects" of the LA/MSF subsidies existing in the post-implementation period, including the A380 LA/MSF subsidies[2084], and the VLA delivery data underlying the United States' claim, concern the same aircraft model, and, as explained above, the Panel made necessary findings on both "product effects" and delivery data.[2085] On the basis of these considerations, we see no error in the Panel's conclusion that, absent the LA/MSF subsidies, the US LCA industry would have achieved a higher volume of deliveries and market share in the VLA markets at issue than its actual level in the post-implementation period.[2086]

5.741. The Panel's findings reviewed above thus support the conclusion that the effect of the LA/MSF subsidies existing in the post-implementation period is impedance of US VLA in the markets in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' continued offering of the A380, and the existence of sufficient substitutability between Boeing's and Airbus' VLA product offerings.

[2082] Panel Report, para. 6.1805, fn 3312 to Table 22: Market for very large LCA (referring to European Union's comments on the United States' response to Panel questions No. 162, para. 145, and No. 40, fn 321).

[2083] European Union's appellant's submission, para. 1055.

[2084] We recall that, unlike the pre-A380 subsidies, which were disbursed decades ago, the disbursements of the A380 LA/MSF subsidies continued well beyond the original reference period. (See para. 5.607 above)

[2085] We recall that, in claiming displacement and/or impedance in the twin-aisle LCA market, the United States did not rely on orders of the A350XWB, whereas the subsidies existing in the post-implementation period are essentially those under the A380 and A350XWB programmes. Regarding the A330-200 and A340-500/600 LA/MSF subsidies, see fn 2030 and para. 5.719 above.

[2086] Panel Report, para. 6.1806.

5.742. In light of our interpretation of Article 7.8 of the SCM Agreement[2087], however, we disagree with the Panel's conclusion on impedance in the VLA market to the extent that its conclusion was based on the effects of the challenged LA/MSF subsidies that the Panel found to have expired. We therefore modify the Panel's conclusion, in paragraph 6.1817 of the Panel Report, and find instead that the United States has established that the "product effects" of the LA/MSF subsidies existing in the post-implementation period are a genuine and substantial cause of impedance of US LCA in the VLA markets in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates.[2088]

5.6.4.7 United States' request for completing the legal analysis regarding "displacement and/or impedance"

5.743. The United States requests, in the event that we find that the Panel erred in its assessment of the evidence, or that the Panel should have "more explicitly" addressed market trends in its analysis, that we complete the legal analysis regarding "displacement and/or impedance" based on the "relevant data from the period of 2001 through 2013".[2089] The United States contends that "{t}he volume and market share data sets relied on by the United States and the {European Union} are almost identical and sourced from the same Ascend database service."[2090] According to the United States, "{i}n each geographical market in either data set", the evidence shows clear trends in Airbus LCA deliveries that, "according to the Panel's causation findings, would not have occurred absent the effects of LA/MSF and other unwithdrawn subsidies and would have been replaced by U.S. LCA".[2091]

5.744. The European Union, on the other hand, contends that, even if we were able to complete the legal analysis with respect to the causal link between the subsidies and the market presence of certain of Airbus' aircraft, we would not be able to complete the analysis with respect to the United States' claims of "displacement and/or impedance".[2092] According to the European Union, "the Panel failed to identify, or even look for, clear and discernible trends that are capable of evidencing displacement or impedance."[2093] With respect to market data preceding the year 2011, the European Union asserts that "the Panel made no findings with respect to such data or any trends that could be identified from such data", and there are no "undisputed facts of record with respect to the existence of any trends identifiable in such data."[2094]

5.745. We recall that the Appellate Body has, on occasion, completed the legal analysis with a view to facilitating the prompt settlement of the dispute, pursuant to Article 3.3 of the DSU. However, the Appellate Body has "insisted that {it} can do so only if the factual findings of the panel and the undisputed facts in the panel record provide {it} with a sufficient basis for {its} own analysis".[2095] We note that both the United States and the European Union have relied on the same Ascend database service with respect to the volume of deliveries and market share data for the period 2001-2013.[2096] We further recall that we have found no error in the Panel's approach of

[2087] See section 5.4.2.2 of this Report.
[2088] Panel Report, para. 6.1817.
[2089] United States' appellee's submission, para. 573 (referring to United States' response to Panel questions No. 40 and No. 162; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI))).
[2090] United States' appellee's submission, para. 574 (referring to United States' response to Panel question No. 162, paras. 10-32; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI)); European Union's comments on the United States' response to Panel question No. 162, paras. 57-146). We note that, for the Appellate Body's reference, the United States has reproduced these data in the Data Appendix attached to its appellee's submission.
[2091] United States' appellee's submission, para. 574 (referring to Panel Report, paras. 6.1806, 6.1774, 6.1778, 6.1797, and 7.1.d.xii-xiii).
[2092] European Union's appellant's submission, para. 1098.
[2093] European Union's appellant's submission, para. 1098.
[2094] European Union's appellant's submission, para. 1098.
[2095] Appellate Body Report, *EC – Asbestos*, para. 78.
[2096] See Ascend database, Deliveries made, data request as of 7 April 2014 (Panel Exhibit EU-512); Ascend database, Boeing and Airbus Deliveries in Units (2001-2013), Commercial Operators, data request as of 30 March 2014 (Panel Exhibit USA-577).

having "focused on the most recent market data presented by the parties … from the *post-implementation period*"[2097] in order to make findings of displacement and/or impedance.

5.746. In light of the reversal of the relevant Panel findings in the preceding section, our task in this section is to consider whether we can complete the legal analysis in respect of the United States' request to find: (i) displacement and/or impedance in the single-aisle LCA markets in Australia, China, and India; (ii) impedance in the single-aisle LCA market in the European Union, or, in the alternative, threat of displacement and impedance in that market; (iii) displacement in the twin-aisle LCA markets in China, Korea, and Singapore; (iv) impedance in the twin-aisle LCA markets in the European Union, China, Korea, and Singapore; and (v) displacement in the VLA markets in the European Union, Australia, Korea, and Singapore.

5.747. In respect of the United States' claims of displacement and/or impedance in the single-aisle LCA markets in Australia, China, and India and its claim of impedance in the single-aisle LCA market in the European Union, we recall that we have reversed the Panel's finding due to its reliance on the "product effects" of the expired LA/MSF subsidies on the market presence of the A320 family of Airbus LCA.[2098] We do not, however, detect undisputed facts on the Panel record that would allow us to draw our own conclusions regarding the effect of the existing LA/MSF subsidies − those provided for the A380 and the A350XWB − on Airbus' competiveness in respect of its single-aisle LCA offerings. In the absence thereof, we do not see how we could determine whether the LA/MSF subsidies existing in the post-implementation period are a genuine and substantial cause of the alleged "displacement and/or impedance" in the single-aisle LCA markets at issue.[2099]

5.748. In our view, similar considerations apply with regard to the United States' request that we "conduct a threat analysis of displacement and impedance based on order data"[2100] for the EU single-aisle LCA market. We recall that the Panel made no determination with regard to the United States' claim of *threat* of displacement and impedance in the single-aisle LCA market in the European Union, given that "the United States requested the Panel to consider this claim only if {it} rejected {the United States'} claims of *present* serious prejudice".[2101] We therefore do not consider it appropriate to engage with the United States' request in respect of its claim of threat of displacement and impedance claim, as it would require us to review and consider evidence and arguments that were not addressed by the Panel or sufficiently explored and developed before the Panel.

5.749. We now turn to the United States' request that we complete the analysis in respect of its claims of displacement in the twin-aisle LCA markets in China, Korea, and Singapore, and impedance in the twin-aisle LCA markets in the European Union, China, Korea, and Singapore. We have found in paragraphs 5.719-5.722 above that the Panel's analysis and findings do not provide a sufficient basis to sustain the conclusion that the effect of the LA/MSF subsidies existing in the post-implementation period was "to displace or impede" US LCA in the twin-aisle LCA market in the European Union and relevant third country markets. Nor do we detect undisputed facts on the Panel record that would allow us to draw our own conclusions regarding this issue. In these circumstances, engaging with the United States' request for completion where these markets are concerned, would require us to review and consider evidence and arguments that we find were not sufficiently addressed by the Panel or sufficiently explored and developed before the Panel.

[2097] Panel Report, para. 6.1444. (emphasis original)

[2098] See paras. 5.700-5.702 above.

[2099] We further recall that in respect of the United States' claims of displacement, we engaged the participants at the oral hearing with questions regarding the existence or not of discernible trends in the relevant geographical and product markets on the basis of the market data for the post-implementation period. However, the participants could not come to an agreement in this regard. It is therefore our view that we cannot ourselves step into the shoes of the Panel to examine these issues in light of the insufficient analysis by the Panel, coupled with the participants' disagreement on this issue.

[2100] United States' appellee's submission, para. 577. (fn omitted)

[2101] Panel Report, para. 6.1818 (referring to United States' first written submission to the Panel, para. 514; second written submission to the Panel, para. 720; response to Panel question No. 162). (emphasis original)

5.750. Finally, regarding the United States' claims of displacement in the VLA markets in the European Union, Australia, Korea, and Singapore, we recall the market data that was tabulated by the Panel for these markets:

Table 14: Market for very large LCA

	European Union			Australia			Korea			Singapore		
Delivery Data	**Dec. 2011**	**2012**	**2013**	**Dec. 2011**	**2012**	**2013**	**Dec. 2011**	**2012**	**2013**	**Dec. 2011**	**2012**	**2013**
Boeing Volume (Units)	0	5	5	0	0	0	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	0	0	0	1	2	0	5	0
Airbus Market Share	-	44.4%	44.4%	100%	-	-	-	100%	100%	-	100%	-

Source: Panel Report, para. 6.1805, Table 22.

5.751. We recall that we have reversed the Panel's findings of displacement in these markets on the ground that the Panel failed to explain the basis for its finding that the LA/MSF subsidies existing in the post-implementation period had the effect of displacing the US LCA. That said, we recall that the United States' market trend analyses for the EU[2102] and Australian[2103] VLA markets span the years 2001-2013. For the Korean VLA market, while the United States relies on market data for the years 2001-2013[2104], it does not present a market trend analysis. As for the VLA market in Singapore, while the United States relies on market data for the years 2001-2013, its market trend analysis spans the years 2006-2013.[2105] It is our view that, in these circumstances, engaging with the United States' request for completion where these markets are concerned would require us to review and consider evidence and arguments in respect of the aforesaid concerns that we find were not sufficiently addressed by the Panel or sufficiently explored and developed before the Panel.[2106]

5.752. In light of all of the above considerations, we find that we are unable to complete the legal analysis of the United States' claims of displacement and/or impedance in the single-aisle LCA markets in Australia, China, and India, impedance in the single-aisle LCA market in the European Union, or, in the alternative, threat of displacement and impedance in that market, displacement in the twin-aisle LCA markets in China, Korea, and Singapore, impedance in the twin-aisle LCA markets in the European Union, China, Korea, and Singapore, and displacement in the VLA markets in the European Union, Australia, Korea, and Singapore.

5.6.4.8 Overall conclusion

5.753. We recall that "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

[2102] United States' appellee's submission, para. 581, Figure 5: EU VLA – Volume Trendline Analysis (referring to United States' response to Panel question No. 162, para. 18; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI)), p. 4).

[2103] United States' appellee's submission, para. 585, Figure 7: Australia VLA – Volume Trendline Analysis (referring to United States' response to Panel question No. 162, para. 20; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI)), p. 6).

[2104] United States' appellee's submission, para. 597, Table 2: U.S. Data – Korea VLA Market (referring to United States' response to Panel question No. 162, para. 28; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI)), p. 12).

[2105] United States' appellee's submission, para. 601, Figure 16: Singapore VLA – Volume Trendline Analysis (referring to United States' response to Panel question No. 162, para. 31; Summary Table of Updated Ascend Aircraft Database (Panel Exhibit USA-578 (BCI)), p. 14).

[2106] We also recall that we engaged the participants at the oral hearing with questions regarding the existence or not of discernible trends in the relevant VLA markets on the basis of the market data for the post-implementation period. However, the participants could not come to an agreement in this regard.

higher in the absence of the challenged subsidy. We understand the Panel to have sought to apply this framework when it turned to assess whether 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"[2107] in the absence of the "product effects" of the LA/MSF subsidies. We further consider that the Panel's finding 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"[2108] in the relevant geographic markets for single-aisle LCA, twin-aisle LCA, and VLA is informed by the manner in which the United States framed its claims. We do not read the Panel's use of the term "displacement and/or impedance" when summing up its serious prejudice findings regarding the relevant markets at issue as suggesting that the Panel found the existence of these serious prejudice phenomena in an undifferentiated manner with respect to one and the same product and country market. Therefore, contrary to what the European Union appears to suggest, it does not necessarily follow from the Panel's use of the term "displacement and/or impedance" that the Panel treated "displacement" and "impedance" as interchangeable and indistinguishable concepts for purposes of its adverse effects analysis.

5.754. We recall our finding that the Panel's assessment of the relevant product markets in these compliance proceedings was based on a proper analysis of the nature and degree of competition between products that the Panel found to demonstrate sufficient substitutability. However, an assessment of the nature and degree of competition in the relevant product market(s) does not, in and of itself, answer the question of whether the subsidies existing in the post-implementation period are a genuine and substantial cause of adverse effects in the relevant market(s).

5.6.4.8.1 The single-aisle LCA market

5.755. With regard to the single-aisle LCA market, the Panel's findings regarding the "product effects" of LA/MSF subsidies on the market presence of *the A320* concerned primarily the effects of those subsidies that had expired prior to the end of the implementation period. We have found, however, that the European Union has no compliance obligation in respect of those expired subsidies. Rather, the pertinent question is whether the subsidies existing in the post-implementation period (i.e. after 1 December 2011) cause adverse effects, such that the European Union has failed to comply with its obligation under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects". We do not find any analysis by the Panel as to whether, and to what extent, Airbus' competitiveness in the single-aisle LCA market, gained through the pre-A380 LA/MSF subsidies, was renewed and sustained beyond the original reference period as a result of the subsidies that the European Union maintained or granted in the post-implementation period.

5.756. Thus, we are not convinced that, insofar as the single-aisle LCA market is concerned, the Panel's analysis provides a sufficient basis to sustain its conclusion, in paragraph 6.1798 of the Panel Report, that "the orders identified in Table 19 {in the single-aisle LCA market} 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". Similarly, we are not convinced that, with regard to the various country markets for single-aisle LCA, the Panel's analysis is sufficient to sustain its conclusion, in paragraph 6.1817 of the Panel Report, that "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".

5.757. We therefore reverse the above conclusions of the Panel under Articles 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement insofar as they relate to the single-aisle LCA market. Consequently, we do not consider it necessary for us to address the European Union's additional arguments described in paragraph 5.703 above.

[2107] Panel Report, para. 6.1817. (emphasis added)
[2108] Panel Report, para. 6.1817. (emphasis added)

5.758. We further find that we are unable to complete the legal analysis of the United States' claims of "displacement and/or impedance" in the single-aisle LCA markets in Australia, China, and India, and impedance in the single-aisle LCA market in the European Union, or, in the alternative, threat of displacement and impedance in that market.

5.6.4.8.2 The twin-aisle LCA market

5.759. With regard to lost sales in the twin-aisle LCA market, our review of the Panel's finding on the product effects of LA/MSF subsidies on the A350XWB indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period (i.e. after 1 December 2011), Airbus would not have been able to offer the A350XWB at the time it did and with the features it had. The Panel's finding that the sales of the A350XWB in the post-implementation period constituted "lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement is also supported by relevant Panel findings regarding the competitive dynamics between Boeing's and Airbus' respective product offerings in the twin-aisle LCA market. Furthermore, we are not convinced by the European Union's argument that the Panel failed to take into account market-specific and sale-specific non-attribution factors.

5.760. Therefore, the Panel's findings support the conclusion that the sales of the A350XWB identified in Table 19 of the Panel Report represent "significant lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement, and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' timely launch of the A350XWB, and the existence of sufficient substitutability between Boeing's and Airbus' twin-aisle product offerings. In light of our interpretation of Article 7.8 of the SCM Agreement, however, we disagree with the Panel's conclusion on "significant lost sales" in the twin-aisle LCA market to the extent that its conclusion was based on the effects of the challenged LA/MSF subsidies that the Panel found to have expired.

5.761. Accordingly, we modify the Panel's conclusion in paragraph 6.1798 of the Panel Report, and find instead that the orders identified in Table 19 of the Panel Report in the twin-aisle LCA market represent "significant lost sales" to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period are a genuine and substantial cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement.

5.762. With regard to displacement and impedance in the twin-aisle LCA market, we note that, according to the Panel, the LA/MSF subsidy for the A330-200 expired no later than **[BCI]**, i.e. in the post-implementation period. We note, however, that the original panel 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. Moreover, unlike for the A380 and A350XWB LA/MSF subsidies, there are no specific findings by the Panel relating to the issue of whether and how the "product effects" of the A330-200 LA/MSF subsidy continued beyond 2006 and into the post-implementation period. Our review of the Panel's finding on the "product effects" of LA/MSF subsidies on the A350XWB indicates that, in the absence of the LA/MSF subsidies for the A380 and A350XWB existing in the post-implementation period, Airbus would not have been able to offer the A350XWB at the time it did and with the features it had. We further recall the Panel's finding that Airbus' A350XWB product offering was in direct competition with Boeing's twin-aisle LCA.

5.763. We note, however, that the United States framed its claim of displacement and/or impedance in the twin-aisle LCA market on the basis of data concerning market shares and *deliveries* of Airbus and Boeing LCA during the period 2001-2013. There were no deliveries of the A350XWB during that period. Thus, for purposes of the claim of displacement and/or impedance in the twin-aisle LCA market, the Panel relied on market shares and delivery data relating to the A330, rather than orders of the A350XWB, in making its finding. We recall, in this regard, that the Panel's findings regarding the "product effects" of LA/MSF subsidies on the A330 concerned primarily the effects of those subsidies that had expired. We have found, however, that the European Union has no compliance obligation in respect of those expired subsidies. Rather, the

pertinent question is whether the subsidies existing in the post-implementation period cause adverse effects, such that the European Union has failed to comply with its obligations under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects". However, given the way the claims of displacement and/or impedance were raised before the Panel and its approach to assessing these claims, the Panel did not explore, and made no findings on, the issue of whether and, if so, how the A380 and A350XWB subsidies existing in the post-implementation period may have contributed to the deliveries of the A330 occurring during that period. In these circumstances, we are not convinced that the Panel's analysis and findings provide a sufficient basis to sustain the conclusion that the effect of the LA/MSF subsidies existing in the post-implementation period was to displace or impede US LCA in the twin-aisle LCA market in the European Union and relevant third country markets.

5.764. Accordingly, we reverse the Panel's conclusion, in paragraph 6.1817 of the Panel Report, that "the United States ha{d} 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 … twin-aisle LCA in the European Union, China, Korea and Singapore". Having done so, we see no further reason to address the European Union's additional arguments regarding the Panel's conclusion, as set out in paragraph 5.703 above.

5.765. We further find that we are unable to complete the legal analysis of the United States' claims of displacement in the twin-aisle LCA markets in China, Korea, and Singapore, and impedance in the twin-aisle LCA markets in the European Union, China, Korea, and Singapore.

5.6.4.8.3 The VLA market

5.766. With regard to lost sales in the VLA market, our review of the Panel's findings, as well as the relevant findings from the original proceedings, indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period (i.e. after 1 December 2011), Airbus would not have been able to offer the A380 at the time it did. Moreover, the Panel's analysis regarding the conditions of competition in the VLA market confirms that Airbus' and Boeing's respective VLA products − the A380 and 747 − are sufficiently substitutable. Such competitive dynamics, in our view, provide further support to the proposition that the sales won by Airbus in the VLA market were at the expense of the US LCA producer. Finally, like the Panel, we have doubts as to whether Airbus' pre-existing commonality advantages and other product-related advantages over Boeing could be characterized as non-attribution factors that could be said to "dilute" the causal link between the LA/MSF subsidies existing in the post-implementation period and the relevant market phenomena.

5.767. Therefore, the Panel's findings support the conclusion that the sales of the A380 identified in Table 19 of the Panel Report represent "significant" "lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement, and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' continued offering of the A380, and the existence of sufficient substitutability between Boeing's and Airbus' VLA product offerings. In light of our interpretation of Article 7.8 of the SCM Agreement, however, we disagree with the Panel's conclusion on "significant lost sales" in the VLA market to the extent that its conclusion was based on the effects of the challenged LA/MSF subsidies that the Panel found to have expired.

5.768. Accordingly, we modify the Panel's conclusion in paragraph 6.1798 of the Panel Report, and find instead that the orders identified in Table 19 of the Panel Report in the VLA market represent "significant lost sales" to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period 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.

5.769. With regard to displacement and impedance in the VLA market, our review of the Panel's findings, as well as the relevant findings from the original proceedings, indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did. We also recall that, as the Panel's analysis of

the competitive dynamics in the VLA market shows, Boeing's and Airbus' respective product offerings – the 747 and the A380 – are sufficiently substitutable. With respect to the non-attribution factor alleged by the European Union concerning the development and production delays affecting the 747-8, we note the Panel's observation that the larger versions of the 777 may also at times challenge for sales in the VLA market. Therefore, we see no reason to disturb the Panel's finding that this non-attribution factor would not be capable of diluting the genuine and substantial relationship of cause and effect between the LA/MSF subsidies and the alleged market phenomena.

5.770. We recall that a trend analysis may be relevant and indicative, although not necessarily determinative, for purposes of a finding of displacement. In reaching its finding of displacement, however, the Panel did not examine whether there existed any discernible trends in volumes and market shares in the VLA markets at issue, including whether or not there existed declining trends that could have supported the Panel's findings. In these circumstances, we consider that the Panel should have engaged with the evidence before it in order to explain sufficiently the basis for its finding that the LA/MSF subsidies had the effect of displacing US LCA in these VLA markets in the post-implementation period.

5.771. Accordingly, insofar *as displacement in the VLA market is concerned*, we disagree with the Panel, to the extent that it found, in paragraph 6.1817 of the Panel Report, that "the United States ha{d} established that the 'product' effects of the challenged LA/MSF subsidies are a 'genuine and substantial' cause of displacement ... of United States LCA in the markets for ... {VLA} in the European Union, Australia, ... Korea, {and} Singapore".

5.772. We further find that we are unable to complete the legal analysis of the United States' claim of displacement in the VLA markets in the European Union, Australia, Korea, and Singapore.

5.773. As for the finding of impedance, we recall that the phenomenon of impedance refers to 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. Given the particular nature of the LCA industry, especially for VLA like the Boeing 747-8 and the Airbus A380, where instances of sales and volumes of deliveries are generally much lower than in the case of consumer goods, we do not consider that the volumes of deliveries that the Panel considered could not have supported a finding of impedance. We further recall that our review of the Panel's findings with respect to the A380 and A350XWB programmes, as well as relevant findings from the original proceedings, indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did. Moreover, as the Panel's analysis of the competitive dynamics in the VLA market shows, Boeing's and Airbus' respective product offerings – the 747-8 and the A380 – are sufficiently substitutable. Thus, contrary to the situation regarding alleged impedance in the twin-aisle LCA market, the "product effects" of the LA/MSF subsidies existing in the post-implementation period, including the A380 LA/MSF subsidies, and the VLA delivery data underlying the United States' claim, concern the same aircraft model, and, as explained above, the Panel made necessary findings on both "product effects" and delivery data. On the basis of these considerations, and in light of the deliveries of the A380 in the post-implementation period, we see no error in the Panel's conclusion that, absent the LA/MSF subsidies, the US LCA industry would have achieved a higher volume of deliveries and market share than its actual level in the post-implementation period.

5.774. Therefore, the Panel's findings reviewed above support the conclusion that the effect of the LA/MSF subsidies existing in the post-implementation period is impedance of US VLA in the VLA markets in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' continued offering of the A380, and the existence of sufficient substitutability between Boeing's and Airbus' VLA product offerings. In light of our interpretation of Article 7.8 of the SCM Agreement, however, we disagree with the Panel's conclusion on impedance in the VLA market to the extent that its conclusion was based on the effects of the challenged LA/MSF subsidies that the Panel found to have expired.

5.775. Accordingly, we modify the Panel's conclusion in paragraph 6.1817 of the Panel Report, and find instead that the United States has established that the "product effects" of the LA/MSF subsidies existing in the post-implementation period are a genuine and substantial cause of impedance of US LCA in the markets for VLA in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

6.1 Article 21.5 of the DSU – the Mühlenberger Loch and Bremen Airport measures

6.2. In its Compliance Communication, the European Union took the view that the Mühlenberger Loch aircraft assembly site measure and the Bremen Airport runway extension measure are consistent with the WTO agreements and in full compliance with the relevant recommendations and rulings of the DSB. Based on our review of the Panel Report and the Panel record, we do not understand the United States to have contested this view. The Panel, therefore, did not err in its interpretation and application of Article 21.5 of the DSU in finding, in paragraph 5.77 of the Panel Report, that there was no "disagreement" for it to resolve within the meaning of that provision. Based on our review of the Panel's analysis, we further disagree with the European Union to the extent that it argues that the Panel acted inconsistently with its duties under Article 11 of the DSU in reaching this conclusion. For these reasons, we find that the Panel did not err by declining to make a finding as to whether the European Union had achieved compliance with respect to the Mühlenberger Loch aircraft assembly site measure and the Bremen Airport runway extension measure, and see no need to make further findings in respect of those measures.

6.2 Article 3.1(b) of the SCM Agreement

6.3. With respect to the admissibility of the United States' appeal under Article 3.1(b) of the SCM Agreement, we find that the United States' appeal falls within the scope of appellate review. As we see it, the United States' appeal adequately identifies "issues of law covered in the panel report and legal interpretations developed by the panel" pursuant to Article 17.6 of the DSU, as well as "specific allegations of errors" within the meaning of the Working Procedures for Appellate Review, with regard to the Panel's interpretation and application of Article 3.1(b) of the SCM Agreement.

a. Regarding the merits of the United States' appeal, we uphold the Panel's interpretation of Article 3.1(b) of the SCM Agreement and agree with the Panel that *the fact that a subsidy 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*. While we have expressed concerns with certain aspects of the Panel's reasoning, the focus of the Panel's legal standard on the need to establish a condition requiring the use of domestic over imported goods comports with our reading of this provision.

6.4. Having upheld the Panel's interpretation of Article 3.1(b) of the SCM Agreement, we are not required to make findings regarding the application of this provision to the facts of the present case, or to address the United States' arguments concerning completion of the legal analysis. The Panel's finding under Articles 3.1(b) and 3.2 of the SCM Agreement therefore stands.

6.3 Benefit

6.3.1 The calculation of general corporate borrowing rate

6.5. We agree with the European Union that, in conducting the benefit analysis, the comparison focuses on the moment in time when the lender and borrower commit to the transaction. We disagree, however, with the European Union to the extent that it suggests that the Panel was required to limit its analysis to data from "the day of conclusion" of each A350XWB LA/MSF contract regardless of the time period over which the parties may have committed to the terms

and conditions of that financing instrument. Rather, the Panel was required to take into account the specific financing instrument at issue, including the relevant circumstances surrounding the conclusion of that instrument, to determine the period over which the terms and conditions of the relevant contract were agreed. The Panel provided two reasons in support of its decision to determine the corporate borrowing rate using the average yields one month prior and six months prior to the conclusion of the A350XWB LA/MSF contracts, in the form of a *range*. First, the Panel considered that "the yield on the day of the signature of contract may reflect atypical fluctuations."[2109] The Panel's second reason was that "{p}arties 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 actual day on which the contract is signed."[2110] We have found this understanding to be in line with our observation that, in some cases, parties may have committed to a transaction − or to key aspects thereof − during a finalization period of the negotiations preceding the moment of formal conclusion of *all* aspects of that transaction. In the present case, the financial contribution at issue consists of complex financing, the terms and conditions of which have been negotiated and agreed over a certain contracting period. In these circumstances, we find that the Panel did not err in its application of Article 1.1(b) of the SCM Agreement in finding that the corporate borrowing rate component of the market benchmark could be based on the average yields of the EADS bond "one-month prior and six-months prior to the conclusion" of the French, German, Spanish, and UK A350XWB LA/MSF contracts, "in the form of a range", attributing more weight to the former average yields than it did to the latter.[2111]

6.6. Moreover, we reject the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU because it *lacked a sufficient evidentiary basis* for rejecting the EADS bond yield on the day of conclusion of each A350XWB LA/MSF contract. In addition, the European Union has not established that the Panel's decision to set the corporate borrowing rate in the form of a range of average yields, or the fact that such decision was done against the background of a downward trend in the yield of the EADS bond, reflects a lack of objectivity and even-handedness contrary to the requirements of Article 11 of the DSU. Consequently, we find that the European Union has failed to establish that the Panel acted inconsistently with its obligations under Article 11 of the DSU.

6.7. We also reject the European Union's alternative claims that the Panel erred in its application of Article 1.1(b) of the SCM Agreement and acted inconsistently with Article 11 of the DSU by accepting the average yield of the EADS bond over the *six months* prior to the conclusion of the French, German, Spanish, and UK A350XWB LA/MSF contracts as part of the range of average yields that was used to determine the corporate borrowing rate. Although the corporate borrowing rate was determined in the form of a range of average yields, the Panel rightly gave more prominence to the one-month average yield of the EADS bond than to the six-month average yield, which was considered only to be a "helpful indication of market expectations".[2112] In these circumstances, we find that the European Union has failed to establish that the Panel erred in its application of Article 1.1(b) of the SCM Agreement or acted inconsistently with Article 11 of the DSU by deciding to observe the EADS bond yield on the basis of the average yields one month prior and six months prior to the conclusion of each of the four A350XWB LA/MSF contracts, in the form of a range, attributing more weight to the former average yields than it did to the latter.

a. For these reasons, we uphold the Panel's finding, in paragraph 6.389 of the Panel Report, that the corporate borrowing rate component of the market benchmark be based on "the average yields one-month prior and six-months prior to the conclusion of the {French, German, Spanish, and UK A350XWB LA/MSF contracts}, in the form of a range". We also uphold the Panel's findings related to the corporate borrowing rate in Table 7 at paragraph 6.430 and in Table 10 at paragraph 6.632 of the Panel Report.[2113]

[2109] Panel Report, para. 6.389.
[2110] Panel Report, para. 6.389.
[2111] Panel Report, para. 6.389.
[2112] Panel Report, para. 6.389.
[2113] See *supra* fns 330 and 514.

6.3.2 The calculation of project-specific risk premium

6.8. We disagree with the European Union's claim that "the Panel failed to adopt the most appropriate benchmark, tailored to the risks associated with the A350XWB, based on a 'progressive search' for the benchmark that shared 'as many elements as possible in common with' the A350XWB LA/MSF loans."[2114] We also disagree that the Panel erred under Article 1.1(b) of the SCM Agreement merely because it applied a single, undifferentiated project risk premium derived from the A380 project to the A350XWB project. Moreover, given that we addressed and rejected the European Union's claim that the Panel erred under Article 1.1(b) by failing to undertake a "progressive search" for a market benchmark[2115], we consider it unnecessary to address further the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU by failing to consider alternative, and more appropriate, benchmarks than those proposed by the United States. In addition, we disagree with the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU because it allegedly deviated from the original panel's findings by adopting a "constant, undifferentiated project risk premium" for the A350XWB.[2116] Consequently, we find that the European Union has not established that the Panel erred in its application of Article 1.1(b) of the SCM Agreement. We also find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU.

6.9. We also disagree with the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU in its examination of the risk profiles of the A380 and A350XWB projects, including in its assessment of: (i) programme risk; (ii) contract risk; and (iii) the price of risk. Contrary to the European Union's view, the Panel did not simply assume that the WRP would serve as an appropriate project-specific risk premium for the A350XWB. Instead, the Panel assessed the relative project-specific risks associated with the A380 and A350XWB projects. The purpose of this comparative analysis was, in the Panel's view, to determine "whether the United States ha{d} demonstrated that the project-specific risks of the A350XWB programme {were} 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".[2117] Thus, the Panel sought to engage carefully with the arguments and evidence presented by the parties regarding the possible risk premia that should be used in constructing the market benchmark. Regarding the Panel's analysis of programme risk, we find that the European Union has failed to establish that the Panel acted inconsistently with its obligations under Article 11 of the DSU in its analysis of development risk, market risk, or in its comparison of the development and market risks. With regard to contract risk, we find that the European Union has failed to establish that the Panel's comparison of the A350XWB and A380 LA/MSF contracts lacks a sufficient evidentiary basis in a manner inconsistent with the requirements of Article 11 of the DSU. We also find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU by failing to compare the terms of the A350XWB LA/MSF contracts to the terms of the A380 risk-sharing supplier contracts. Finally, we find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU in its analysis of the price of risk.

6.10. We also reject the European Union's claims that, in adopting a single, undifferentiated project-specific risk premium for each of the four A350XWB LA/MSF contracts, the Panel erred in its application of Article 1.1(b) of the SCM Agreement, and also failed to make an objective assessment of the matter as required by Article 11 of the DSU.[2118] The Panel recognized that there were some differences among the risk profiles of the four A350XWB LA/MSF contracts.[2119] However, based on its analysis, the Panel was not persuaded that the terms of those contracts rendered them significantly different so as to require the application of two or more different project-specific risk premia in these proceedings. Given the Panel's analysis and the arguments that were put before it, we find that the European Union has not established that the Panel erred under Article 1.1(b) of the SCM Agreement by applying a "single, undifferentiated project risk

[2114] European Union's appellant's submission, para. 405 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 476 and 486; referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345).
[2115] See section 5.3.2.2.1 of this Report.
[2116] European Union's appellant's submission, para. 423.
[2117] Panel Report, para. 6.459.
[2118] European Union's appellant's submission, paras. 517-518.
[2119] Panel Report, para. 6.604.

premium" without making adjustments for differences among the risk profiles of the A350XWB LA/MSF contracts.[2120] Moreover, contrary to the European Union's claim under Article 11 of the DSU, we see no error in the Panel's decision to adopt, on the one hand, an undifferentiated project-specific risk premium for the four A350XWB LA/MSF contracts and, on the other hand, a contract-specific approach to the corporate borrowing rate. Thus, we find that the European Union has failed to establish that, by applying a single, undifferentiated project risk premium to all four of the A350XWB LA/MSF contracts, the Panel acted inconsistently with Article 11 of the DSU.

a. For these reasons, we uphold the Panel's finding, in paragraphs 6.487 and 6.542 of the Panel Report, that the development risks associated with the A350XWB were *at least as high as, or sufficiently similar to*, those associated with the A380; the Panel's findings, in paragraphs 6.579 and 6.608 of the Panel Report, that the market risks experienced by the A380 and A350XWB were overall comparable in importance and that the A350XWB market risks would not have been much lower than the A380 market risks; the Panel's finding, in paragraphs 6.595 and 6.609 of the Panel Report, that the A350XWB LA/MSF contracts containing such "risk-reducing" terms are no less risky than at least **[BCI]** for A380 LA/MSF that also contained similar terms in the original proceedings; the Panel's findings, in paragraphs 6.607 and 6.609 of the Panel Report, that it was not persuaded that the differences in certain terms affecting the risk profiles of the individual A350XWB LA/MSF contracts would require the application of two or more different project-specific risk premia; and, consequently, the Panel's finding, in paragraphs 6.608 and 6.610 of the Panel Report, that the overall project-specific risks of the A380 and A350XWB projects were sufficiently similar to allow the risk premium applied to the A380 LA/MSF in the original proceedings to be applied to the A350XWB LA/MSF.

b. Accordingly, we uphold the Panel's findings, in paragraphs 6.632 (including Table 10)[2121] and 6.633 of the Panel Report, that Airbus paid a lower interest rate for the A350XWB LA/MSF than would have been available to it on the market and, consequently, a benefit has thereby been conferred within the meaning of Article 1.1(b) of the SCM Agreement. Consequently, we also uphold the Panel's findings, in paragraphs 6.656 and 7.1.c.i of the Panel Report, that the French, German, Spanish, and UK A350XWB LA/MSF contracts each constitute a subsidy within the meaning of Article 1.1 of the SCM Agreement and, thus, that the United States has demonstrated that the French, German, Spanish, and UK A350XWB LA/MSF contracts are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.

6.4 Article 7.8 of the SCM Agreement

6.11. We find that the obligation to "take appropriate steps to remove the adverse effects or … withdraw the subsidy" concerns the subsidies that are "grant{ed} or maintain{ed}" by the implementing Member at the end of the implementation period. An implementing Member cannot be required to withdraw a subsidy that has ceased to exist. Nor do we see a basis, under Article 7.8 of the SCM Agreement, to require that an implementing Member "take appropriate steps to remove the adverse effects" of subsidies that no longer exist.

a. Accordingly, we reverse the Panel's interpretation of Article 7.8 of the SCM Agreement, in paragraph 6.822 of the Panel Report, whereby an implementing Member would be required to "withdraw" or "take appropriate steps to remove the adverse effects" of past subsidies *irrespective* of whether such subsidies have expired prior to the end of the relevant implementation period. It follows from our finding that, in the present dispute, the European Union has no compliance obligation with respect to subsidies that had expired before 1 December 2011.

6.5 Conditional appeals under Article 7.8 of the SCM Agreement

6.12. We find that an *ex ante* analysis regarding the benefit of a subsidy serves as *the starting point* of the analysis to determine whether a subsidy continues to exist at the end of the

[2120] European Union's appellant's submission, para. 522.
[2121] See Table 4 at para. 5.350 above.

implementation period. For such a determination, it is also necessary to conduct an analysis regarding "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."[2122] We further find that the Panel's ultimate conclusion regarding the *actual* duration of relevant pre-A380 LA/MSF subsidies was based on a proper analysis of both the expiry of the *ex ante* "lives" of the subsidies and the alleged intervening events after the granting of the subsidies. We consider this to be consistent with the Appellate Body's approach in the original proceedings, whereby the assessment of the "life" of a subsidy should encompass both an *ex ante* analysis and an evaluation of intervening events.

a. For these reasons, we uphold the Panel's finding, in paragraphs 6.879, 6.1076, and 7.1.d.ii of the Panel Report, that the European Union had demonstrated that the *ex ante* "lives" of the French, German, and Spanish LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, and A330/A340, and the UK LA/MSF subsidies for the A320 and A330/A340, "expired" before 1 June 2011.

6.13. We see no reason to make additional findings on whether the French LA/MSF for the A310-300, the French and Spanish LA/MSF for the A300B/B2/B4 and A300-600, and the French, Spanish, and UK LA/MSF for the A320 and A330/A340 *also* came to an end due to the actual repayment of the loans with interests. We do not consider such findings to be necessary to resolve this dispute.

6.6 European Union's consequential appeal under Article 7.8 of the SCM Agreement

6.14. We disagree with the European Union that it *necessarily* follows from the manner in which the Panel characterized the scope of the compliance obligation under Article 7.8 of the SCM Agreement that the Panel's findings of adverse effects must be reversed for each of the specific country and product markets with respect to which the United States brought its claims. We note that the Panel's adverse effects analysis led to its final conclusion, in paragraph 7.2 of the Panel Report, that "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'." In our view, whether the Panel had a sufficient basis for this ultimate conclusion is a question that can only be answered following a careful review of the Panel's reasoning and analysis, in particular its analysis relating to the adverse effects of the *existing* LA/MSF subsidies that are maintained or granted in the post-implementation period.

6.15. Thus, we do not dismiss the totality of the Panel's adverse effects analysis solely on the basis of its interpretation of Article 7.8 of the SCM Agreement. Rather, we do not preclude that the pertinent question in these compliance proceedings − i.e. whether the subsidies existing in the post-implementation period cause adverse effects − may still be answered on the basis of the Panel's analysis of the existing subsidies. A consideration of expired subsidies is relevant for this purpose insofar as it sheds light on whether LA/MSF subsidies granted or maintained by the European Union in the post-implementation period cause adverse effects.

6.7 Articles 5, 6, and 7.8 of the SCM Agreement – adverse effects

6.7.1 Non-subsidized like product

6.16. Regarding the European Union's arguments concerning the relevance of Article 6.4 of the SCM Agreement to the United States' claims under Article 6.3(b) of the SCM Agreement, the Panel was required to examine the meaning of Article 6.3(b), including the relationship between this provision and Article 6.4, as clarified by the Appellate Body in the original proceedings in this dispute and in *US – Large Civil Aircraft (2nd complaint)*. It was also appropriate for the Panel to take into account the findings and reasoning by the original panel regarding the meaning of Article 6.4. The Panel could not simply refuse to address the arguments and evidence before it in dealing with the United States' claims under Article 6.3(b). Rather, the Panel was required to

[2122] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 709.

adjudicate the United States' claims under Article 6.3(b) in light of the arguments raised and evidence submitted by both parties to the dispute, and it erred by declining to do so.

a. Accordingly, we declare moot and of no legal effect the Panel's finding, in paragraph 6.1154 of the Panel Report, concerning the European Union's reliance on Article 6.4 to reject the United States' claims under Article 6.3(b) of the SCM Agreement. Based on our interpretation of Article 6.3(b), read together with Article 6.4, we disagree, however, with the European Union that a complainant is required to demonstrate, in each case, that its like product is non-subsidized in order to show that the effect of the subsidy is displacement and/or impedance of its like product in a third country market.

6.7.2 The relevant product markets

6.17. Regarding the term "market" in Article 6.3 of the SCM Agreement, for the purposes of conducting an adverse effects analysis, two products are in the same market if they are sufficiently substitutable and they exercise "meaningful" competitive constraints on each other. A consideration of *quantitative* tools and evidence may assist a panel in defining the relevant product markets and in answering the question of whether products exercise meaningful competitive constraints on each other and are sufficiently substitutable to fall in the same product market. However, like the Panel, we do not see a reason to preclude that a careful scrutiny of *qualitative* evidence may also be sufficient provided that it permits an informative and meaningful analysis of the relevant product markets. Depending on the particularities of a given case, it may be sufficient for a panel to examine *qualitative* evidence regarding demand-side and supply-side substitutability, product characteristics, end-uses, and customer preferences in order to reach a conclusion as to the nature and degree of competition between two products.

6.18. Having reviewed the Panel's analysis of competition in the single-aisle LCA, twin-aisle LCA, and VLA product markets, we are satisfied that the Panel's identification of the product markets in the present dispute was based on a proper analysis of the competition among the relevant products, which the Panel found to demonstrate sufficient substitutability, in accordance with the standard articulated by the Appellate Body in the original proceedings. We are also satisfied that the Panel's analyses identifying the single-aisle LCA, twin-aisle LCA, and VLA product markets reflect a proper reading of the term "market" and we do not agree with the European Union to the extent that it argues that the Panel erred in its interpretation of the term "market" in Article 6.3 of the SCM Agreement.

a. Accordingly, we uphold the Panel's finding, in paragraph 6.1416 of the Panel Report, that the United States had brought its 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.

6.7.3 "Product effects" of LA/MSF subsidies on Airbus LCA

6.19. The errors alleged by the European Union regarding the Panel's findings on the "product effects" of the pre-A350XWB LA/MSF subsidies on the market presence of the A320 and A330 families of Airbus LCA concern primarily the LA/MSF subsidies that were found by the Panel to have expired before the end of the implementation period – namely, the subsidies for the A300, A310, A320, A330, and A340. We recall that, under our interpretation of Article 7.8 of the SCM Agreement, the European Union does not bear a compliance obligation with respect to the subsidies that were found by the Panel to have expired by the end of the implementation period. Thus, to the extent that some subsidies have expired, a further examination of the removal of the effects of those subsidies would not be necessary. In other words, it is not pertinent to examine whether the Panel's findings on the "product effects" of the *expired* subsidies can support its ultimate conclusion of non-compliance under Article 7.8 of the SCM Agreement. In line with this view, we do not consider it necessary to make separate findings on the European Union's claims on appeal insofar as they concern the Panel's alleged failure to assess properly the passage of time and the events during that time in reaching its findings on the "product effects" of the expired

subsidies. In addition, we disagree with the Panel insofar as its reference to the aggregated LA/MSF subsidies in the above findings includes the expired subsidies.[2123]

6.20. Rather, as we have explained above, the pertinent question for purposes of these compliance proceedings is whether the subsidies existing in the post-implementation period (i.e. after 1 December 2011) cause adverse effects. The Panel found, and the European Union does not disagree, that the French, German, Spanish, and UK A380 LA/MSF subsidies had not expired by the end of the implementation period. Furthermore, the Panel found that, subsequent to the original reference period (2001-2006), the European Union granted new LA/MSF subsidies to Airbus for developing its A350XWB family of LCA, and that these subsidies were "closely connected" with the adopted recommendations and rulings of the DSB and the European Union's alleged compliance "actions". Given the scope of these compliance proceedings, we have therefore focused our review on the Panel's analysis and findings regarding the effects of subsidies existing in the post-implementation period − namely, the A380 LA/MSF and the A350XWB LA/MSF subsidies − and the European Union's appeal thereof, to determine whether those findings support the Panel's ultimate conclusion regarding serious prejudice.

6.21. As part of our analysis above, we have disagreed with the European Union's claim under Article 11 of the DSU that the Panel's understanding of the "direct effects" of A380 LA/MSF on Airbus' ability to launch, bring to market, and continue developing the A380 *as and when it did* lacks sufficient evidentiary basis. Furthermore, we have found that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU in reaching its conclusion that, "*without* A350XWB LA/MSF, the Airbus company that *actually existed* {in 2006-2010} 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."[2124] We have also rejected the European Union's claim that the Panel erred in finding that the A380 LA/MSF subsidies had "indirect effects" on the A350XWB.

6.22. The findings by the Panel on the issues surrounding the Original A350 and the launch of the A350XWB, together with its findings on the severe implications of the extensive delays with the A380 programme, establish that Airbus was faced with considerable overall uncertainty in the years following the original reference period. Moreover, the original panel's findings, together with the Panel's analysis, indicate that A380 LA/MSF had "direct effects" on Airbus' ability to launch, bring to market, and continue developing the A380 *as and when it did*, given that the A380 LA/MSF subsidies had not expired, as well as the fact that Airbus continued to receive disbursements under the French, German, and Spanish LA/MSF contracts at a time when it was experiencing severe financial difficulties resulting from the extensive production delays in the A380 programme. The Panel's findings regarding the "direct effects" of the A350XWB LA/MSF, read together with its findings concerning the "indirect effects" of the A380 LA/MSF, also indicate that, without the aggregated "product effects" of the existing LA/MSF subsidies for the A380 and A350XWB programmes, Airbus would not have been able to launch the A350XWB *as and when it did*. In other words, the existing LA/MSF subsidies that Airbus continued to receive made it possible to proceed with the timely launch of the A350XWB − a high-risk and expensive programme of considerable strategic importance to Airbus − and to bring to market the A380, which had suffered extensive delays.

6.23. In sum, our discussion of the Panel's findings reveals that the LA/MSF subsidies existing in the post-implementation period − i.e. the A380 and the A350XWB LA/MSF subsidies − enabled Airbus to proceed with the timely launch and development of the A350XWB, and to bring to market and to continue developing the A380. Both these events were crucial to renew and sustain Airbus' competitiveness in the post-implementation period.

[2123] Having said that, we recall that the expired subsidies remain relevant as part of a matrix of analysis that seeks to identify the effects of the subsidies existing in the post-implementation period, in respect of which the European Union continues to have a compliance obligation. Findings from the original proceedings concerning the design, structure, and operation of the expired subsidies, as well as how those subsidies affected Airbus' operations until the end of 2006, can help in understanding the extent to which the existing subsidies may cause adverse effects in the post-implementation period.

[2124] Panel Report, para. 6.1717. (emphasis original)

6.7.4 Lost sales, displacement, and impedance

6.24. We recall that "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. We understand the Panel to have sought to apply this framework when it turned to assess whether 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"[2125] in the absence of the "product effects" of the LA/MSF subsidies. We further consider that the Panel's finding 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"[2126] in the relevant geographic markets for single-aisle LCA, twin-aisle LCA, and VLA is informed by the manner in which the United States framed its claims. We do not read the Panel's use of the term "displacement and/or impedance" when summing up its serious prejudice findings regarding the relevant markets at issue as suggesting that the Panel found the existence of these serious prejudice phenomena in an undifferentiated manner with respect to one and the same product and country market. Therefore, contrary to what the European Union appears to suggest, it does not necessarily follow from the Panel's use of the term "displacement and/or impedance" that the Panel treated "displacement" and "impedance" as interchangeable and indistinguishable concepts for purposes of its adverse effects analysis.

6.25. We recall our finding that the Panel's assessment of the relevant product markets in these compliance proceedings was based on a proper analysis of the nature and degree of competition between products that the Panel found to demonstrate sufficient substitutability. However, an assessment of the nature and degree of competition in the relevant product market(s) does not, in and of itself, answer the question of whether the subsidies existing in the post-implementation period are a genuine and substantial cause of adverse effects in the relevant market(s).

6.7.4.1 The single-aisle LCA market

6.26. With regard to the single-aisle LCA market, the Panel's findings regarding the "product effects" of LA/MSF subsidies on the market presence of *the A320* concerned primarily the effects of those subsidies that had expired prior to the end of the implementation period. We have found, however, that the European Union has no compliance obligation in respect of those expired subsidies. Rather, the pertinent question is whether the subsidies existing in the post-implementation period (i.e. after 1 December 2011) cause adverse effects, such that the European Union has failed to comply with its obligation under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects". We do not find any analysis by the Panel as to whether, and to what extent, Airbus' competitiveness in the single-aisle LCA market, gained through the pre-A380 LA/MSF subsidies, was renewed and sustained beyond the original reference period as a result of the subsidies that the European Union maintained or granted in the post-implementation period.

6.27. Thus, we are not convinced that, insofar as the single-aisle LCA market is concerned, the Panel's analysis provides a sufficient basis to sustain its conclusion, in paragraph 6.1798 of the Panel Report, that "the orders identified in Table 19 {in the single-aisle LCA market} 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". Similarly, we are not convinced that, with regard to the various country markets for single-aisle LCA, the Panel's analysis is sufficient to sustain its conclusion, in paragraph 6.1817 of the Panel Report, that "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".

[2125] Panel Report, para. 6.1817. (emphasis added)
[2126] Panel Report, para. 6.1817. (emphasis added)

a. We therefore reverse the above conclusions of the Panel under Articles 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement insofar as they relate to the single-aisle LCA market.

6.28. Having so found, we do not consider it necessary for us to address the European Union's additional arguments described in paragraph 5.703 of this Report.

6.29. We further find that we are unable to complete the legal analysis of the United States' claims of "displacement and/or impedance" in the single-aisle LCA markets in Australia, China, and India, and impedance in the single-aisle LCA market in the European Union, or, in the alternative, threat of displacement and impedance in that market.

6.7.4.2 The twin-aisle LCA market

6.30. With regard to lost sales in the twin-aisle LCA market, our review of the Panel's finding on the product effects of LA/MSF subsidies on the A350XWB indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period (i.e. after 1 December 2011), Airbus would not have been able to offer the A350XWB at the time it did and with the features it had. The Panel's finding that the sales of the A350XWB in the post-implementation period constituted "lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement is also supported by relevant Panel findings regarding the competitive dynamics between Boeing's and Airbus' respective product offerings in the twin-aisle LCA market. Furthermore, we are not convinced by the European Union's argument that the Panel failed to take into account market-specific and sale-specific non-attribution factors.

6.31. Therefore, the Panel's findings support the conclusion that the sales of the A350XWB identified in Table 19 of the Panel Report represent "significant lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement, and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' timely launch of the A350XWB, and the existence of sufficient substitutability between Boeing's and Airbus' twin-aisle product offerings. In light of our interpretation of Article 7.8 of the SCM Agreement, however, we disagree with the Panel's conclusion on "significant lost sales" in the twin-aisle LCA market to the extent that its conclusion was based on the effects of the challenged LA/MSF subsidies that the Panel found to have expired.

a. Accordingly, we modify the Panel's conclusion in paragraph 6.1798 of the Panel Report, and find instead that the orders identified in Table 19 of the Panel Report in the twin-aisle LCA market represent "significant lost sales" to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period are a genuine and substantial cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement.

6.32. With regard to displacement and impedance in the twin-aisle LCA market, we note that, according to the Panel, the LA/MSF subsidy for the A330-200 expired no later than **[BCI]**, i.e. in the post-implementation period. We note, however, that the original panel 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. Moreover, unlike for the A380 and A350XWB LA/MSF subsidies, there are no specific findings by the Panel relating to the issue of whether and how the "product effects" of the A330-200 LA/MSF subsidy continued beyond 2006 and into the post-implementation period. Our review of the Panel's finding on the "product effects" of LA/MSF subsidies on the A350XWB indicates that, in the absence of the LA/MSF subsidies for the A380 and A350XWB existing in the post-implementation period, Airbus would not have been able to offer the A350XWB at the time it did and with the features it had. We further recall the Panel's finding that Airbus' A350XWB product offering was in direct competition with Boeing's twin-aisle LCA.

6.33. We note, however, that the United States framed its claim of displacement and/or impedance in the twin-aisle LCA market on the basis of data concerning market shares and

deliveries of Airbus and Boeing LCA during the period 2001-2013. There were no deliveries of the A350XWB during that period. Thus, for purposes of the claim of displacement and/or impedance in the twin-aisle LCA market, the Panel relied on market shares and delivery data relating to the A330, rather than orders of the A350XWB, in making its finding. We recall, in this regard, that the Panel's findings regarding the "product effects" of LA/MSF subsidies on the A330 concerned primarily the effects of those subsidies that had expired. We have found, however, that the European Union has no compliance obligation in respect of those expired subsidies. Rather, the pertinent question is whether the subsidies existing in the post-implementation period cause adverse effects, such that the European Union has failed to comply with its obligations under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects". However, given the way the claims of displacement and/or impedance were raised before the Panel and its approach to assessing these claims, the Panel did not explore, and made no findings on, the issue of whether and, if so, how the A380 and A350XWB subsidies existing in the post-implementation period may have contributed to the deliveries of the A330 occurring during that period. In these circumstances, we are not convinced that the Panel's analysis and findings provide a sufficient basis to sustain the conclusion that the effect of the LA/MSF subsidies existing in the post-implementation period was to displace or impede US LCA in the twin-aisle LCA market in the European Union and relevant third country markets.

a. Accordingly, we reverse the Panel's conclusion, in paragraph 6.1817 of the Panel Report, that "the United States ha{d} 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 … twin-aisle LCA in the European Union, China, Korea and Singapore".

6.34. Having done so, we see no further reason to address the European Union's additional arguments regarding the Panel's conclusion, as set out in paragraph 5.703 of this Report.

6.35. We further find that we are unable to complete the legal analysis of the United States' claims of displacement in the twin-aisle LCA markets in China, Korea, and Singapore, and impedance in the twin-aisle LCA markets in the European Union, China, Korea, and Singapore.

6.7.4.3 The VLA market

6.36. With regard to lost sales in the VLA market, our review of the Panel's findings, as well as the relevant findings from the original proceedings, indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period (i.e. after 1 December 2011), Airbus would not have been able to offer the A380 at the time it did. Moreover, the Panel's analysis regarding the conditions of competition in the VLA market confirms that Airbus' and Boeing's respective VLA products − the A380 and 747 − are sufficiently substitutable with each other. Such competitive dynamics, in our view, provide further support to the proposition that the sales won by Airbus in the VLA market were at the expense of the US LCA producer. Finally, like the Panel, we have doubts as to whether Airbus' pre-existing commonality advantages and other product-related advantages over Boeing could be characterized as non-attribution factors that could be said to "dilute" the causal link between the LA/MSF subsidies existing in the post-implementation period and the relevant market phenomena.

6.37. Therefore, the Panel's findings support the conclusion that the sales of the A380 identified in Table 19 of the Panel Report represent "significant lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement, and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' continued offering of the A380, and the existence of sufficient substitutability between Boeing's and Airbus' VLA product offerings. In light of our interpretation of Article 7.8 of the SCM Agreement, however, we disagree with the Panel's conclusion on "significant lost sales" in the VLA market to the extent that its conclusion was based on effects of challenged LA/MSF subsidies that the Panel found to have expired.

a. Accordingly, we modify the Panel's conclusion in paragraph 6.1798 of the Panel Report, and find instead that the orders identified in Table 19 of the Panel Report in the VLA market represent "significant lost sales" to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period 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.

6.38. With regard to displacement and impedance in the VLA market, our review of the Panel's findings, as well as the relevant findings from the original proceedings, indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did. We also recall that, as the Panel's analysis of the competitive dynamics in the VLA market shows, Boeing's and Airbus' respective product offerings − the 747 and the A380 − are sufficiently substitutable. With respect to the non-attribution factor alleged by the European Union concerning the development and production delays affecting the 747-8, we note the Panel's observation that the larger versions of the 777 may also at times challenge for sales in the VLA market. Therefore, we see no reason to disturb the Panel's finding that this non-attribution factor would not be capable of diluting the genuine and substantial relationship of cause and effect between the LA/MSF subsidies and the alleged market phenomena.

6.39. We recall that a trend analysis may be relevant and indicative, although not necessarily determinative, for purposes of a finding of displacement. In reaching its finding of displacement, however, the Panel did not examine whether there existed any discernible trends in volumes and market shares in the VLA markets at issue, including whether or not there existed declining trends that could have supported the Panel's findings. In these circumstances, we consider that the Panel should have engaged with the evidence before it in order to explain sufficiently the basis for its finding that the LA/MSF subsidies had the effect of displacing US LCA in these VLA markets in the post-implementation period.

a. Accordingly, insofar *as displacement in the VLA market is concerned*, we disagree with the Panel to the extent that it found, in paragraph 6.1817 of the Panel Report, that "the United States ha{d} established that the 'product' effects of the challenged LA/MSF subsidies are a 'genuine and substantial' cause of displacement … of United States LCA in the markets for … {VLA} in the European Union, Australia, … Korea, {and} Singapore".

6.40. We further find that we are unable to complete the legal analysis of the United States' claim of displacement in the VLA markets in the European Union, Australia, Korea, and Singapore.

6.41. As for the finding of impedance, we recall that the phenomenon of impedance refers to 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. Given the particular nature of the LCA industry, especially for VLA like the Boeing 747-8 and the Airbus A380, where instances of sales and volumes of deliveries are generally much lower than in the case of consumer goods, we do not consider that the volumes of deliveries that the Panel considered could not have supported a finding of impedance. We further recall that our review of the Panel's findings with respect to the A380 and A350XWB programmes, as well as relevant findings from the original proceedings, indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did. Moreover, as the Panel's analysis of the competitive dynamics in the VLA market shows, Boeing's and Airbus' respective product offerings − the 747-8 and the A380 − are sufficiently substitutable. Thus, contrary to the situation regarding alleged impedance in the twin-aisle LCA market, the "product effects" of the LA/MSF subsidies existing in the post-implementation period, including the A380 LA/MSF subsidies, and the VLA delivery data underlying the United States' claim, concern the same aircraft model, and, as explained above, the Panel made necessary findings on both "product effects" and delivery data. On the basis of these considerations, and in light of the deliveries of the A380 in the post-implementation period, we see no error in the Panel's conclusion that, absent the LA/MSF subsidies, the US LCA industry would have achieved a higher volume of deliveries and market share than its actual level in the post-implementation period.

6.42. Therefore, the Panel's findings reviewed above support the conclusion that the effect of the LA/MSF subsidies existing in the post-implementation period is impedance of US VLA in the VLA markets in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' continued offering of the A380, and the existence of sufficient substitutability between Boeing's and Airbus' VLA product offerings. In light of our interpretation of Article 7.8 of the SCM Agreement, however, we disagree with the Panel's conclusion on impedance in the VLA market to the extent that its conclusion was based on the effects of the challenged LA/MSF subsidies that the Panel found to have expired.

a. Accordingly, we modify the Panel's conclusion in paragraph 6.1817 of the Panel Report, and find instead that the United States has established that the "product effects" of the LA/MSF subsidies existing in the post-implementation period are a genuine and substantial cause of impedance of US LCA in the VLA markets in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates.

6.43. On the basis of the above, in respect of subsidies existing in the post-implementation period, we uphold, *albeit for different reasons*, the Panel's conclusions:

a. in paragraph 7.2 of the Panel Report, that "{b}y continuing to be in violation of Articles 5(c) and 6.3(a), (b) and (c) of the SCM Agreement" insofar as the twin-aisle LCA and VLA markets are concerned, "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'"; and

b. in paragraph 7.4 of the Panel Report, 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" and that, "{t}o 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."

6.44. 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.

Signed in the original in Geneva this 8th day of May 2018 by:

_____
Ricardo Ramírez-Hernández
Presiding Member

_____
Ujal Singh Bhatia
Member

_____
Peter Van den Bossche
Member

_____

WORLD TRADE ORGANIZATION

WT/DS316/AB/RW/Add.1

15 May 2018

(18-2863)

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

AB-2016-6

Report of the Appellate Body

Addendum

This *Addendum* contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS316/AB/RW.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

LIST OF ANNEXES

ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX D

PROCEDURAL RULINGS

ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

ANNEX A-1

EUROPEAN UNION'S NOTICE OF APPEAL*

Pursuant to Article 16.4 and Article 17.1 of the *DSU*, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Union – Measures Affecting Trade in Large Civil Aircraft (Recourse to Article 21.5 of the DSU by the United States)* (WT/DS316/RW). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

The European Union is restricting its appeal to those errors that it believes constitute serious errors of law and legal interpretation that need to be corrected. Non-appeal of an issue does not signify agreement therewith.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect, the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report[1]:

I. WHETHER THE PANEL PROPERLY INTERPRETED ARTICLE 7.8 OF THE SCM AGREEMENT (SECTIONS 6.6.2 AND 6.6.3 OF THE REPORT)

1. The Panel erred in interpreting Article 7.8 of the *SCM Agreement* to require an implementing Member to "remove the adverse effects" found from an actionable subsidy in original proceedings, even if that subsidy has been "withdraw{n}" and is no longer "maintain{ed}".[2]

2. The Panel additionally erred in its interpretation of Article 7.8 (in conjunction with Article 1.1(a)) of the *SCM Agreement*) when finding that bringing about the end of a financial contribution does *not* result in withdrawal of the subsidy.[3] The European Union requests the Appellate Body to consider this appeal only if the Appellate Body reverses the Panel's interpretation of Article 7.8 and attempts to complete the analysis under a proper interpretation of Article 7.8.

II. WHETHER THE PANEL ERRED BY REFUSING TO ASSESS WHETHER THE EUROPEAN UNION ACHIEVED COMPLIANCE IN RESPECT OF THE MÜHLENBERGER LOCH AND BREMEN AIRPORT RUNWAY SUBSIDIES (SECTIONS 5.10, 6.2.5 AND 6.6.3.4.4 OF THE REPORT)

3. The Panel erred in interpreting Article 21.5 of the DSU as providing an original respondent with the right to seek findings of compliance in Article 21.5 compliance proceedings only in the narrow factual circumstances of the *US/Canada – Continued Suspension* dispute.[4]

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* This notification, dated 13 October 2016, was circulated to Members as document WT/DS316/29.

[1] Paragraph numbers provided in footnotes to the following description of the errors of the Panel are intended to indicate the primary instance of the errors. These errors have consequences throughout the report, and the European Union also appeals all findings and conclusions deriving from or relying on the appealed errors, and in particular the relevant findings and conclusions in Sections 7.1, 7.2, 7.3 and 7.4 of the Panel Report.

[2] Panel Report, paras. 6.803, 6.813, 6.819, 6.822, 6.838, 6.839-6.841, 6.1078, 6.1089, 6.1094, 6.1100, 6.1101-6.1102, 6.1451-6.1452, 6.1463, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(i), 7.1(d)(viii), 7.1(d)(ix), 7.1(d)(xii)-(xvii) and 7.2.

[3] Panel Report, paras. 6.1072-6.1074, 6.1451-6.1452, 6.1463, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(i), 7.1(d)(viii), 7.1(d)(ix), 7.1(d)(xii)-(xvii) and 7.2.

[4] Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.

4. The Panel erred in the application of Article 21.5 of the DSU by finding that no disagreement, within the meaning of Article 21.5 of the DSU, existed between the European Union and the United States, and consequently by failing to make findings concerning the European Union's withdrawal of the Mühlenberger Loch and Bremen airport runway subsidies.[5]

5. Separately, by declining to make findings on a matter that was properly before it, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[6]

III. WHETHER LA/MSF FOR THE A350XWB IS A SUBSIDY (SECTION 6.5.2 OF THE REPORT)

6. The Panel erred when identifying the appropriate point in time from which to draw the *corporate borrowing rate component* of the market benchmark to determine whether each A350XWB launch aid/member state financing ("LA/MSF") contract confers a "benefit", and therefore constitutes a subsidy, under Article 1.1(b) of the *SCM Agreement*.[7] Specifically, in identifying the corporate borrowing rate as "the average yields {on the relevant EADS bond} one-month prior and six-months prior to the conclusion of the contract, in the form of a range",[8] the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.[9]

7. Separately, by rejecting the yield on the day of the conclusion of each contract, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[10]

8. Should the Appellate Body disagree with the European Union and reject the appeals described in paragraphs 6 and 7, the European Union appeals the Panel's inclusion, in its construction of the corporate borrowing rate, of the six-month average yield on the relevant EADS bond within the Panel's range of average yields.[11] Specifically, by including the six-month average yield within its range, the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.[12]

9. Separately, by including the six-month average yield within its range, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[13]

10. Further, the Panel erred in identifying the *project risk premium component* of the market benchmark to determine whether each A350XWB LA/MSF contract confers a "benefit", and therefore constitutes a subsidy, under Article 1.1(b) of the *SCM Agreement*.[14] The Panel selected a single undifferentiated project risk premium for each A350XWB LA/MSF contract, which was developed for a different programme (i.e., the A380) in the original proceedings. In so doing, the Panel committed three sets of error.

11. First, the Panel failed to establish a project-specific risk premium for A350XWB LA/MSF based on the risks associated with the A350XWB programme. As a result, the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.[15]

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[5] Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.

[6] Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.

[7] Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

[8] Panel Report, para. 6.389.

[9] Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

[10] Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

[11] Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

[12] Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

[13] Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

[14] Panel Report, paras. 6.435, 6.459, 6.487, 6.492, 6.527, 6.539-6.542, 6.579, 6.595, 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

[15] Panel Report, paras. 6.435, 6.459, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

12. Separately, by failing to consider more appropriate benchmarks and by deviating from the approach to project-specific benchmarks taken in the original proceedings, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[16]

13. *Second*, by failing to establish similarity between the risks involved in the A350XWB project and the A380 LA/MSF project, as well as between the risks involved in the A350XWB LA/MSF contracts and the A380 LA/MSF contracts, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[17]

14. *Third*, and finally, the Panel erroneously adopted a single project risk premium to benchmark all four A350XWB LA/MSF contracts. As a result, the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.[18]

15. Separately, by failing to adopt a differentiated project risk premium while adopting a differentiated corporate borrowing rate, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[19]

IV. WHETHER THE PANEL ERRED IN IDENTIFYING APPROPRIATE PRODUCT MARKETS (SECTION 6.6.4.4 OF THE REPORT)

16. The Panel erred in its interpretation of the term "market" in Article 6.3 of the *SCM Agreement*, as permitting two products to be placed in the same product market on the basis of any competition between them, rather than on the basis of the existence of significant competitive constraints between them.[20]

17. Should the Appellate Body disagree with the European Union and reject the appeal described in paragraph 16, the Panel erred in the application of Articles 5(c), 6.3 and Article 7.8 of the *SCM Agreement* when it identified the relevant product markets for purposes of assessing the United States' adverse effects claims in a manner that is inconsistent with its own legal standard.[21]

18. Separately, by limiting its assessment of the existence of the relevant product markets for purposes of assessing the United States' adverse effects claims to competition between only those products that the United States had placed in the same product markets, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[22]

V. WHETHER THE PANEL ERRED IN REACHING ITS FINDINGS RELATING TO THE "NON-SUBSIDIZED LIKE PRODUCT" PROVISIONS OF ARTICLES 6.3, 6.4 AND 6.5 OF THE SCM AGREEMENT (SECTION 6.6.4.3 OF THE REPORT)

19. The Panel erred in reaching its findings on whether there is a new matter. Specifically, the Panel erred in its interpretation and application of the term "matter" in Article 11 of the

[16] Panel Report, paras. 6.435, 6.459, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

[17] Panel Report, paras. 6.487, 6.492, 6.527, 6.539-6.542, 6.579, 6.595, 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

[18] Panel Report, paras. 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

[19] Panel Report, paras. 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

[20] Panel Report, paras. 6.1210, 6.1211, 6.1236, 6.1280, 6.1289, 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xi), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[21] Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xi), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[22] Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xi), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

DSU.[23] The Panel also erred in failing to make an objective assessment of the matter, under Article 11 of the DSU.[24]

20. In addition, the Panel erred in reaching its findings on cogent reasons. Specifically, the Panel erred in its interpretation and application of "security and predictability" within the meaning of Article 3.2 of the DSU as it relates to the cogent reasons rule;[25] and, erred in failing to make an objective assessment of the matter, under Article 11 of the DSU.[26]

21. Finally, the Panel erred in its interpretation and application of Articles 6.3(a), 6.3(b), 6.3(c), 6.4 and 6.5 of the *SCM Agreement*.[27]

VI. WHETHER THE PANEL ERRED IN FINDING ADVERSE EFFECTS (SECTION 6.6.4.4 OF THE REPORT)

A. EFFECTS OF LA/MSF ON THE LAUNCH AND MARKET PRESENCE OF AIRCRAFT

22. The Panel erred in the interpretation of Article 5(c) of the *SCM Agreement* in adopting a "but for" approach to causation that failed to consider the passage of time, and events that occurred during that time, and consequently attributing the current market presence of the A320, A330 and A380 families of aircraft to pre-A350XWB LA/MSF.[28]

23. Should the Appellate Body disagree with the European Union and reject the appeal described in paragraph 22, the Panel erred in the application of Articles 5(c) and 7.8 of the *SCM Agreement* in adopting a "but for" approach to causation that failed to consider the passage of time, and events that occurred during that time, and consequently attributing the current market presence of the A320 and A330 families of aircraft to pre-A350XWB LA/MSF.[29]

24. Separately, to the extent the Panel found that LA/MSF for the A380 resulted in "direct effects" on the launch and market presence of the A380, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[30]

25. The Panel additionally erred in the application of Articles 5(c) and 7.8 of the *SCM Agreement* by attributing the market presence of the A350XWB to the "indirect effects" of LA/MSF for the A380.[31]

26. Separately, to the extent the Panel found that LA/MSF for the A350XWB resulted in "direct effects" on the launch and market presence of the A350XWB, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[32]

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[23] Panel Report, paras. 6.1125-6.1138, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[24] Panel Report, paras. 6.1125-6.1138, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[25] Panel Report, paras. 6.1125-6.1153, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[26] Panel Report, paras. 6.1125-6.1153, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[27] Panel Report, paras. 6.1125-6.1154, 6.1798, 6.1817, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[28] Panel Report, paras. 6.1515, 6.1527, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-7.1(d)(xvii) and 7.2.

[29] Panel Report, paras. 6.1527, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-7.1(d)(xvii) and 7.2.

[30] Panel Report, paras. 6.1507, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-7.1(d)(xvii) and 7.2.

[31] Panel Report, paras. 6.1747, 6.1771, 6.1773, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

[32] Panel Report, paras. 6.1717, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

B. FINDINGS OF DISPLACEMENT, IMPEDANCE AND LOST SALES

27. The Panel erred in the application of Articles 5(c), 6.3 and 7.8 of the *SCM Agreement* by failing, in its assessment of lost sales, displacement and impedance, to account for the differences in closeness of competition between various aircraft.[33]

28. The Panel erred in the application of Articles 5(c), 6.3 and 7.8 of the *SCM Agreement* by failing, in its assessment of lost sales, displacement and impedance, to account for non-attribution factors.[34]

29. The Panel erred in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* in finding that non-withdrawn subsidies cause "displacement and/or impedance", thereby conflating the two separate forms of serious prejudice.[35]

30. The Panel erred in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* as permitting findings of "displacement" without any assessment of sales volume and market share data.[36]

31. In addition, the Panel also erred in the application of Articles 5(c), 6.3(a), 6.3(b) and 7.8 of the *SCM Agreement* by finding "displacement" without any assessment of sales volume and market share data.[37]

32. The Panel erred in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* as permitting findings of "impedance" without any assessment of sales volume and market share data.[38]

33. In addition, the Panel also erred in the application of Articles 5(c), 6.3(a), 6.3(b) and 7.8 of the *SCM Agreement* by finding "impedance" without any assessment of sales volume and market share data.[39]

[33] Panel Report, paras. 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.
[34] Panel Report, paras. 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.
[35] Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.
[36] Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.
[37] Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.
[38] Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.
[39] Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

ANNEX A-2

UNITED STATES' NOTICE OF OTHER APPEAL*

Pursuant to Rule 23(1) of the Working Procedures for Appellate Review, the United States hereby notifies the Appellate Body of its decision to appeal certain issues of law covered in the Report of the Panel in 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 (WT/DS316/RW & Add.1) ("Panel Report") and certain legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body of the Panel's finding that the United States failed to establish that the French, German, Spanish, and UK LA/MSF subsidies for Airbus's A350 XWB constituted prohibited import substitution subsidies, within the meaning of Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").[1] While the United States agrees with the Panel's interpretation of Article 3.1(b), a competing interpretation is under consideration in another dispute, US − Conditional Tax Incentives for Large Civil Aircraft (DS487). If the Appellate Body were to determine that this competing interpretation of Article 3.1(b) is correct, then the Panel here erred in its interpretation and application of Article 3.1(b) and its finding that the French, German, Spanish, and UK LA/MSF for the A350 XWB do not constitute import substitution subsidies prohibited by Article 3.1(b). The paragraphs relating to these errors include paragraphs 6.745-6.791 of the Panel Report.

2. In addition, the United States conditionally appeals the Panel's findings that the ex ante lives of the French, German, Spanish, and UK LA/MSF subsidies for the A320, A330/A340 Basic, and A330-200 had passively "expired" before December 1, 2011, as a result of the amortization of benefit.[2] These conclusions are in error and are based on erroneous findings of law and related legal interpretations, including an erroneous interpretation and application of Article 1.1(b) of the SCM Agreement. The paragraphs relating to these errors include paragraphs 6.872-6.879 of the Panel Report. However, the United States only requests the Appellate Body to address this issue if it modifies or reverses the Panel's finding that the passive "expiry" events cited by the European Union did not satisfy its obligation to "withdraw the subsidy" for purposes of Article 7.8 of the SCM Agreement.[3]

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* This notification, dated 10 November 2016, was circulated to Members as document WT/DS316/30.

[1] *See* Panel Report, paras. 6.790, 7.1(c)(ii).
[2] *See* Panel Report, paras. 6.879, 7.1(d)(ii) and (iii).
[3] *See* Panel Report, paras. 6.1094, 7.1(d)(viii).

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLANT'S SUBMISSION

1 INTRODUCTION

1. The European Union's Appellant's Submission sets out appeals of a number of serious errors of law and legal interpretation in the Report of the Panel in *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)* ("compliance Panel" or "Panel").

2 THE PANEL ERRED IN THE INTERPRETATION OF ARTICLE 7.8 OF THE *SCM AGREEMENT*[1]

2. The Panel erred in interpreting Article 7.8 to require an implementing Member, found in original proceedings to have granted or maintained subsidies that cause adverse effects, to "remove the adverse effects" of the subsidies, "*irrespective of whether those subsidies continue to exist* in the implementation period".[2] That is, for the Panel, an obligation to "remove the adverse effects" applies even if the implementing Member no longer "grant{s} or maintain{s}" the subsidy at issue after the end of the implementation period, but has, instead, "withdraw{n} the subsidy".

3. Properly interpreted, the terms of Article 7.8, viewed in their context and in light of the object and purpose of the *SCM Agreement*, provide an implementing Member that is "*granting or maintaining*" an actionable subsidy, which was found in original proceedings to cause adverse effects, with the *option* either "to remove the adverse effects *or* ... withdraw the subsidy". Thus, as is the case throughout the covered agreements with regard to any WTO-inconsistent measure, withdrawal of the measure (here, an actionable subsidy) constitutes compliance, regardless whether any historically caused effects of the withdrawn measure temporarily linger in the marketplace. In this respect, compliance under the *SCM Agreement* follows the same principles that apply throughout the covered agreements.

4. Whilst in cases of other WTO-inconsistent measures, an adverse impact is *presumed* pursuant to Article 3.8 of the DSU, for adverse effects claims under Part III of the *SCM Agreement*, an alleged adverse effect must be *demonstrated*. In other words, in the context of adverse effects claims, the burden to establish effects in the marketplace is shifted to the complainant. This places an *additional burden on the complainant*, reflecting the fact that, unlike other measures (including a prohibited subsidy), an actionable subsidy is WTO-inconsistent solely if it is demonstrated to cause adverse effects. Thus, unlike a prohibited subsidy, an actionable subsidy is "not prohibited *per se*".[3] These considerations confirm that compliance with adverse effects findings can be achieved *either* by withdrawing the subsidy measure *or* by removing the adverse effects.

5. In contrast, with its interpretation of Article 7.8, the Panel *placed an additional compliance burden on a respondent* found in original proceedings to have granted an actionable subsidy. Under the Panel's interpretation of Article 7.8, respondents face *a unique and exacting compliance obligation* with regard to an actionable subsidy – an obligation that does not attach to *any* other WTO-inconsistent measure, including prohibited subsidies. Under the Panel's interpretation, compliance with recommendations and rulings concerning an actionable subsidy requires removal of any effects temporary lingering in the marketplace, even if the subsidy has already been withdrawn.

6. The Panel arrived at its erroneous interpretation of Article 7.8 not on the basis of the proper application of the *Vienna Convention* rules on treaty interpretation. Rather, the Panel's

[1] Panel Report, paras. 6.803, 6.813, 6.819, 6.822, 6.838, 6.839, 6.840, 6.1078, 6.1100, 6.1101, 6.1102, 7.1(d)(i), 7.1(d)(viii), 7.1(d)(ix).
[2] Panel Report, para. 6.822 (emphasis in original).
[3] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 238 (emphasis in original).

interpretative approach was *explicitly* outcome-determined, namely to "*avoid ... an outcome*"[4] that would, in the Panel's view, make the ruling secured by the United States in the original proceedings "purely declaratory" with respect to an expired subsidy.[5] To "avoid an outcome" it considered undesirable, the Panel developed a contrived interpretation that conflicts not only with the ordinary meaning of the terms used in Article 7.8, but also with the context of the provision, and with the overall object and purpose of the *SCM Agreement*.

7. The Panel recognised that its interpretation is not rooted in the terms of Article 7.8. Instead, the Panel acknowledged that the reference in Article 7.8 to "granting or maintaining" of a subsidy suggests that compliance obligations regarding an actionable subsidy are triggered whenever "an implementing Member *continues* to grant or maintain a subsidy found to have caused adverse effects in an original proceeding".[6] Moreover, the Panel acknowledged that "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".[7] Although the Panel acknowledged that this was the interpretation flowing from the terms "granting or maintaining", it adopted an interpretation unsupported by the terms actually used in Article 7.8, in their context, and according to the object and purpose of the *SCM Agreement*.

8. The Panel's interpretation also reads the option to "withdraw the subsidy" out of the text of Article 7.8. Under the Panel's interpretation, "withdraw{al of} the subsidy" achieves compliance only if doing so *also* succeeds in "remov{ing} the adverse effects".[8] As a result, the Panel's interpretation renders inutile the phrase "withdraw the subsidy" and the conjunction "or" in Article 7.8. Under the Panel's interpretation, there remains only one option to achieve compliance under Article 7.8, namely through removal of the adverse effects. The Panel's interpretation is inconsistent with the plain language of Article 7.8.

9. The Panel's interpretation also runs contrary to the context of Article 7.8, including the most proximate context (*i.e.*, Articles 7.9, 5, and 4.7 of the *SCM Agreement*), the structure and design of the *SCM Agreement*, and the DSU.

10. In assessing context, the Panel began, not with *proximate* context from the *SCM Agreement* itself, but instead from the DSU. The Panel used the DSU not to *support* the meaning flowing from the terms of Article 7.8, but rather to *replace* the terms of Article 7.8 with the terms of Article 5 of the *SCM Agreement*. Specifically, the Panel stated that, under various provisions of the DSU, implementation must "focus on securing *conformity* with the covered agreements".[9] According to the Panel, this meant that a subsidy found to cause adverse effects in original proceedings must be brought into "*conformity with Article 5*" of the *SCM Agreement*.[10]

11. The Panel misconstrued the DSU and its relevance as context. *First*, the Panel ignores that, as set forth in Article 3.7 of the DSU, compliance under the DSU is focused on the *withdrawal* of the WTO-inconsistent measure. Where a WTO-inconsistent measure is withdrawn, the DSU does *not* impose any additional requirement to remove any lingering effects in the marketplace. On the Panel's view, findings in original proceedings are, therefore, always "purely declarative" with respect to temporary lingering *effects* of a WTO-inconsistent measure in the marketplace. This feature of WTO dispute settlement has not stopped WTO Members from challenging WTO-inconsistent measures and seeking their withdrawal, despite the possibility of a temporarily lingering impact of the withdrawn measure on competitive opportunities in the marketplace.

[4] Panel Report, para. 6.819 (emphasis added).
[5] Panel Report, paras. 6.840, 6.1094. *See also Id.*, para. 6.819 ("merely 'declaratory in nature'"); para. 6.830 ("would also render the disciplines of Article 5 completely ineffective").
[6] Panel Report, para. 6.802 (emphasis in original).
[7] Panel Report, para. 6.802 (emphasis in original).
[8] Panel Report, paras. 6.813, 6.819, 6.840, 6.1078, 6.1088, 6.1098, 6.1099.
[9] Panel Report, para. 6.813 (emphasis added).
[10] Panel Report, para. 6.813 (emphasis added).

12. *Second*, the Panel relied on the DSU in a way that deprives Article 7.8 of independent meaning, distinct from Article 5 of the *SCM Agreement*. The Panel erroneously assumed that, with respect to an actionable subsidy in compliance proceedings, "conformity" with the *SCM Agreement* is defined exclusively by reference to Article 5, with Article 7.8 subsumed by and read exclusively through the prism of Article 5. The Panel's assumption is wrong. The Appellate Body has explained that "*Article 7.8 specifies the actions* that the respondent Member must take when a subsidy granted or maintained by that Member is found to have resulted in adverse effects to the interests of another Member".[11] Thus, to achieve compliance, Article 7.8 – and not Article 5 – "specifies the actions that the respondent must take".

13. Turning to Article 5 as context, the Panel did not explicitly rely on the terms of this provision to shed light on the interpretation of Article 7.8. Instead, it turned to the DSU to reach the erroneous conclusion that Article 7.8 must be subsumed by and read exclusively through the prism of Article 5. In so doing, the Panel collapsed the substantive obligations under Article 5 and the implementation obligations under Article 7.8, despite the textual differences between the provisions. Article 5 (like Article 6) is concerned with "*caus{ing}* .... *adverse effects*" through the use of any subsidy. Article 7.8 is formulated differently, and explicitly gives the implementing Member the *option either* to remove adverse effects, *or* to withdraw a subsidy it is granting or maintaining. Thus, contrary to Article 5, Article 7.8 is *not* "*focus{ed}* on the causing of *adverse effects* through the use of any subsidy".[12]

14. The Panel's interpretation of Article 7.8 is also contradicted by context from Article 4.7 of the *SCM Agreement* – the provision setting out the implementation obligation for prohibited subsidy findings. Article 4.7 provides a single implementation option, namely to "withdraw the subsidy". Although the Panel agreed that the terms "withdraw the subsidy" must be given "parallel" and "consistent" meaning under Articles 4.7 and 7.8, its interpretation of Article 7.8 failed to achieve this outcome.[13] Indeed, the Panel's interpretation of Article 7.8 gives the phrase "withdraw the subsidy" a *very different and inconsistent* meaning than the Panel affords the same phrase in Article 4.7, resulting in more demanding compliance obligations for actionable subsidies than for prohibited subsidies. Under the Panel's interpretation, expiry of a subsidy achieves "withdrawal" of that subsidy under Article 4.7.[14] Under Article 7.8, however, expiry of a subsidy does not achieve "withdrawal" of that subsidy, unless expiry also achieves removal of adverse effects.[15]

15. This also shows that the Panel's interpretation of Article 7.8 blurs the line between *prohibited* export subsidies and *actionable* production subsidies, which is, as the Appellate Body explained, contrary to the overall design and structure of the *SCM Agreement*.[16] The interpretive approach taken by the Panel makes compliance with actionable subsidy-related recommendations *more exacting* than compliance with prohibited subsidy-related recommendations under Article 4.7, despite the fact that Article 4.7 relates to subsidies that are *prohibited per se*, while Article 7.8 relates to subsidies that are merely *actionable*, and are "*not prohibited per se*".[17]

16. Finally, the Panel's interpretation of Article 7.8 also frustrates the object and purpose of the *SCM Agreement*, as it ignores the textual flexibility afforded to implement findings regarding actionable subsidies. Under the Panel's interpretation, an *actionable* subsidy would face a unique and exacting compliance obligation, not present with regard to a *prohibited subsidy*, nor with regard to *any other WTO-inconsistent measure disciplined under the covered agreements*. This outcome cannot be reconciled with the object and purpose of the *SCM Agreement*.

17. The European Union notes that the Panel's erroneous interpretation of Article 7.8 directly informed its erroneous refusal to recognise that, with respect to each subsidy withdrawn as a

[11] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 235 (emphasis added).
[12] Appellate Body Report, *EC – Large Civil Aircraft*, para. 712 (emphasis added).
[13] Panel Report, para. 6.1098.
[14] Panel Report, para. 6.1097. *See also Id.*, paras. 6.1085-6.1086.
[15] Panel Report, paras. 6.1086, 6.1098.
[16] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1054 (emphasis in original).
[17] Appellate Body Report, *EC – Large Civil Aircraft*, para. 708.

result of expiry of the life of the subsidy or otherwise, the compliance remedy specified in Article 7.8 had been provided. Consequently, the Panel's erroneous interpretation of Article 7.8 also undermined the Panel's adverse effects-related findings.[18] The European Union also appeals several of these findings directly, on separate and unrelated grounds.

18. If the Appellate Body reverses the Panel's interpretation of Article 7.8 and attempts to complete the analysis, the European Union raises a conditional appeal. Specifically, the Panel erred in its interpretation of Article 7.8 (in conjunction with Article 1.1(a)) when finding that repayment of a financial contribution does not constitute withdrawal of the subsidy.[19]

19. The Panel acknowledged that the full repayment of the principal of a subsidised loan, plus any interest due under the terms of that loan, would "bring about the end of the financial contribution, in the sense that there would be *no longer any financial contribution in existence*".[20] That is, the Panel accepted that, in this scenario, one of the constituent elements of the subsidy (*i.e.*, a financial contribution) is no longer present. At the same time, the Panel found that bringing about the end of the financial contribution does not suffice to bring about the end of, and thus to withdraw, the subsidy.

20. In so finding, the Panel erred in the interpretation of Article 1 and 7.8 of the *SCM Agreement*. Bringing about the end of one of the constituent element of a "subsidy", within the meaning of Article 1, also brings the life of the subsidy to an end, implying that this subsidy is no longer maintained and is, instead, withdrawn, within the meaning of Article 7.8. In the original proceedings, the Appellate Body made an express finding to this effect, when it stated 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".[21]

3 THE PANEL ERRED IN REFUSING TO ASSESS WHETHER THE EUROPEAN UNION HAS ACHIEVED COMPLIANCE IN RESPECT OF THE MÜHLENBERGER LOCH AND BREMEN AIRPORT RUNWAY SUBSIDIES[22]

21. In its Compliance Communication, the European Union indicated that it had adopted "measures taken to comply" ("MTTCs") that resulted in the withdrawal of the subsidies arising under (i) the leases of the land and the special-purpose facilities in the Mühlenberger Loch, and (ii) the take-off and landing fees at Bremen airport. Specifically, the MTTCs aligned the terms of the leases and the take-off and landing fees with relevant market benchmarks.[23] The United States identified these MTTCs in its panel request.[24] Throughout the Panel proceedings, the Parties continued to disagree as to whether the two EU MTTCs had achieved compliance with the recommendations and rulings in the original proceedings,[25] although the United States declined to substantiate its position that they failed to do so.

22. In these circumstances, the matter was properly before the Panel. Moreover, the European Union was entitled to a finding that it had withdrawn the Mühlenberger Loch and Bremen airport runway subsidies, based on the unrefuted *prima facie* showing of withdrawal it had presented. Yet, the Panel refused to make such a finding, based on a series of errors in the interpretation and application of Article 21.5 of the DSU. The Panel also failed to undertake an objective assessment of the matter properly before it, under Article 11 of the DSU.

[18] Panel Report, paras. 6.1451-6.1452, 6.1463, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-(xvii), 7.2.
[19] Panel Report, paras. 6.1072-6.1074.
[20] Panel Report, para. 6.1073 (emphasis added).
[21] Appellate Body Report, *EC – Large Civil Aircraft*, para. 709 (emphasis and underlining added).
[22] Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.
[23] Communication from the European Union to the DSB, 1 December 2011, WT/DS316/17, items 28, 29, p. 4.
[24] US Request for Establishment of a Compliance Panel, WT/DS316/23, paras. 5(j), 6(a), 6(e).
[25] US FWS, paras. 5 and 97, and footnote 13; US SWS, para. 265 and heading 4; US 12 February 2016 Comments on the EU Comments on Interim Panel Report, para. 48.

23. *First*, the Panel erred in its interpretation of Article 21.5 of the DSU, finding that the right of an original respondent to request a determination of compliance is limited to situations in which (i) an original *respondent* initiates an Article 21.5 proceeding; (ii) the original *complainant* refuses to participate in that Article 21.5 proceeding; and, (iii) the original complainant had already *suspended* concessions *vis-à-vis* the original respondent under Article 22 of the DSU.[26]

24. The terms used in Article 21.5 do not support such an interpretation. The "disagreement" to be resolved in compliance proceedings under Article 21.5 of the DSU relates "to the existence or consistency with a covered agreement of measures taken to comply". Such a disagreement may arise – and indeed regularly arises in Article 21.5 compliance proceedings – *before* concessions are suspended under Article 22.

25. The Panel's interpretation is also inconsistent with the object of "prompt settlement" reflected in Article 3.3 of the DSU, and that of "prompt compliance" set out in Article 21.1 of the DSU. Contrary to these objectives, the Panel's interpretation prolongs the dispute and forces the original respondent to endure suspension of concessions, an "abnormal state of affairs",[27] before it can seek recourse to Article 21.5. Such an interpretation also disturbs the "proper balance between the rights and obligations of Members" that the dispute settlement system is tasked with preserving.[28]

26. *Second*, the Panel erred in the application of Article 21.5 of the DSU, in finding that a "disagreement" did not exist between the Parties in respect of the two MTTCs at issue.[29] According to the Appellate Body, a "disagreement" under Article 21.5 "arises from the existence of conflicting views: the original complainant's view that such a measure is inconsistent with the WTO agreements or brings about only partial compliance, and the original respondent's view that a measure is consistent with the WTO agreements and brings about full compliance with the DSB's recommendations and rulings".[30] The Parties repeatedly expressed "conflicting views" on the effectiveness of the two MTTCs in securing withdrawal of the Mühlenberger Loch and Bremen airport runway subsidies. In particular, while the United States refused to *substantiate* its view that compliance was not achieved with the two EU MTTCs, it nonetheless maintained that view throughout the Panel proceedings, and did not accept that, on the facts, the alignment with market benchmarks achieved withdrawal of the subsidies. The Panel erred in mistaking the US *refusal to substantiate* its views, for a *lack of disagreement* between the Parties.

27. *Third*, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.

28. In original proceedings, where complainant alone enjoys the right to place a matter before the panel and to seek findings, a panel may forego findings on a claim abandoned by the complainant. Being the sole holder of the right to seek findings in an original proceeding, the complainant is at liberty to waive that right. In contrast, in compliance proceedings, the original complainant no longer enjoys the *sole* right to place matters before a panel and seek adjudication in the form of panel findings and conclusions regarding the adequacy of the responding Member's compliance efforts. Instead, as the Appellate Body has clarified, "either party to the original dispute may initiate the proceedings".[31] This principle reflects the fact that both parties have a shared interest in the resolution of disagreements concerning compliance.

29. Accordingly, in compliance proceedings, even if the original complainant waives its own right to adjudication of a particular matter properly placed before a compliance panel, that waiver does not prejudice the *original respondent's right* to have the same matter adjudicated. In the present dispute, the Panel improperly "declined to exercise validly established jurisdiction and

[26] Panel Report, para. 5.77.

[27] Appellate Body Report, *US – Continued Suspension*, para. 310; Appellate Body Report, *Canada – Continued Suspension*, para. 310.

[28] Article 3.3 of the DSU.

[29] Panel Report, paras. 5.76-5.78.

[30] Appellate Body Report, *US – Continued Suspension*, para. 347; Appellate Body Report, *Canada – Continued Suspension*, para. 347.

[31] Appellate Body Report, *US – Continued Suspension*, para. 347; Appellate Body Report, *Canada – Continued Suspension*, para. 347.

abstained from making any finding on the matter before it",[32] despite the European Union's express request to the contrary, and in so doing failed to make an objective assessment of a matter properly before it.

30. The European Union requests the Appellate Body to complete the analysis and find, based on unrefuted evidence in the record, that the European Union has achieved withdrawal of the Mühlenberger Loch and Bremen airport runway subsidies.

4 THE PANEL ERRED IN DETERMINING THE CORPORATE BORROWING RATE COMPONENT OF THE MARKET BENCHMARK FOR A350XWB LA/MSF[33]

31. To determine whether LA/MSF for the A350XWB confers a "benefit", the Panel adopted a benchmark rate of return comprised of two components: (i) a corporate borrowing rate, plus (ii) a project risk premium. This appeal concerns the first component of the benchmark, whereas the appeal in Section 5 , below, concerns the second component.

32. With respect to the corporate borrowing rate component of the benchmark, the Panel erred in identifying the benchmark as "the average yields {on an EADS bond} one-month prior and six-months prior to the conclusion of the contract, in the form of a range".[34] In selecting a *range* of *average* yields, instead of adopting the yield on <u>the day of conclusion</u> of each contract,[35] the Panel erred in the application of Article 1.1(b), and separately failed to make an objective assessment of the matter, under Article 11 of the DSU.

33. The Panel began by correctly identifying the legal standard under Article 1.1(b) of the *SCM Agreement*. As noted by the Appellate Body, borrowing costs "should be observed *at the time* that each particular contract was *concluded*",[36] which requires that "the assessment *focuses on the moment in time when the lender and borrower commit to the transaction*".[37]

34. The Panel's first error arose in its application of this standard to the facts at hand. Specifically, the Panel rejected the use of actual data pertaining to the yield <u>*at* the time</u> each contract was concluded (*i.e.*, on the day of conclusion of each contract), which was "the moment in time when the lender and borrower committ{ed} to the transaction". The Panel replaced the yield at the time each contract was concluded with a *range* based on the *average* yields one- and six-months <u>*prior* to the time</u> each contract was concluded. By using a range of *average* yields, the Panel's approach risks artificially increasing or lowering the market borrowing rate, creating the danger of false positive or false negative findings of subsidisation.

35. In a second error, the Panel rejected the yield on the day of conclusion of each contract without a sufficient evidentiary basis to do so, in contravention of Article 11 of the DSU. The Panel's justification for rejecting the yield on the day of conclusion of each contract was the possibility that the rate "*may* reflect atypical fluctuations".[38] However, undisputed evidence before the Panel demonstrated that no such distortion existed.[39]

36. In light of the demonstrated downward trend in yields during the period leading up to the conclusion of the contracts, the Panel's selection of a range of *average* yields <u>prior</u> to – instead of <u>at the time</u> of – conclusion of each contract, could have but one result, of which the Panel must surely have been aware: an *artificial increase* in the benchmark. These circumstances suggest a lack of objectivity and even-handedness on the part of the Panel in its identification of the corporate borrowing rate element of the benchmark.

37. Should the Appellate Body disagree with the EU's main argument regarding these two errors, the European Union appeals the Panel's erroneous inclusion, within its range of average yields,

[32] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 51.
[33] Panel Report, paras. 6.389, 6.430 (Table 7), 6.632 (Table 10).
[34] Panel Report, para. 6.389.
[35] Panel Report, paras. 6.389, 6.430 (Table 7), 6.632 (Table 10).
[36] Panel Report, para. 6.385 (emphasis added).
[37] Panel Report, para. 6.388 (emphasis added), referring to Appellate Body Report, *EC – Large Civil Aircraft*, paras. 706, 825-836.
[38] Panel Report, para. 6.389 (emphasis added).
[39] Panel Report, para. 6.382 (Table 6).

of the six-month average yield on the relevant EADS bond. In so doing, the Panel erred in the application of Article 1.1(b) of the *SCM Agreement*, and separately failed to make an objective assessment of the matter, under Article 11 of the DSU.[40]

38. *First*, the six-month average yield does not reflect the yield "*at the time* that each particular contract was *concluded*",[41] and does not "focus{} on the moment in time when the lender and borrower *commit to the transaction*".[42] Indeed, the Panel itself found that the six-month average was "*less likely to reflect* expectations during the finalisation period" of each contract than the one-month average.[43] Including the six-month average yield within the range, therefore, amounts to error in the application of Article 1.1(b).

39. *Second*, the Panel failed to provide any explanation, let alone a reasoned and adequate explanation, for its decision to adopt a range of values that includes the six-month average, when – according to the Panel itself[44] – the other part of the range consisted of a more appropriate proxy (*i.e.*, the one-month average). The Panel's reasoning is also internally inconsistent. On the one hand, the Panel criticised the use of an average yield over seven months, due to the *possibility* that such an approach *could* result in an "artificially" lower (or higher) market borrowing rate, and therefore *could* result in a "misplaced" finding of subsidisation (or of no subsidisation).[45] On the other hand, the Panel adopted a six-month average yield as one element of the range used for this component of the benchmark, even though the six-month average *demonstrably resulted in* an "artificial" increase of the market borrowing rate, and a heightened risk of "misplaced" findings of subsidisation. For these reasons, the Panel failed to make an objective assessment of the matter, under Article 11.

40. When the Panel's erroneous selection of the corporate borrowing rate is corrected, based either on the EU's main appeal argument or on its alternative appeal arguments, the Panel's "benefit" findings become more sensitive to the correct identification of the second component of the market benchmark, *i.e.*, the risk premium. The European Union summarises its appeal of the Panel's identification of the project risk premium component of the benchmark in the next Section.

5 THE PANEL ERRED IN USING THE PROJECT-SPECIFIC RISK PREMIUM FOR ASSESSING THE "BENEFIT" FROM A380 LA/MSF AS THE PROJECT RISK PREMIUM FOR A350XWB LA/MSF[46]

41. In addition to identifying the wrong corporate borrowing rate component of the benchmark, the Panel also erred in identifying the second component of the benchmark for A350XWB LA/MSF, *i.e.*, the project risk premium, and, consequently, erred in finding a "benefit" from A350XWB LA/MSF.

42. The Panel's "benefit" findings, as illustrated in Table 10 of its Report, are *highly dependent on precision and accuracy* in the benchmarking exercise, with a *small* change in the project risk premium potentially changing the results, from a finding that a particular LA/MSF loan constitutes a subsidy, to a finding that it does not. However, the project risk premium chosen by the Panel did not result from a precise and accurate benchmarking exercise that was tailored to the A350XWB project risks assumed by the LA/MSF lenders, under the terms of each of the four LA/MSF contracts.

43. Instead, for all four A350XWB LA/MSF contracts, the Panel selected a single, undifferentiated risk premium, which was developed, in the original proceedings, for a *different project*, *i.e.*, the A380, launched at a *different moment in time*, and implicating *different risks*. That is, to benchmark the four A350XWB LA/MSF contracts, the Panel applied the risk premium developed to benchmark *another* aircraft project – the A380 – and another set of LA/MSF

[40] Panel Report, paras. 6.389, 6.430 (Table 7), 6.632 (Table 10).
[41] Panel Report, para. 6.385 (emphasis added).
[42] Panel Report, para. 6.388 (emphasis added).
[43] Panel Report, para. 6.389 (emphasis added).
[44] Panel Report, para. 6.389.
[45] Panel Report, para. 6.385.
[46] Panel Report, paras. 6.1210, 6.1211, 6.1236, 6.1280, 6.1289, 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 7.1(d)(xi), 7.1(d)(xiv), 7.1(d)(xv), 7.1(d)(xvi), 7.1(d)(xvii).

contracts. The Panel did so without making any adjustments to the benchmark, *despite* its acknowledgement of differences in risks as between the A380 project and the A350XWB project, and differences in risks as between the four A350XWB LA/MSF contracts.

44. The approach taken by the compliance Panel is particularly surprising, in light of the concerns expressed by the original panel about this *very same* approach. The original panel expressed significant concern about the use of a single, *undifferentiated* project risk premium across LCA programmes receiving LA/MSF, precisely because such an approach ignores the *differentiated* risks borne by lenders for each specific LCA programme, and in each specific LA/MSF contract.[47] The Appellate Body echoed this concern, adding that it was "the Panel's duty to assess, based on the evidence on record, whether the application of a *constant project risk premium* was the most appropriate approach and, to the extent that it was not, to *consider alternative approaches*".[48]

45. Accordingly, the compliance Panel should have required the United States to establish the project risk premium based on the risks associated *with the A350XWB project itself*, and in light of *the terms of each specific LA/MSF contract*. Instead, the Panel acquiesced in the United States' approach, which purported to establish the existence of a "benefit" on the basis of a single, undifferentiated project risk premium applied across two distinct LCA programmes, launched *six years* apart, and eight distinct LA/MSF contracts, concluded over a period of *10 years*.

46. The degree to which this approach required the Panel to gloss over differences between the two distinct LCA programmes and the eight distinct LA/MSF contracts is astonishing, and is particularly glaring in light, once again, of the conceit of precision reflected in the benchmarking results tabulated in the Panel's Table 10. Even with the use of a single, undifferentiated project risk premium, to which the Panel made no adjustment whatsoever to account for differences in the risk profiles of eight LA/MSF contracts concluded at different points in time over a *ten-year* period, to finance the development of two distinct aircraft launched *six years* apart, the Panel's Table 10 results in nothing more than small "benefits". Those findings are sensitive to small changes in the project risk premium, and potential changes in the result, from a finding that a particular LA/MSF loan constitutes a subsidy, to a finding that it does not.

47. In reaching its "benefit" findings, the Panel committed three sets of errors.

5.1 The Panel failed to establish a project-specific risk premium for A350XWB LA/MSF based on the risks associated with the A350XWB programme[49]

48. The Panel failed to establish a project-specific risk premium for A350XWB LA/MSF based on the risks associated with the A350XWB programme, and therefore erred in the application of Article 1.1(b) of the *SCM Agreement*. For distinct reasons, the Panel's approach also constitutes error under Article 11 of the DSU.

49. Beginning with the Panel's error in the application of Article 1.1(b), the Appellate Body has explained that a benchmark loan must be identified through "a *progressive search*", which must *begin* by assessing the commercial loan that shares "as many elements as possible in common with the investigated loan", *before* progressing to less similar commercial loans.[50] The Panel failed to undertake a "*progressive search*" for and to adopt the benchmark that shared "as many elements as possible in common with" the A350XWB LA/MSF loans, and that was most closely tailored to the risks associated with the A350XWB programme.[51] In fact, the Panel did not engage in *any* search, progressive or otherwise, to identify the project risk premium. The Panel failed to do so despite the fact that it was well aware that there was a

[47] *See* Appellate Body Report, *EC – Large Civil Aircraft*, para. 870 (summary by the Appellate Body of the major concerns expressed by the original panel).

[48] Appellate Body Report, *EC – Large Civil Aircraft*, para. 883 (emphasis added).

[49] Panel Report, paras. 6.608, 6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 7.1(c)(i), 7.1(d)(xiv), 7.1(d)(xv), 7.1(d)(xvii).

[50] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486.

[51] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 476, 486 (emphasis added). *See also* Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345.

more appropriate benchmark that was more closely tailored to the risks associated with the A350XWB programme – that is, A350XWB risk-sharing supplier ("RSS") contracts. The Panel made other findings relating to RSS contracts for the A350XWB, demonstrating that it knew of their existence. Moreover, the Panel evidently thought RSS financing was an appropriate benchmark, because RSS contracts for the A380 served as the basis for the A380 project risk premium that the Panel ultimately applied.

50. The Appellate Body has further explained that, when resort to a less similar commercial loan to serve as the benchmark is necessary, *adjustments* must be made to ensure comparability with the investigated loan.[52] The Panel failed to make *any adjustments* to the project risk premium developed for the A380 project, despite the Panel's own findings of differences in risk between the A380 project and the A350XWB project.

51. The Panel's approach also constitutes error under Article 11 of the DSU. Paraphrasing the Appellate Body's guidance from the original proceedings, the compliance Panel did *not* assess "whether the application of a{n A380-based} constant project risk premium {as suggested by the United States} was *the most appropriate approach* and, to the extent that it was not, *to consider alternative approaches*"[53]. Further, by inappropriately deviating from the approach taken by the original panel in this regard, the compliance Panel committed another, separate error under Article 11.

5.2 The Panel failed to establish similarity between (i) the risks involved in the A350XWB project and the A350XWB LA/MSF contracts, and (ii) the risks involved in the A380 project and the A380 LA/MSF contracts, and therefore failed to make an objective assessment of the matter[54]

52. The Panel erroneously found that the project risk premium developed for the A380 project is a suitable benchmark for the A350XWB project, on the basis that the risks posed by the A380 and the A350XWB projects were purportedly similar. However, the Panel's finding that the risks posed by the A380 and the A350XWB projects are similar is *not* based on an objective assessment of the matter, as required under Article 11 of the DSU.

53. The Panel's errors relate to its assessment of each of the three aspects of risk considered relevant by the Panel to assess the similarity of the risk profiles of, respectively, the A380 and A350XWB projects.

5.2.1 Price of risk

54. The Panel found that the United States did not demonstrate the similarity of the *price of risk* at the time of the provision of A380 and A350XWB LA/MSF. As a result, the Panel's conclusion that the risks (including the price of risk) of providing financing for the A380 project are sufficiently similar to the risks of providing financing for the A350XWB project, is self-evidently based on inconsistent reasoning and lacks sufficient evidentiary support.

5.2.2 Programme risk

55. The Panel next addressed *programme risk*, which consists of "development" risk and "market" risk. From its finding that the A380 and A350XWB projects gave rise to *different* programme risks, the Panel erroneously concluded that the projects bore *similar* programme risks. The leap from "different" to "similar" programme risks was erroneous, because it was based on insufficient support in the evidence, and was additionally not accompanied by a reasoned and adequate explanation. More specifically, the Panel failed to reduce the differences in programme risk to common terms that are relevant under Article 1.1(b), and that allow for the comparison necessary to determine similarity. That is, the Panel failed to express the differences in programme risks between the A380 and the A350XWB projects in terms of the *impact* each project's programme risks had *on the market price* that would be demanded by a market lender as a risk premium to bear those risks.

[52] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486.
[53] Appellate Body Report, *EC – Large Civil Aircraft*, para. 883 (emphasis added).
[54] Panel Report, paras. 6.487, 6.492, 6.527, 6.539, 6.542, 6.579, 6.595, 6.608, 6.609, 6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 7.1(c)(i), 7.1(d)(xiv), 7.1(d)(xv), 7.1(d)(xvii).

56. The Panel's also erred under Article 11 of the DSU in assessing the respective development risks faced by each project. *First*, the Panel failed to account for differences in the mitigation of development risks as between the A350XWB and the A380 projects. Specifically, to find similarity between the development risks of each project, the Panel was forced to ignore its own findings that, at the time the A350XWB contracts were signed, the development risk of the A350XWB project was already mitigated to some extent, whereas the development risk of the A380 was not. *Second*, the Panel made inconsistent findings in assessing the questions of "benefit" and "adverse effects" from LA/MSF for the A350XWB, suggesting a lack of even-handedness. Specifically, in its "benefit" assessment, the Panel emphasised the *novelty* of the A350XWB project (which facilitated its "benefit" findings), whereas, in its assessment of the "effects of the subsidies", the Panel emphasised the *continuity* of the A350XWB project in light of the A380 project (which facilitated its "adverse effects" findings). The Panel did not explain the reason for this disparate treatment of the evidence.

5.2.3 Contract risk

57. Finally, as regards *contract risk*, the Panel failed properly to compare the terms of the A350XWB contracts to those of the A380 contracts. For several reasons, the Panel's comparison between the A350XWB and A380 LA/MSF contracts lacks a sufficient evidentiary basis.

58. *First*, the Panel's finding of similarity in risk-reducing terms between certain A380 LA/MSF and A350XWB LA/MSF contracts is contradicted by the undisputed fact that the risk-reducing terms in certain A350XWB LA/MSF contracts were *more extensive* than in any of the A380 LA/MSF contracts. *Second*, the undisputed evidence shows that *more* A350XWB LA/MSF *contracts* contained certain risk-reducing terms than was the case in the A380 LA/MSF contracts. *Third*, and finally, undisputed evidence shows that risk-reducing terms in the A350XWB LA/MSF contracts are *more consequential* than risk-reducing terms in the A380 LA/MSF contracts, given that, according to the Panel, the A350XWB project would be exposed to a slightly higher development risk than the A380 project.

59. Additionally, and again with regard to contract risks, the Panel failed entirely to compare the terms of the A350XWB LA/MSF contracts to those of the RSS contracts for the A380, which were used in the original proceedings to derive the project risk premium for the A380 LA/MSF contracts. The reason is simple: the A380 RSS contracts do not form part of the record. Without a proper examination of the terms of the A380 RSS contracts, the Panel could not know whether the terms of the A350XWB LA/MSF contracts are *dis*similar to the terms of the A380 RSS contracts.

5.3 The Panel erroneously adopted a single project risk premium to benchmark all four of the A350XWB LA/MSF loans[55]

60. The Panel erroneously found that a single project risk premium could be applied as a benchmark for each of the four distinct LA/MSF contracts for the A350XWB. This constitutes error in the application of Article 1.1(b) of the *SCM Agreement*. The Panel's own factual findings reveal that there are important differences in the terms of the four loans that affect the risk profile – and hence the market price – of each loan. However, in selecting a single, undifferentiated project risk premium, the Panel failed to consider, let alone adjust for, these differences.

61. The Panel also failed to make an objective assessment of the matter, under Article 11 of the DSU. Specifically, the Panel took inconsistent approaches to the identification of the corporate borrowing rate component of its benchmark, and the project risk premium component of that benchmark. Purportedly to avoid the risk of producing false positive or false negative subsidy findings, the differences in timing between the conclusion of the various LA/MSF contracts prompted the Panel to adopt a different corporate borrowing rate for each of the four A350XWB LA/MSF contracts.[56] On the other hand, as regards the project risk premium component of its benchmark, differences between the four A350XWB LA/MSF contracts did *not*

[55] Panel Report, paras. 6.607, 6.608, 6.609, 6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 7.1(c)(i), 7.1(d)(xiv), 7.1(d)(xv), 7.1(d)(xvii).

[56] Panel Report, paras. 6.385-6.388.

prompt the Panel to adopt a different risk premium for each contract, despite a similar risk of producing false subsidy findings.

6 THE PANEL ERRED IN ITS IDENTIFICATION OF THE APPROPRIATE PRODUCT MARKETS[57]

62. The European Union appeals the Panel's finding, in paragraph 6.1411 of the Panel Report, 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.

63. This finding rests on several errors in the interpretation and application of Articles 5 and 6.3 of the *SCM Agreement*; separately, the Panel also failed to make an objective assessment of the matter, under Article 11 of the DSU.

64. *First*, the Panel erred in interpreting the term "market" in Article 6.3 to require the placement of two products in the same product market based solely on the existence of competition between those products, without regard to the nature or degree of the competitive relationship. In other words, the Panel held that, for two products to be in the same product market, it is not necessary "that they impose 'significant competitive constraints' on each other or that those products are 'closely competitive'".[58] This interpretation undermines the very concept of a "market" as envisaged in Article 6.3 of the *SCM Agreement*, and constitutes interpretative error. That interpretative error also undermines the Panel's identification of the relevant product markets, and the adverse effects findings based thereon.

65. As the Appellate Body explained in *US – Upland Cotton*, the ordinary meaning of the word "market" is "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices".[59] The Appellate Body also clarified, in the original proceedings in this dispute, that "the scope of the relevant product market in any given case will depend on the *nature and degree of competition* between the products of the complaining Member and the allegedly subsidized products of the responding Member".[60] It would be erroneous to group products into the same product market based solely on the *existence* of competition between them, without consideration of the "nature and degree" of the competitive relationship.

66. In the original proceedings, the Appellate Body referred to the "small but significant and non-transitory increase in prices" or "SSNIP" test to locate the proper balance, in the product market definition, between the complete absence of competitive constraints (or substitutability), on the one hand, and perfect substitutability, on the other.[61] This conceptual tool underscores the proposition that the mere existence of competition between two products is insufficient to group them into the same product market. Instead, two products may properly be placed in the same market where the "nature and degree of competition" between the products reveals that they exercise "*significant competitive constraints*" on one another. While circumstances may undermine the ability to apply the SSNIP test in a given case, the Appellate Body's choice of this conceptual tool supports the proposition that product markets should be defined on the basis of "significant competitive constraints", and not merely the existence of competition.

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[57] Panel Report, paras. 6.1210, 6.1211, 6.1236, 6.1280, 6.1289, 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 7.1(d)(xi).

[58] Panel Report, para. 6.1211.

[59] Appellate Body Report, *US – Upland Cotton*, para. 408.

[60] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1123.

[61] Appellate Body Report, *EC – Large Civil Aircraft*, footnote 2468, *citing* M. Motta, *Competition Policy: Theory and Practice*, pp. 102, 103.

67. The Panel's approach to identifying product markets based on the mere existence of competition would produce unworkable product market definitions that make identifying the effects of subsidies virtually impossible, thereby undermining the utility of the very exercise of demarcating product markets for purposes of a serious prejudice assessment. For example, under the Panel's product market standard, a product market could readily be composed of, for example, small regional aircraft, large regional aircraft, single-aisle aircraft, twin-aisle aircraft, very large aircraft, and may even include other means of transport.

68. *Second*, should the Appellate Body find that the Panel did *not* err in its interpretation of the term "market" in Article 6.3, and instead agree that two products belong in the same product market as long as competition exists between those products (regardless of the nature or degree of that competitive relationship), the Panel failed in its application of Articles 5(c) and 6.3 to the facts at hand.[62] Specifically, on the facts, the Panel's product market standard should have led inexorably to the conclusion that *all* LCA fall in the same *single* product market. The Panel's factual findings reveal that competition exists *across the product spectrum* covered by the US challenge, such that application of the Panel's own standard should have led it to find a single product market. In fact, in concluding its finding on product markets, the Panel emphasised that "important competitive relationships may also exist between pairings or combinations of aircraft *across* two, or even all three, of the product markets".[63] Thus, even assuming that the legal standard identified by the Panel was correct, *quod non*, the Panel erred in the application of that standard. This error undermines the Panel's identification of the relevant product markets, and the adverse effects findings based thereon.

69. *Third*, and finally, the Panel's failure to test its erroneous product market standard against the competitive dynamics between products that the United States alleged to fall in different product markets constitutes a failure, under Article 11 of the DSU, to make an objective assessment of the matter.[64] The Panel confined its analysis to an enquiry whether there existed some competitive relationship between the aircraft placed by the United States *within* each of the three product markets it alleged, without also enquiring whether there existed a competitive relationship between aircraft that the United States placed into *separate* product markets. For instance, on the sole basis that the United States alleged them to be in different product markets, the Panel neglected altogether to examine whether the A321neo exerts competitive constraints on the 767, or whether the 777-300ER or the A350XWB-1000 exert competitive constraints on the 747-8. In so doing, just as in the original proceedings, the compliance Panel took an undiscerning approach to identifying the product markets, uncritically accepting the markets proposed by the United States.

70. In these circumstances, the European Union requests the Appellate Body to reverse the Panel's product market findings. Having erred in the identification of the product markets at issue, these findings must be reversed, and with them the findings of displacement, impedance and significant lost sales that the Panel made on the basis of its erroneously identified product markets.

7 NON-SUBSIDIZED LIKE PRODUCT[65]

71. The Panel erred in the section of its report that deals with the subsidization of the like product. The Panel should have made an objective assessment of the US claim and the EU arguments under Articles 6.3(b) and 6.4, taking into account the facts and evidence submitted by the parties, and taking into account the Appellate Body's guidance that Article 6.4 provides context for the interpretation and application of Article 6.3(b). The Panel should have assessed not only the EU argument that any subsidization of the like product precludes or defeats the US claim (the original "clean hands" argument) but also the novel interpretative proposition advanced by the EU to the effect that the compliance Panel was bound to take such subsidization into account in its assessment of causation (the "causation" argument). The

[62] Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 7.1(d)(xi).
[63] Panel Report, para. 6.1416.
[64] Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 7.1(d)(xi).
[65] Panel Report, paras. 6.1125-6.1138, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii), 7.2.

Panel was also bound to take into account the multilateral determination in DS353 that Boeing LCA are subsidized to the tune of several billion dollars.

72. Thus, the Panel erred in stating that the EU arguments were "essentially the same" as in the original proceedings, and erred in reducing the matter to two questions: whether or not there was a new matter; and whether or not there were cogent reasons. The Panel further erred in its assessment of whether or not there was a new matter, because it failed to take into account changes in the law and facts, erred in the interpretation of the term "matter" in Article 11 of the DSU, and failed to make an objective assessment. The Panel also erred in its assessment of whether or not there were cogent reasons, including by failing to make an objective assessment under Article 11 of the DSU.

73. Accordingly, the European Union requests the Appellate Body to reverse the Panel's findings that relate to or rely on its findings with respect to the subsidized like product, and complete the legal analysis with respect to the interpretation of Articles 6.3(b) and 6.4. The European Union further submits that the Appellate Body cannot complete the analysis with respect to the US claims of displacement or impedance. The European Union also asks the Appellate Body to take these matters into account when considering and reversing other aspects of the Panel's findings under Article 6, and specifically Articles 6.3(a) and 6.3(c).

8 THE PANEL ERRED IN FINDING THAT THE LA/MSF LOANS ARE A GENUINE AND SUBSTANTIAL CAUSE OF ADVERSE EFFECTS RELATED TO AIRBUS' A320, A330, A380 AND A350XWB FAMILIES OF LCA[66]

74. The European Union appeals several errors in the Panel's causation-related findings.

75. *First*, the Panel erred in finding that, despite the passage of time and events that occurred during that time, "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".[67] This finding is based on a "but for" approach to causation that, in the circumstances of the present dispute, was incapable of taking into account the passage of time, and events that occurred during that time, including the expiry of most of the pre-A350XWB subsidies, resulting in error in the interpretation of Article 5(c) of the *SCM Agreement*.

76. The Panel acknowledged the Appellate Body's guidance on the relevance of the passage of time and events that occurred during that time – in particular, that the effect of any subsidy must "diminish{} and eventually come to an end".[68] However, under the Panel's approach to causation, adverse effects continue to be attributable to the subsidy for as long as the subsidised product exists (as well as any subsequent products manifesting "learning", "scope" or "financial" effects from the subsidised product), since the subsidy will continue to be the necessary "but for" cause of its market presence. This enquiry was, therefore, ill-suited and insufficient to determine whether, at present, and taking into account the passage of time and events that occurred over that time, including the expiry of the subsidies and massive non-subsidised investments by Airbus, the subsidies continue to be a "genuine and substantial" cause of adverse effects.

77. The Panel's "but for" approach to causation, coupled with its approach to the interpretation of Article 7.8, created an anomalous situation in which it is nearly impossible for a Member to bring itself into compliance with the recommendations and rulings of the DSB in relation to an actionable subsidy. Under the Panel's approach to Article 7.8, compliance cannot be achieved through withdrawal of the subsidy, though expressly recognised as an option to achieve compliance, unless accompanied by the removal of adverse effects. And under the Panel's "but for" approach, the finding from the original proceedings that the subsidies were historically a "necessary" cause of adverse effects is extended indefinitely, meaning that the causal link to alleged adverse effects does not "diminish{} and eventually come to an end".

[66] Panel Report, paras. 6.1515, 6.1527, 6.1534, 6.1774, 7.1(d)(xii)-7.1(d)(xiii).
[67] Panel Report, para. 6.1534.
[68] Panel Report, para. 6.1487, *quoting* Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1236-1238.

78. Additionally, the European Union appeals the Panel's error in the application of Article 5(c) and 7.8 of the *SCM Agreement*, by failing to examine whether Airbus' non-subsidised investments diluted the causal link between the subsidies and the alleged adverse effects related to Airbus' A320 and A330 families of LCA, such that the subsidies are no longer a "genuine and substantial" cause of present adverse effects.[69] Having determined that the subsidies were the historical "necessary" cause of the market presence of these aircraft, the Panel outright precluded the possibility that these investments could ever have an impact on the existence of a "genuine and substantial" *present* causal link. To the Panel, the non-subsidised post-launch investments were merely evidence that the adverse effects of the subsidies persisted, because "but for" the subsidies, the programmes into which the non-subsidised investments were made would not have existed in the first place.[70]

79. *Second*, the Panel may have implied that LA/MSF for the A380 resulted in "direct effects".[71] To the extent the Panel did make such a finding, it constitutes error under Article 11 of the DSU. The Panel defined the term "direct effects" as "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".[72] Having (i) expressly found that A380 LA/MSF was "not critical to {the} very existence" of the A380,[73] and (ii) not having found that absent A380 LA/MSF, Airbus would have delayed the launch of the A380, or that the A380 would have been any different in technology, the Panel lacked an evidentiary basis to find that LA/MSF for the A380 resulted in "direct effects".

80. *Third*, in attributing the market presence of the A350XWB to LA/MSF, the Panel erred in the application of Article 5, and under Article 11 of the DSU. Specifically, the Panel appears to have attributed the market presence of the A350XWB to "indirect effects" of LA/MSF for previous aircraft, including LA/MSF for the A380.[74] Moreover, certain of the Panel's statements could be read to imply that the market presence of the A350XWB is attributable to "direct effects" of LA/MSF for the A350XWB.[75]

81. The Panel's attribution of the market presence of the A350XWB to the "indirect effects" of the LA/MSF for the A380 constitutes error in the application of Article 5(c). The Panel's finding that A380 LA/MSF was "not critical to {the} very existence"[76] of the A380 precludes a finding of "direct effects" from that subsidy on the existence of the A380. In these circumstances, any "learning effects", "scope and scale effects" or "financial effects" for the A350XWB associated with the A380 would have existed even absent A380 LA/MSF, and are not attributable to those loans. Thus, as A380 LA/MSF did not result in "direct effects" for the A380, those loans were logically incapable of resulting in "indirect effects" on later LCA such as the A350XWB. Yet, the Panel appears to have erroneously included A380 LA/MSF in the aggregated group of subsidies that had "indirect effects" on the launch and market presence of the A350XWB.[77]

82. To the extent that the Panel attributed the market presence of the A350XWB to "direct effects" from LA/MSF for the A350XWB, the Panel's finding rests on its assertion that "*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".[78] This single sentence – which is, incredibly, the concluding sentence in the concluding paragraph of a 182-paragraph section of the Panel Report dedicated to assessing the effects of A350XWB LA/MSF – is the sole basis on which the Panel appears to have found "direct effects" from A350XWB LA/MSF on the launch and market presence of the A350XWB.

[69] Panel Report, paras. 6.1527, 6.1534, 6.1774, 7.1(d)(xii)-7.1(d)(xiii).
[70] Panel Report, para. 6.1525.
[71] Panel Report, para. 6.1507.
[72] Panel Report, para. 6.1492.
[73] Panel Report, para. 6.1507 and footnote 2597.
[74] Panel Report, paras. 6.1747, 6.1771, 6.1773, 7.1(d)(xiii).
[75] Panel Report, paras. 6.1717, 7.1(d)(xiii).
[76] Panel Report, para. 6.1507 and footnote 2597.
[77] Panel Report, paras. 6.1771, 6.1773, 7.1(d)(xiii).
[78] Panel Report, paras. 6.1717, 7.1(d)(xiii).

83. The Panel's assertion that, without A350XWB LA/MSF, there was a "high likelihood" that Airbus would have had to "make certain compromises" to the timing and features of the aircraft, enjoys no support whatsoever in the 182-paragraph section of the Panel Report dedicated to assessing the effects of A350XWB LA/MSF. Indeed, the Panel does not cite a single piece of evidence to support such a finding; nor does it otherwise provide reasoning in support of any such finding. In fact, the Panel's speculation is *contradicted by* a number of its own factual findings, which collectively demonstrate that Airbus would not have made compromises on the timing or features of the A350XWB.[79] Thus, the Panel's finding of "direct effects" for the A350XWB constitutes error under Article 11 of the DSU.

84. *Fourth*, and finally, the Panel erred in its application of the requirement that there be a "genuine and substantial" causal link, under Article 5(c) and 6.3 of the *SCM Agreement* by failing to account for, in its causation analysis, the differences in the degree of competition between pairings of aircraft, and market-specific and sale-specific non-attribution factors.[80]

85. The Panel clarified that "it {was} *not* {the Panel's} view that the degree of competition existing within each of {the} markets will be identical between all pairings or combinations of aircraft".[81] The Panel also acknowledged that "where the evidence shows that the competitive relationship {between two products} is not direct and 'at most, indirect or remote', *this must be properly taken into account in the {subsequent adverse effects} analysis*".[82] Yet, the Panel failed to account for the differences in the degree of competition between relevant LCA in assessing the US claims of displacement, impedance and lost sales.

86. Similarly, in the context of displacement, impedance and lost sales, the Panel failed to account for the market-specific and sale-specific non-attribution factors that the European Union demonstrated as causing (or contributing to) the observed market phenomena. Having determined that, historically, the LA/MSF subsidies were the "necessary" cause of the market presence of certain Airbus aircraft, the Panel posited that any further discussion of non-attribution factors was "obviously" irrelevant.[83] In so doing, the Panel erred in its application of the requirement that there be a "genuine and substantial" causal link, under Article 5(c) and 6.3 of the *SCM Agreement*

9 THE PANEL ERRED IN FINDING "DISPLACEMENT AND/OR IMPEDANCE" IN VARIOUS COUNTRY AND PRODUCT MARKETS[84]

87. The Panel's findings of "displacement and/or impedance" rest on three sets of errors.

88. *First*, the Panel made undifferentiated findings of "displacement *and/or* impedance" with respect to each of the country and product markets at issue, without clarifying whether it had found, for a particular country and product market, *both* displacement and impedance, or instead *one or the other* of these two distinct forms of adverse effects. Articles 6.3(a) and 6.3(b) employ the words "displace" and "impede", separated by the conjunction "or", which confirms that displacement and impedance are two distinct forms of serious prejudice. Indeed, the Appellate Body has defined the term "displace" to connote a "substitution effect",[85] and the term "impede" to connote "obstructed" or "hindered" imports/exports.[86] The Appellate Body also clarified, in *US – Large Civil Aircraft*, that "'displacement' and 'impedance' are ... not interchangeable concepts".[87] The Panel's undifferentiated findings of "displacement and/or impedance" constitute error in the interpretation of Articles 6.3(a) and 6.3(b), and amount to treating displacement and impedance as interchangeable concepts.

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[79] *Compare* Panel Report, para. 7.1717 *with* Panel Report, paras. 6.1542-6.1544, 6.1546, 6.1547, 6.1548, 6.1555, 6.1569, 6.1572, 6.1579.

[80] Panel Report, paras. 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii).

[81] Panel Report, para. 6.1416.

[82] Panel Report, para. 6.1169 (emphasis added).

[83] Panel Report, para. 6.1814.

[84] Panel Report, paras. 6.1817, 7.1(d)(xiv)-7.1(d)(xv).

[85] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1160. *See also* Appellate Body Report, *US – Large Civil Aircraft*, para. 1071.

[86] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1161. *See also* Appellate Body Report, *US – Large Civil Aircraft*, paras. 1071, 1086.

[87] Appellate Body Report, *US – Large Civil Aircraft*, para. 1071. *See also* Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1160-1162.

89. *Second*, assuming, *arguendo*, that the Panel's findings of "displacement" apply to each country and product market at issue, the European Union demonstrates that all of the Panel's findings of "displacement" are in error.

90. Properly interpreted, the term "displacement" connotes a substitution effect. The Appellate Body has clarified that in deciding a claim of displacement, a panel must "assess whether this phenomenon is discernible by examining *trends* in data relating to export volumes and market shares over an appropriately representative period".[88] The Panel erroneously sought to distinguish the Appellate Body's guidance by postulating that it pertained solely to a "two-step" analysis of causation, and not to the type of "unitary" analysis that the Panel undertook. The Panel's application of the law to the facts confirms that the Panel interpreted Articles 6.3(a) and 6.3(b) to allow a finding of displacement without any engagement with the sales volume and market share data, and without a finding of clearly discernible and identifiable declining trends in sales volume or market shares for each of the country and product markets at issue. This constitutes error in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement.*

91. The Panel additionally erred in the application of Articles 5(c), 6.3(a) and 6.3(b) and 7.8 by effectively confining its analysis to two data points (annual data for 2012 and 2013), which, as the Appellate Body clarified in *US – Large Civil Aircraft*, "by any measure, cannot constitute a trend".[89]

92. The Panel further erred in the application of Articles 5(c), 6.3(a) and 6.3(b) and 7.8 in making findings of displacement entirely divorced from the data. The Panel failed to engage with the data, to determine whether it revealed a "discernible" or "clear" trend of a "substitution effect" in the markets at issue. In several instances, the Panel's findings of displacement cover markets where Boeing's market share *increased* over the period under consideration, evidencing the exact opposite of a substitution effect.

93. *Third*, assuming, *arguendo*, that the Panel's findings of "impedance" apply to each country and product market at issue, the European Union demonstrates that all of the Panel's findings of "impedance" are in error.

94. Contrary to the meaning of the term "impede", and the Appellate Body's guidance, the Panel interpreted Articles 6.3(a) and 6.3(b) to support a finding of impedance without any engagement with the sales volume and market share data, and without a finding of clearly discernible and identifiable trends in sales volume or market shares for each of the country and product markets at issue. This constitutes error in the interpretation of Articles 6.3(a) and 6.3(b).

95. Additionally, the Panel erred in the application of Articles 5(c), 6.3(a) and 6.3(b) by effectively confining its analysis to two data points (annual data for 2012 and 2013), and in making findings of impedance that are entirely divorced from the data.

10 CONSIDERATIONS THAT APPLY WERE THE APPELLATE BODY TO ATTEMPT TO COMPLETE THE ADVERSE EFFECTS ANALYSIS

96. Having set out the bases on which the Appellate Body should reverse (i) the Panel's findings with respect to the withdrawal of subsidies, under Article 7.8 of the *SCM Agreement*, and (ii) the Panel's causation findings, under Articles 5 and 6.3 of the *SCM Agreement*, the European Union addresses considerations that would apply were the Appellate Body to attempt to complete the analysis regarding the United States' assertion of adverse effects.

97. The Panel employed the tools of aggregation and cumulation to undertake a *collective* assessment of the effects of LA/MSF and non-LA/MSF subsidies. Specifically, the Panel found that the aggregated group of LA/MSF subsidies is a "genuine and substantial" cause of adverse

[88] Appellate Body Report, *US – Large Civil Aircraft*, para. 1071.
[89] Appellate Body Report, *US – Large Civil Aircraft*, para. 1087.

effects, and then cumulated the effects of the non-LA/MSF subsidies, which it found to be a "genuine" cause of adverse effects.[90]

98. Should the Appellate Body reverse the Panel's interpretation of Article 7.8 or its causation findings, the basket of subsidies subject to the Appellate Body's analysis of the adverse effects asserted by the United States will be different from the basket considered by the Panel. In the reconstituted basket, there will no longer be a single LA/MSF subsidy or an aggregated group of LA/MSF subsidies to serve as a "genuine and substantial" cause of adverse effects. The Panel's factual findings provide no basis for a conclusion that anything short of the entire group of LA/MSF subsidies considered by the Panel is a "genuine and substantial" cause of adverse effects.

99. Without an "anchor" subsidy (or aggregated group of subsidies) that has been found to be a "genuine and substantial" cause of adverse effects, cumulation will no longer be an appropriate tool for the collective assessment of the effects of the LA/MSF and non-LA/MSF subsidies. Nor can the non-LA/MSF subsidies be aggregated with the LA/MSF subsidies, given the differences in the "design, structure and operation" of these measures. Neither aggregation nor cumulation is appropriate for the collective assessment of the effects of the non-withdrawn LA/MSF and non-LA/MSF subsidies, should the Appellate Body seek to complete the analysis.

100. While the European Union does not believe that the inapplicability of aggregation and cumulation would preclude a collective assessment of the effects of the subsidies, the European Union believes that the Appellate Body would be unable to complete the analysis to make any findings of adverse effects properly attributable to any non-withdrawn subsidies for other reasons:

a. The Panel erred in its identification of the relevant product markets.[91] In doing so, the Panel failed to undertake any examination of the competitive dynamic between products that the United States alleged to be in different product markets. The Panel's failure in this regard renders the Panel Report devoid of factual findings that would allow the Appellate Body to complete the analysis by identifying the appropriate product markets. Nor are there undisputed facts of record to enable the identification of appropriate product markets by the Appellate Body.

b. The Panel erroneously failed to consider whether the United States brought its claim in respect of a "non-subsidized like product", within the meaning of Article 6.4 of the *SCM Agreement.*[92] There are no Panel findings or undisputed facts of record that would allow the Appellate Body to identify which, if any, of the Boeing aircraft in respect of which the United States alleges adverse effects is "non-subsidized".

c. In its causation analysis, the Panel failed to account for the passage of time and events that occurred during that time.[93] There are no Panel findings or undisputed facts of record that would allow the Appellate Body to account for these factors in completing the analysis.

d. The nature of the adverse effects analysis advocated by the United States, and accepted by the Panel, resulted in an absence, from the record, of evidence necessary to assess properly the causal link between a *reconstituted basket* of subsidies and any adverse effects. The United States did not advance any argument or evidence that could have assisted the Panel, or that could assist the Appellate Body, in assessing whether a *reconstituted basket* of subsidies, short of even one of the subsidies that the United States included in its basket, would still be a "genuine and substantial" cause of any adverse effects.

e. The re-constitution of the basket of subsidies at issue would require properly accounting for the effects of those subsidies that are withdrawn, and therefore excluded from the

[90] Panel Report, paras. 6.1838, 6.1846, 6.1847, 7.1(d)(xvii).
[91] Section 6 , above.
[92] Section 7 , above.
[93] Section 8 , above.

basket of subsidies at issue, *as non-attribution factors*. There are no Panel findings or undisputed facts of record that would allow such an exercise by the Appellate Body.

f. With respect to claims of displacement and impedance, the Panel failed to identify, or even look for, clear and discernible trends that are capable of evidencing displacement or impedance.[94] While the Panel tabulated the volume and market share data pertaining to two annual data points in its Report, two data points are insufficient to constitute a trend. As for data for the years preceding 2011, there exist no Panel findings or undisputed facts of record that speak to either the existence of trends, or the data based on which such trends are to be ascertained.

g. In assessing displacement, impedance and lost sales, the Panel failed to account for the closeness of competition and substitutability between products that it placed in the same product market, based solely on the *existence* of competition, without regard to the nature or degree of that competitive relationship.[95] There are no Panel findings or undisputed facts of record that would allow such an exercise by the Appellate Body.

h. In the context of displacement, impedance and lost sales, the Panel erroneously failed to examine the market-specific and sale-specific non-attribution factors that the European Union demonstrated caused or contributed to causing the observed market phenomena.[96] There are no Panel findings or undisputed facts of record that would allow the Appellate Body to account for these factors in an attempt to complete the analysis.

11 CONCLUSION

101. For the reasons set out above, the European Union requests that the Appellate Body reverse or modify the findings and conclusions addressed in this Appellant's Submission.

[94] Section 9 , above.
[95] Section 9 , above.
[96] Section 9 , above.

ANNEX B-2

EXECUTIVE SUMMARY OF THE UNITED STATES' OTHER APPELLANT'S SUBMISSION

1. If the Appellate Body were to reverse the Panel and find that the passive expiry of LA/MSF subsidies could satisfy the obligation under Article 7.8 in at least some cases, then the United States conditionally appeals the Panel's separate findings that the *ex ante* lives of the pre-A380 LA/MSF subsidies passively "expired" prior to December 1, 2011.

2. In line with the Appellate Body's guidance in *EC – Large Civil Aircraft*, the period in which a benefit exists should be based on an *ex ante* assessment of factors such as the nature, amount, and projected use of the challenged subsidy. If at the time of grant, the evidence indicates that the grantor expects the benefit to flow over a period whose length is defined to be contingent on some other variable event, then logically the life of the subsidy should be measured accordingly.

3. Evidently, the Panel assumed that the *ex ante* life of the subsidies must be expressed as a fixed number. It erred by focusing on the wrong expectations. It sought to retrospectively project an expected life to each aircraft program. The Panel failed to recognize that, when Airbus accepted a contingent liability and the governments agreed to make payments contingent, they expected the benefit of below-market repayments to last for a variable period defined by external factors.

4. In addition, the United States raises an appeal regarding a legal interpretive question with respect to Article 3.1(b). The United States demonstrated, and the EU did not contest, that French, German, Spanish, and UK LA/MSF is each conditioned on the production of goods in the grantor's territory to be used by Airbus in the manufacture of the A350 XWB. The Panel found that subsidies conditioned on the domestic production of inputs to be used in the manufacture of the A350 XWB are not prohibited under Article 3.1(b). The Panel determined that the contingencies in the A350 XWB LA/MSF contracts "ensure that the member States are subsidizing a domestic producer. Article 3.1(b), therefore, does not discipline them."

5. Under a competing interpretation also under consideration in a separate dispute, where a subsidy is contingent on domestic production of a good that is an input into a manufacturing process, and substituting an imported version result in the loss of an entitlement to the subsidy, the subsidy is contingent on the use of domestic over imported goods. To be clear, the United States considers this is not the best interpretation. However, the United States has an interest in ensuring that the same legal approach is applied in both proceedings.

6. Moreover, should the Appellate Body determine that this competing interpretation is indeed correct, there is no question that the Panel erred in not finding a violation of Article 3.1(b). Further, applying the competing interpretation to the undisputed facts and findings of this proceeding, the Appellate Body would be able to complete the analysis and conclude that all four instances of A350 XWB LA/MSF breach Article 3.1(b).

7. The competing interpretation – in contradiction to the interpretation adopted by the Panel – is as follows: if (i) a subsidy is granted to a domestic producer conditional on the domestic siting of production activities to produce a domestic input in an industrial process, and (ii) a substitution of imported goods for these inputs would result in the producer's loss of the entitlement to the subsidy, then the subsidy is contingent on the use of domestic over imported goods, and therefore is inconsistent with Article 3.1(b). In addition, the competing interpretation of Article 3.1(b) assumes that any good completed in a domestic territory is "domestic" for purposes of Article 3.1(b), without the need to examine the significance of the operations undertaken in the domestic territory, the proportion of foreign content contained in the good, rules of origin, or any other considerations.

8. If the goods that Airbus must use to manufacture the A350 XWB are required to be produced in the EU, then the goods are "domestic goods" and therefore Airbus is required to use domestic over imported goods to receive the subsidy.

9. The Panel, however, found that this logic reflected an improper interpretation of Article 3.1(b). Critical to the Panel's finding was the need to interpret Article III of the GATT 1994 and Article 3.1(b) of the SCM Agreement consistently. The Panel found that a review of both provisions "suggests that the act of granting subsidies to firms so long 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."

10. This raises a threshold interpretive question that the Appellate Body has yet to consider. Where a subsidy is contingent not only on the production of a finished good, but is also contingent on the production, in the grantor's territory, of intermediate goods for use as inputs (or goods used to produce other goods, *i.e.*, instrumentalities of production) – which are then presumed to be "domestic" – in manufacturing the downstream good, is the subsidy in breach of Article 3.1(b)? Arguably, the subsidy could be viewed as contingent on the use of a domestic good because using an imported good in place of the domestic good would result in a loss of the entitlement to the subsidy.

11. If the Appellate Body considers that this "competing interpretation" of Article 3.1(b) – which is also under consideration in *US – Conditional Tax Incentives for Large Civil Aircraft* – is correct, then the Panel erred.

12. Each instance of LA/MSF for the A350 XWB is conditioned on the domestic siting of production activities for goods to be used by Airbus in the manufacture of the A350 XWB, and a counterfactual substitution of imported versions of these goods would result in Airbus's loss of the entitlement to the LA/MSF. The United States reviews below the undisputed facts from each of the LA/MSF contracts containing the contingencies and other relevant evidence.

13. France granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements contained in the French A350XWB *Protocole* that necessitate the use of domestic goods to manufacture the A350 XWB. If the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts establish that the subsidy is contingent on the use of domestic over imported goods.

14. Germany granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements that necessitate the use of domestic goods to manufacture the A350 XWB. Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts establish that the subsidy is contingent on the use of domestic over imported goods.

15. Spain granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements contained in the Spanish A350XWB *Convenio* that necessitate the use of domestic goods to manufacture the A350 XWB. Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts establish that the subsidy is contingent on the use of domestic over imported goods.

16. The UK granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements contained in the UK A350XWB Repayable Investment Agreement that necessitate the use of domestic goods to manufacture the A350 XWB. Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts contained in the UK A350XWB Repayable Investment Agreement establish that the subsidy is contingent on the use of domestic over imported.

ANNEX B-3

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Before launching into a point-by-point rebuttal of the errors in the European Union's ("EU") appeal of the Panel's findings, it is useful to recall how, after 12 years of WTO dispute settlement, we have arrived at this point. The United States requested consultations in 2004 regarding the EU's massive subsidization of its large civil aircraft industry. In 2010, the original panel issued its report finding that the EU violated its obligations under Articles 5 and 6.3 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") not to use subsidies so as to cause adverse effects to U.S. interests. The Appellate Body upheld the Panel's ultimate finding in 2011.[1] The Dispute Settlement Body ("DSB") adopted its recommendations and rulings in this dispute on June 1, 2011.[2]

2. The key measures, and the ones most central to the original panel and the Appellate Body findings, were approximately USD 15 *billion* in subsidized lending in the form of Launch Aid "LA/MSF" provided by the French, German, Spanish, and U.K. governments to each and every Airbus large civil aircraft ("LCA") development program: the A300/310, A320, A330/340, A340-500/600, and the A380.[3] The adverse effects caused by these and other subsidies were even greater – more than 300 lost aircraft orders worth tens of billions of dollars and displaced exports to seven major country markets in the 2001-2006 period alone.[4] The subsidies found by the original panel and the Appellate Body were unprecedented, both in terms of their immensity and their harmful market effects. As the original panel found:

> Given the amount of funding transferred to Airbus under the individual LA/MSF contracts, and in the light of the formidable risks associated with the LCA business and the learning curve effects that are necessary to successfully participate in this sector, we have found that it would not have been possible for Airbus to have launched all of these models, as originally designed and at the times it did, without LA/MSF. Even assuming this were a possibility, and that Airbus had actually been able to launch these aircraft relying on only market financing, the increase in the level of debt Airbus would have accumulated over the years would have been massive.[5]

In confirming the original panel's findings, the Appellate Body concluded that "{w}ithout 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."[6]

3. The original panel recommended 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."[7] In line with Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the Appellate Body recommended further that "the DSB request the European Union to bring its measures, found in this Report,

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[1] *EC – Large Civil Aircraft (AB)*, para. 1416.

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

[3] *See, e.g.*, *EC – Large Civil Aircraft (Panel)*, para. 7.525 (finding "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"); US First Written Submission, para. 353.

[4] The original panel found, and the Appellate Body confirmed, that Boeing lost sales involving 342 firm orders. *EC – Large Civil Aircraft (Panel)*, paras. 7.1803-7.1832; *EC – Large Civil Aircraft (AB)*, para. 1414(p). The total value of these lost orders amounts to many billions of dollars by any reasonable calculation. The Appellate Body found displacement in the following markets: in the single-aisle product market in Australia and in the single-aisle and twin-aisle product markets in the European Communities, China, and Korea. *EC – Large Civil Aircraft (AB)*, para. 1414(p).

[5] *EC – Large Civil Aircraft (Panel)*, para. 7.1948.

[6] *EC – Large Civil Aircraft (AB)*, para. 1264.

[7] *EC – Large Civil Aircraft (Panel)*, para. 8.7 (ellipsis in original).

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."[8] The DSB adopted the reports of the panel and the Appellate Body.[9] Under Article 7.9 of the SCM Agreement, if the EU did not comply with the DSB's recommendations within six months, the United States could seek DSB authorization to take countermeasures.

4. The responses of the EU and Airbus to the Appellate Body's report signaled from the outset that they did not take this report, or the DSB's request for compliance, seriously. Where the Appellate Body found that without the subsidies, Airbus would most likely not exist at all,[10] the EU asserted that "the economic impact of these support measures in the LCA market has been found to be very limited."[11] For its part, Airbus saw "no significant consequences for Airbus or the European support system from today's decision."[12] In fact, Airbus has interpreted the rulings as an affirmation of past subsidized funding practices – a "big victory for Europe."[13] Airbus CEO Tom Enders responded to the 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.[14]

5. Consistent with these statements, the EU and its member States took *no* affirmative steps to withdraw the LA/MSF subsidies. This is not litigation rhetoric on the part of the United States. The Panel made a factual finding that only two of the 36 steps the EU said it took to comply with the DSB recommendations and rulings were related to ongoing subsidization, and that these related exclusively to the Bremen airport subsidy and the Mühlenberger Loch subsidy. With respect to the other subsidies, including *all* of the LA/MSF, "the remaining 34 alleged compliance 'steps' are not 'actions' relating to the ongoing (or even past) subsidization of Airbus LCA . . . ."[15]

6. The EU did not appeal the Panel's finding that only two of the 36 alleged steps – and none of the LA/MSF-related steps – were affirmative compliance actions. Thus, for purposes of this proceeding, it is a matter of uncontested fact that the EU took no actions to withdraw the LA/MSF subsidies or remove their adverse effects. The EU's appeal is therefore not about alleged failures by the compliance Panel to recognize the efficacy of its nonexistent compliance with respect to LA/MSF subsidies, but about whether the Panel was correct in declining to accept a series of mere assertions and arguments as a substitute for affirmative steps that would have brought the EU's measures into compliance.

7. To make matters even worse, the four Airbus member States actually granted *another* round of LA/MSF to Airbus, this time to launch its latest new model, the A350 XWB, amounting to an additional USD 4.8 billion,[16] for a total of approximately USD 20 billion in LA/MSF principal.

8. After literally thousands of pages of written submissions, 292 questions to the parties, and nearly seven years of WTO dispute settlement, the EU did nothing to withdraw the massive

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[8] *EC – Large Civil Aircraft (AB)*, para. 1418.

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

[10] *EC – Large Civil Aircraft (Panel)*, para. 7.1984.

[11] *WTO Airbus Case – Appellate Body overturns key findings of the Panel in favour of the EU*, EU Press Release (May 18, 2011) (Exhibit USA-3).

[12] *WTO final ruling: Decisive victory for Europe*, Airbus Press Release (May 18, 2011) (Exhibit USA-4).

[13] *WTO final ruling: Decisive victory for Europe*, Airbus Press Release (May 18, 2011) (Exhibit USA-4).

[14] *WTO final ruling: Decisive victory for Europe*, EADS Statement (May 18, 2011) (Exhibit USA-5) (emphasis added). Similarly, Ranier Ohler, Airbus's 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." *WTO final ruling: Decisive victory for Europe*, Airbus Press Release (May 18, 2011) (Exhibit USA-4).

[15] *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*, WT/DS316/RW, circulated 22 September 2016, para. 6.42 ("Compliance Panel Report").

[16] *Airbus set to gain aid for A350*, Kevin Done and Peggy Hollinger, Financial Times (June 15, 2009) (Exhibit USA-7).

amounts of LA/MSF that were the subject of the original U.S. consultation and panel requests. The United States considered that this course of inaction on the earlier LA/MSF and grant of new LA/MSF only served to bring the EU farther out of compliance with Articles 5 and 6.3 of the SCM Agreement. It accordingly commenced this proceeding under Article 21.5 of the DSU. And thus, unsurprisingly, after further thousands of pages of written submissions, 166 additional questions to the parties, and a searching evaluation, the compliance Panel came to the conclusion that the EU had not complied with the recommendations and rulings of the DSB. It found further that, as with past Airbus aircraft, the USD 4 billion in LA/MSF for the A350 XWB conferred a subsidy and caused adverse effects to U.S. interests, including lost sales of 50 airplanes worth billions of dollars.[17] Overall, the compliance Panel found 375 lost orders worth tens of billions of dollars,[18] plus displacement and/or impedance in eight different markets, including in the EU, China, India, and Australia.[19]

9. That brings us to the present day. The EU has appealed the compliance Panel's findings, asserting that the Panel misinterpreted and misapplied the relevant provisions of the SCM Agreement and DSU, and that it failed to conduct an objective assessment of the matter for purposes of Article 11 of the DSU. None of its claims has any merit.

10. **Section II** addresses the standard applied to evaluate whether a party has complied with a recommendation that it come into compliance with its obligation under Article 5 of the SCM Agreement not to cause adverse effects through the use of subsidies. The Panel noted that Article 5 defines WTO inconsistency in terms of the effects of subsidies, and that the Appellate Body found that "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."[20] It accordingly found that the alleged passive expiry of certain LA/MSF subsidies did not relieve the EU of its obligation to come into compliance with Article 5 with respect to the effects of those subsidies. Article 7.8 of the SCM Agreement describes the remedy for inconsistencies with Article as a choice between withdrawing the subsidy *or* removing its adverse effects. The EU argued before the Panel, and now argues on appeal, that the alleged passive expiry of actionable subsidies achieves their "withdrawal," and argues that it accordingly has no obligation with respect to their current adverse effects. This argument fails to account for the Appellate Body's finding in the original proceeding, based on reasoning that applies to the present time, that the EU's LA/MSF subsidies cause adverse effects with respect to all of Boeing's existing aircraft. Thus, the EU's interpretation of Article 7.8 would allow it to continue to act inconsistently with Article 5. This interpretation contradicts the proper interpretation of Article 7.8, in accordance with customary rules of interpretation applicable to the covered agreements, and improperly downplays the massive ongoing lost sales, displacement, and impedance that LA/MSF has been causing for at least a decade, as a "temporary" market effect. They provide no basis to modify or reverse the Panel's findings.

11. **Section III** addresses the EU's argument that the Panel erred in finding that there is no disagreement between the parties as to whether the EU is currently in compliance with its WTO obligations with respect to the Mühlenberger Loch and Bremen runway subsidies and, therefore, no need to make a finding on that issue. The United States has been clear throughout the proceeding that it made no claim of noncompliance with respect to the Bremen runway subsidy, and since its second written submission that it is not pursuing any claim on the Mühlenberger Loch subsidy. The EU has taken the position that any such claim would be unfounded. There is accordingly no disagreement between the parties regarding whether the EU's measures have taken to comply are consistent with the SCM Agreement's relevant disciplines, and no need for a finding by the Panel.

12. **Sections IV and V** respond to the EU's claims of error regarding the Panel's selection of a commercial benchmark for LA/MSF for the A350 XWB. Section IV pertains to the corporate borrowing rate element of the benchmark in particular. The EU argues that the Panel erred by

[17] Compliance Panel Report, para. 6.1781. List prices for the relevant aircraft as of 2011 are provided at paragraph 6.1295 of the compliance Panel's report. The total value of these lost orders runs well into the billions of dollars under any reasonable assumption about discounts from list price.

[18] Compliance Panel Report, para. 6.1781. List prices for the relevant aircraft are provided in paragraphs 6.1239, 6.1295, and 6.1373 of the Compliance Panel Report. The total value of these lost orders runs well into the tens of billions of dollars under any reasonable assumption about discounts from list price.

[19] Compliance Panel Report, paras. 6.1817, 7.1(d)(xv).

[20] Compliance Panel Report, para. 6.820, *quoting EC – Large Civil Aircraft (AB)*, para. 712.

using the one-month and six-month average yield of an EADS bond to establish the corporate borrowing rate. According to the EU, the Panel was required to limit itself to the 24-hour period coinciding with the finalization of the terms and conditions of LA/MSF in selecting data for the commercial benchmark. However, no provision of the covered agreements imposes such a limitation on panels – and in fact, the Appellate Body's guidance suggests that panels should construct commercial benchmarks on the basis of any relevant information that is available at the time of finalization of the terms and conditions of a subsidy, including information that pre-dates finalization.[21] This broader approach is especially suitable on the facts of this case, because the terms and conditions of LA/MSF for the A350 XWB were negotiated through **[BCI]**[22] that extended over a period of approximately **[BCI]** or more.[23]

13. **Section V** pertains to the Panel's selection of the project-specific risk premium ("PSRP") element of the commercial benchmark for LA/MSF for the A350 XWB. The EU argues that the Panel should have undertaken a "progressive search" for a commercial benchmark loan instrument, which supposedly would have led it to devise a PSRP based on Airbus contracts with its risk-sharing suppliers ("RSS") for the A350 XWB project, rather than the PSRP for LA/MSF for the A380 from the original dispute, which is what the Panel actually did. However, the Panel was under no requirement to perform the "progressive search" that the EU advocates. On the contrary, the "progressive search" requirement applies to domestic authorities conducting countervailing duty investigations, whereas in WTO disputes under Parts II and III of the SCM Agreement the burden is on the parties – not the Panel – to establish the appropriate commercial benchmark. The United States met this burden by establishing the suitability of the A380 PSRP for LA/MSF for the A350 XWB, and the EU failed to put forward any alternative. Indeed, the EU did not even submit the RSS contracts that it now argues, belatedly, are so essential to the Panel's benchmark analysis. In any event, a "progressive search" would likely have led the Panel to select the PSRP for the A380, just as it actually did, because LA/MSF for the A380 has terms closer to those of LA/MSF for the A350 XWB than RSS contracts for the A350 XWB, as far as available evidence indicates.

14. **Section VI** addresses the EU challenge to the Panel's finding that adverse effects should be assessed based on three product markets: single-aisle, twin-aisle, and very large aircraft ("VLA"). The EU alleges that the Panel "replaced the Appellate Body's 'significant competitive constraints' standard" with a standard based on the mere existence of a competitive relationship, regardless of the nature or degree of that relationship.[24] Both EU premises are wrong.

15. As the Panel found, the Appellate Body did not endorse a "significant competitive constraints standard" when it used that phrase a single time in a footnote, and "there is 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."[25]

16. Moreover, the Panel did not apply a standard that treated products as competing in the same market where any competitive relationship existed. This is obvious in the Panel's acknowledgment that, while the three product markets it found captures most competitive interactions, some competition exists between aircraft in different markets. Rather, the Panel's 90-page analysis followed the Appellate Body's guidance strictly and carefully assessed extensive argumentation and voluminous evidence, including multiple expert reports and HSBI concerning marketing strategies and sales campaigns. Therefore, the Panel correctly interpreted and applied Article 6.3 and made an objective assessment of the matter as required by DSU Article 11. Accordingly, the EU's allegations of error are meritless, as demonstrated further in Section VI.

[21] *EC – Large Civil Aircraft (AB)*, para. 836.

[22] Compliance Panel Report, para. 6.644 (quoting Tom Williams, Executive Vice President, Programmes, Airbus SAS, May 17, 2013 (Exhibit EU-354(BCI)), para. 3).

[23] *See* Compliance Panel Report, paras. 6.55 and 6.645.

[24] EU Appellant Submission, paras. 602, 624.

[25] Compliance Panel Report, para. 6.1211.

17. **Section VII** addresses the EU argument that the finding in *US – Large Civil Aircraft* that Boeing large civil aircraft were subsidized creates a "new" factual matter. On that basis, the EU contends that "cogent reasons," centered on what the EU purports is intervening Appellate Body guidance, require a review of the original panel's finding that Article 6.4 of the SCM Agreement does not preclude a finding of displacement under Article 6.3(b) when the exports of the complaining Member have themselves been subsidized. The extent to which Boeing aircraft were subsidized played no role in the original panel's legal analysis and finding. The original panel's finding was not appealed, so the Appellate Body did not address this issue of law during the original proceeding. The DSB adopted the original panel report as modified by the Appellate Body. The EU is not entitled in this compliance proceeding to have the Appellate Body consider, pursuant to DSU Article 17.13, whether the legal finding of the original panel and recommendations and rulings of the DSB in respect of Article 6.4 of the SCM Agreement should be upheld, modified, or reversed. Therefore, the Panel did not err when it found that the EU argument fails to justify modifying or reversing the original panel's finding that Article 6.4 does not describe the exclusive basis on which a claim of displacement or impedance under Article 6.3(b) may be demonstrated.

18. **Section VIII** addresses the EU's challenge to the Panel's analysis of causation. According to the EU, the Panel's incorrect approach to causation left it blind to the effects of the the passage of time and Airbus's post-launch investments in the A320 and A330 programs, which the EU believes severed any causal link between LA/MSF and the presence in the market of the A320, A330, and A380. These allegations are demonstrably untrue. The Panel explicitly adhered to the counterfactual approach preferred by the Appellate Body. Using the original findings as its starting point, the Panel exhaustively examined the evidence and argumentation concerning the counterfactual situation in the post-implementation period. In doing so, it carefully evaluated the EU's arguments about the passage of time and intervening causes. It found them wanting because they were factually and legally unsupported, not because of an incorrect analytical approach.

19. The Panel followed the Appellate Body's guidance that the effects of LA/MSF subsidies will at some point come to an end, while recognizing that the determination of when that happens will depend on the evidence, and not expectations as to the "life" of the subsidy. Accordingly, the Panel found that the indirect effects of the earliest rounds of LA/MSF did not have a genuine connection to the launch and market presence of the A350 XWB. This disproves the EU's contention that the Panel's analytical approach was incapable of accounting for the way that subsidy effects dissipate over time. Although the EU repeatedly asserted that the passage of time had deprived past LA/MSF subsidies of any current effect, these were mere assertions, without any evidentiary or logical basis.

20. A similar flaw undermined the EU's critique of the Panel's analysis of Airbus's post-launch investments. The Panel recognized their significance but found that they did not render insubstantial the effects of LA/MSF subsidies, particularly given that the post-launch investments were dependent on those subsidy effects for their existence.

21. Overall, the EU did not provide the Panel with any basis to find that, absent LA/MSF subsidies, Airbus would have taken the sales and market share that it did during the post-implementation period.[26] The EU also contends that the Panel lacked a basis for finding any effects caused by LA/MSF to the A380 and A350 XWB, but these arguments are based on mischaracterizations of the findings in the original proceeding and this proceeding. In sum, the Panel found that LA/MSF and other subsidies continue to cause serious prejudice because that is what the evidence showed when considered in light of the findings in the original proceeding. Airbus's sponsor governments have provided massive subsidies designed to create production programs lasting for decades and enable the financial, technological, and industrial bases for subsequent production programs that are also directly subsidized at a tremendous scale. This pattern continued during the pendency of the original proceedings and this compliance proceeding with the provision of still more LA/MSF subsidies to the A350 XWB.[27] The Panel did not err in recognizing this longstanding pattern of subsidization and its adverse effects on U.S. interests.

[26] *See* Compliance Panel Report, para. 6.1526 ("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.").

[27] *See* Compliance Panel Report, para. 6.145.

22. **Section IX** addresses the EU's critique of the Panel's displacement and/or impedance findings, which reflect an incorrect interpretation of the SCM Agreement and are at odds with the facts found by the Panel. The Panel correctly examined the U.S. claims of displacement and impedance through a unitary counterfactual analysis.[28] Considered together with its findings regarding the absence of Airbus LCA from the market in the plausible counterfactual scenarios, the Panel's assessment of the data demonstrated that the challenged LA/MSF and other subsidies prevented the U.S. LCA industry from realizing improved market positions, either by substituting subsidized Airbus LCA for exports of U.S. LCA (displacement) or by obstructing U.S. LCA export volumes and market share from being higher or materializing at all (impedance). Therefore, the EU has identified no valid reason to reverse or modify the Panel's findings.

23. **Section X** addresses the EU argument that, if the Appellate Body reverses or modifies certain findings by the Panel, there is no basis to complete the Panel's analysis. As Sections II through IX show, the EU has provided no basis to do this. Nonetheless, assuming *arguendo* that the Appellate Body were to reverse one or more of the Panel's findings, the EU errs in arguing that there are insufficient findings of fact and uncontested facts for the Appellate Body to complete the adverse effects analysis. The most glaring error is the contention that partial reversal of the Panel's findings regarding the EU's failure to withdraw LA/MSF subsidies would "*re-constitute the basket of subsidies* that are subject to the Appellate Body's adverse effects assessment,"[29] and transform the effects of any withdrawn subsidies into *non-attribution factors* that preclude findings of adverse effects with respect to unwithdrawn subsidies.[30] In effect, this argument asks the Appellate Body to find that the effects of WTO-inconsistent subsidies have themselves brought the EU fully into compliance.

[28] *EC – Large Civil Aircraft (AB)*, para. 1163.
[29] EU Appellant Submission, para. 1074.
[30] EU Appellant Submission, para. 1097.

ANNEX B-4

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION

1 INTRODUCTION

1. In its Other Appellant's Submission, the United States raises what it characterises as "two limited issues" with the Report of the Panel in *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)* ("compliance Panel" or "Panel").[1] The European Union requests that the Appellate Body reject the United States' appeal regarding both issues.

2 THE APPELLATE BODY SHOULD REJECT THE US APPEAL THAT THE PANEL ERRONEOUSLY FOUND THAT THE LIVES OF PRE-A380 LA/MSF SUBSIDIES HAVE EXPIRED

2. The United States appeals certain elements of the Panel's findings that the lives of the pre-A380 LA/MSF subsidies expired before or shortly after the end of the implementation period on 1 December 2011.[2] The US appeal is contingent on the Appellate Body reversing the Panel's interpretation of Article 7.8 of the *SCM Agreement*.[3]

3. According to the United States, the Panel erred in the interpretation and application of Article 1.1(b) of the *SCM Agreement* with respect to some (but not all) of the pre-A380 LA/MSF subsidies for which it had found had that their *ex ante* expected lives had expired.[4] Although its position is not entirely clear, for the United States, this error seems to arise because *actual* repayment of principal and interest had not been effected, and/or the *actual* marketing life of the corresponding aircraft had not expired, by the end of the implementation period.

4. The Appellate Body should dismiss the US appeal. Despite paying lip-service to the firmly-established principle that the life of a subsidy must be determined on an *ex ante* basis at the time of the grant of a subsidy, the United States' appeal is in fact premised on the firmly-rejected principle that the life of a subsidy depends on how the subsidy *actually* performs following grant. At its most basic level, the Panel correctly interpreted and applied Article 1.1(b) when finding that the lives of all of the pre-A380 LA/MSF subsidies at issue in this appeal have expired, based on *ex ante* considerations regarding the expected life of each subsidy.

5. *First*, the Panel correctly interpreted Article 1.1(b). Based on the text of Article 1.1(b) and in light of its context (Article 14 of the *SCM Agreement*), the Appellate Body in the original

[1] US Other Appellant's Submission, para. 1.

[2] The United States does not appeal the Panel's findings that the seven capital contribution subsidies had expired before the end of the implementation period, or that two regional development grants had expired in 2014. Nor does the United States appeal the Panel's findings that the life of the A300- and A310-related LA/MSF subsidies have come to an end.

[3] US Other Appellant's Submission, Section II.

[4] US Other Appellant's Submission, paras. 17-18.

proceedings found that the "benefit" analysis involves an "*ex ante* analysis that does not depend on how the particular financial contribution actually performed after it was granted".[5]

6. Consistent with the Appellate Body's guidance, the compliance Panel found that it was required to determine the life of each LA/MSF subsidies on the basis of an *ex ante* assessment.[6] The United States does not advance any argument suggesting why this interpretation of Article 1.1(b) is erroneous. To the contrary, the United Sates seems to agree with the Panel – and with the European Union – that Article 1.1(b), properly interpreted, requires determination of the life of a subsidy on the basis of an "*ex ante* assessment".[7] Both Participants thus appear to agree that the Panel properly interpreted Article 1.1(b).[8] There is, therefore, no interpretative appeal.

7. *Second*, the United States' argument that the Panel erred in the application of Article 1.1(b) should also be dismissed. Despite its agreement that Article 1.1(b) calls for an *ex ante* assessment, the United States erroneously applies an *ex post* assessment, focusing on how the particular subsidy *actually performed after it was granted*.

8. The United States submits that the *ex ante* expectations of the grantor and recipient must be determined *ex post*, in light of either (i) the *actual* loan life; and/or (ii) the *actual* marketing life for the aircraft programme. Specifically, in its view, the Panel failed to recognise that "the grantor and recipient would expect the benefit to continue *as long as payments were due*",[9] which the United States asserts is a "variable event" that depends on actual repayment and that is not susceptible to determination *ex ante*.[10] In other instances, the United States asserts that "the parties expected the benefit of LA/MSF to last *throughout the life of the subsidized aircraft programs*".[11]

9. The US argument that the life of a LA/MSF subsidy must be determined in light of how the life of the subsidy or the marketing life of the funded aircraft plays out *ex post*, is contradicted by the United States' acknowledgement that *ex ante* expectations must form the basis for the determination of the life of a subsidy.

10. Contrary to the Appellate Body's guidance, each of the two approaches counselled by the United States by definition "depend on how the particular subsidy *actually* performed after it was granted".[12] Absent the proverbial crystal ball, the *actual* marketing life and *actual* loan life are not time periods that can be determined *ex ante*. They are time periods that, by definition, can be determined only *ex post*, once the *actual* marketing life of the LCA programme has come to an end, or *actual* final repayment have occurred, often decades after the grant of the subsidy.

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[5] Appellate Body Report, *EC – Large Civil Aircraft*, para. 706 (emphasis in original). Appellate Body Report, *EC – Large Civil Aircraft*, para. 1241 (emphasis added). *See also*, *Id.*, paras. 707 ("a benefit analysis under Article 1.1(b) is forward looking and focuses on future projections"; "*ex ante* analysis of benefit"; "the period of time over which the subsidy is expected to be used for future production) (emphasis in original, underlining added), 709 ("{a}t 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"; a panel "must consider the trajectory of the subsidy as it was projected to materialize over a certain period at the time of grant"; "a panel must take into account that a subsidy provided accrues and diminishes over time, and will have a finite life"; "'intervening events' that ... may affect the projected value of the subsidy as determined under the *ex ante* analysis") (emphasis in original, underlining added), 710 ("the depreciation of the subsidy that was projected *ex ante*"), 1236 ("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") (emphasis in original).

[6] Panel Report, paras. 6.876-6.879, 6.890.

[7] US Other Appellant's Submission, paras. 9 , 10.

[8] US Other Appellant's Submission, para. 9.

[9] US Other Appellant's Submission, para. 12 (emphasis added).

[10] US Other Appellant's Submission, paras. 10, 14.

[11] US Other Appellant's Submission, para. 15. *See also*, *Id.*, paras. 8 (footnote 15) ("continue to be marketed"), 18 ("LA/MSF for the A320, A330-200, and A330/A340 Basic had not expired as of December 1, 2011, given that the corresponding large civil aircraft production programs were still active at that time (and still are)"), 17 (footnote 35) ("continue to be marketed").

[12] Appellate Body Report, *EC – Large Civil Aircraft*, para. 706 (emphasis added). *See also*, *Id.*, para. 1241.

11. The European Union notes that, in one instance, namely as regards LA/MSF for the A340-500/600, the United States takes a different approach. Because, in its view, this programme "failed prior to full repayment", the United States submits that the life of the subsidies does not end with the actual marketing life of the A340-500/600 programme, but extends well into the future, namely until the life of any so-called "debt forgiveness" comes to an end.[13] For at least two separate reasons, the US argument must be rejected. *First*, and yet again, the US argument effectively rejects an *ex ante* assessment of the life of a subsidy, in favour of an approach based on an *ex post* assessment of the performance of a subsidy subsequent to grant. *Second*, the United States mischaracterises the nature of the LA/MSF subsidy as involving a second subsidy, in the form of "debt foregiveness", in situations where contingently repayable loans remain un-repaid because the contingency (*i.e.*, delivery of an aircraft) for repayment is not triggered. The US approach results in "double-counting" of the benefit conferred on the recipient.[14]

12. Further, and also regarding LA/MSF for the A340-500/600, the United States argues that the Panel's findings were in any event "irrelevant" to assess EU compliance, because these subsidies expired *after* the end of the implementation period, albeit well before the Panel made its findings and issued its report.[15] The United States errs.

13. It is well established that a panel, including a compliance panel, must assess the WTO-consistency of a measure before it based on the entirety of the evidence.[16] In the present case, in light of the *ex ante* nature of the analysis, all the evidence on the expiry of any pre-A380 LA/MSF subsidy even *predates*, *by more than a decade*, the Panel's establishment. There is, therefore, no obstacle to the assessment of that evidence. In any event, even where evidence *post-dates* the panel's establishment, such developments must be taken into account to assess compliance, because not doing so would frustrate the objective of the DSU to provide for the prompt settlement of disputes.

14. Finally, the European Union notes that the United States does not ask the Appellate Body to reverse the Panel's findings that the lives of LA/MSF subsidies for aircraft programmes that were no longer marketed on 1 December 2011, namely the A300 and A310 models, have expired.[17] This means that, even were the Appellate Body to agree with the United States' conditional appeal, it would still be compelled to reverse most of the Panel's adverse effects-related findings.

15. Indeed, having reversed the Panel's erroneous interpretation of Article 7.8 of the *SCM Agreement* (which is the condition imposed by the United States for the Appellate Body to consider this aspect of its other appeal), the Appellate Body would have to find that these adverse effects-related findings are erroneous, since the adverse effects found by the Panel are fuelled by subsidies that the United States, itself, accepts have expired, and are therefore withdrawn, within the meaning of Article 7.8.

3 THE APPELLATE BODY SHOULD REJECT THE UNITED STATES' ASSERTIONS RELATING TO THE PANEL'S FINDINGS UNDER ARTICLE 3.1(B) OF THE *SCM AGREEMENT*

16. The United States also makes a number of assertions regarding the compliance Panel's findings that the United States failed to demonstrate that French, German, Spanish and UK

[13] US Other Appellant's Submission, para. 17 (footnote 35). *See also*, *Id.*, paras. 10 (footnote 17), 12.

[14] *First*, at the time the loan is concluded, because the expected return on the loan falls below what a commercial lender would have demanded to assume the risk that deliveries would fall short of the number required to effect full repayment of principal and interest; and, *second*, where the number of aircraft deliveries actually made falls short of projections made by the parties at the time the loan agreements were concluded (in which case, the United States considers that an additional subsidy to the recipient in the form of the "forgiveness" of debt is conferred).

[15] US Other Appellant's Submission, footnotes 14 and 35.

[16] *See*, *e.g.*, Panel Report, para. 6.1443; Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.18, 10.105 and 10.248; Panel Report, *EC– Large Civil Aircraft*, paras. 7.1694 and 7.1714; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 121-130.

[17] US Other Appellant's Submission, paras. 17-18.

LA/MSF for the A350XWB constitute prohibited subsidies under Article 3.1(b) of the *SCM Agreement*.[18]

17. The United States does not, however, allege error with respect to those findings.[19] Instead, the United States limits its submissions by reference to what it calls a "competing interpretation" of Article 3.1(b) that it alleges was under consideration by the panel in *US – Conditional Tax Incentives for Large Civil Aircraft* ("DS487"). In particular, the United States requests the Appellate Body to determine the correctness of that alleged "competing interpretation" of Article 3.1(b).[20] Conditional on the Appellate Body agreeing with this alleged "competing interpretation", the United States requests the Appellate Body to reverse the findings of the Panel in the present dispute and to complete the legal analysis.[21]

18. As a threshold matter, the European Union finds it necessary to clarify that the entirety of the United States' "appeal" is premised on an erroneous assumption built into its choice of vocabulary. The United States alleges that "competing interpretations" of Article 3.1(b) are at issue in the present dispute and in DS487. In making that allegation, the United States assumes that *different outcomes* in two different disputes, under the same treaty provision, necessarily indicate the existence of "competing interpretations" of the provision. This assumption is erroneous – different outcomes may well be the result of differences in the application of the same interpretation to *two different fact patterns* at issue in the two disputes.

19. This is precisely what has happened in the present dispute and in DS487. The *interpretation* of Article 3.1(b) advanced by the European Union in both cases and accepted by both Panels is the same: a subsidy contingent upon the production of a particular good does not, without more, breach Article 3.1(b), irrespective of whether or not that good later becomes an input, as a matter of fact; but a subsidy contingent upon the production of an LCA and, in addition, a requirement that a particular input (the wing) be manufactured domestically, does breach the provision. The difference in outcome between the two cases is driven not by different interpretations, but rather by different *fact patterns* (and associated arguments).

20. On three separate grounds, the Appellate Body should reject the US "appeal". *First*, for several reasons, the assertions upon which the United States seeks the Appellate Body's review of the Panel's findings do not properly constitute an "appeal" within the meaning of the DSU. To begin, at its most basic level, the Appellate Body should reject the US "appeal" as invalid, because the United States has failed to allege any error relating to "issues of law covered in the panel report" or "legal interpretations developed by the panel", within the meaning of Article 17.6 of the DSU. In fact, the United States agrees with the interpretation adopted by the Panel.[22] Without an allegation of error, there is no "appeal" for the Appellate Body to adjudicate.

21. Moreover, considerations relating to DS487 cannot serve as a basis for appellate review, in these proceedings, of interpretative findings allegedly under consideration by a *different* panel in a *different* dispute, and cannot serve as a surrogate for a valid allegation of error by the Panel in this dispute. Deciding otherwise would prejudice the procedural rights of (i) the European Union (by forcing the European Union to comment on the correctness of an interpretative position allegedly relevant to DS487, *without the assistance of the record in that* case); and (ii) third parties in DS487 that are not third participants in the present appeal.

22. Further, the United States' professed "interest in ensuring that the same legal approach is applied" in two disputes cannot serve as the basis for the Appellate Body to undertake appellate review in these proceedings of interpretative issues allegedly arising in DS487. Rather than pursuing a pre-emptive appeal, the appropriate course of action for the United States would be to advocate, in its appeal of the panel report in DS487, the interpretive

[18] US Other Appellant's Submission, Section III.
[19] US Other Appellant's Submission, para. 22.
[20] US Other Appellant's Submission, paras. 21-23.
[21] US Other Appellant's Submission, para. 23, Section III.B.
[22] US Notice of Other Appeal, para. 1; US Other Appellant's Submission, para. 22.

approach to Article 3.1(b) adopted by the Panel in the present dispute, with which the United States explicitly "agrees".[23]

23. *Second*, Rule 21(2)(b)(i) of the Working Procedures for Appellate Review requires that an appellant's submission set out "a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof".[24] The United States' "appeal" fails to meet this requirement.

24. *Third*, and finally, the US "appeal" must be rejected because it is based on a case that is entirely different from the case advanced by the United States before the Panel. The United States seeks to litigate before the Appellate Body a fundamentally different case from the one it litigated before the Panel. Appellate proceedings are not the appropriate venue for a party to make fundamental changes to the case it has brought, especially where, as here, doing so requires reliance on factual assertions that are *not the subject of panel findings*, and that *do not constitute undisputed facts* of record.

25. In these appellate proceedings, the United States has abandoned its argument, made to the Panel, that the requirement to produce components domestically, coupled with the *fact* that these components are used in downstream assembly of the aircraft, demonstrates that the LA/MSF lenders "*effectively* require" the subsidy recipient to use domestic over imported goods. Instead, the United States now seeks to identify an express *de jure* requirement to "use" domestic over imported goods in certain provisions of the A350XWB LA/MSF contracts. In advancing this new case, the United States refers on appeal to specific clauses in each of the A350XWB LA/MSF contracts, and asserts that those clauses have a particular meaning. Yet, the meaning of these provisions in municipal law was never raised before the Panel or debated between the Parties, much less the subject of findings of fact by the Panel or agreement between the Parties.

26. In these circumstances, the US "appeal" cannot be sustained. In light of its authority under Article 17.6 of the DSU, the Appellate Body is "manifestly preclude{d}" from following the course requested by the United States, because doing so would require it "to solicit, receive and review new facts that were not before the Panel, and were not considered by it".[25]

27. Finally, even were the Appellate Body to consider it appropriate to address the United States' "appeal", it should nonetheless reject the United States' assertions on the merits.

28. *First*, the Panel did not err in its interpretation of Article 3.1(b) *of the SCM Agreement*. The ordinary meaning of the terms used in Article 3.1(b), in their context and in the light of the object and purpose of the treaty, clarify that a subsidy contingent solely on domestic production of goods is not prohibited. Accordingly, the Panel did not err in finding that "the act of granting subsidies to firms so long 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".[26]

29. *Second*, even were the Appellate Body to find that the Panel erred in its interpretation of Article 3.1(b), *quod non*, it would be unable to complete the legal analysis on the terms requested by the United States. In previous disputes, the Appellate Body has proceeded to complete the legal analysis only where factual findings by the panel or undisputed facts of record have allowed it to do so.[27] The US request for completion is, however, built on factual assertions concerning the meaning of provisions in the A350XWB LA/MSF agreements that are neither supported by factual findings by the Panel or undisputed facts of record. These factual

[23] US Notice of Other Appeal, para. 1; US Other Appellant's Submission, para. 22.

[24] Rule 23(3) makes this requirement applicable to an other appellant's submission.

[25] Paraphrasing Appellate Body Report, *Canada – Aircraft*, para. 211; Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 240-242.

[26] Panel Report, para. 6.785; US Other Appellant's Submission, para. 27.

[27] *See*, *e.g.*, Appellate Body Report, *Australia – Salmon*, paras. 117-118; Appellate Body Report, *US – Section 211*, para. 352; Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 528; Appellate Body Report, *US – Large Civil Aircraft*, para. 649; Appellate Body Report, *Colombia – Textiles*, para. 5.30.

assertions *were never made by the United States before the Panel*, and are, instead, *newly made in this appeal*. The European Union never had an *opportunity* to dispute the factual assertions now raised by the United States; the European Union cannot be said to have left undisputed factual assertions that were not put to it by the United States. Accordingly, there are no findings of fact or undisputed facts of record that would allow the Appellate Body to complete the legal analysis in the manner requested by the United States.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

1. In relation to Article 7.8 of the SCM Agreement, Brazil agrees with the Panel's rejection of the European Union's argument that the end of the life of a subsidy *ipso facto* extinguishes a Member's compliance obligation under Article 7.8 of the SCM Agreement with respect to such subsidies.

2. Brazil recalls that the original panel's findings under Articles 6.3(b) and 6.4 were not appealed. Accordingly, the Appellate Body should not revisit this interpretation in the compliance proceeding.

3. Brazil also considers that the Panel conducted a correct analysis in interpreting "market" under Article 6.3 of the SCM Agreement. There is no support in WTO jurisprudence for the EU's attempt to characterize "market" as requiring a complaining Member to undertake a quantitative assessment of the degree of competition to determine if it is "significant".

4. Finally, the Panel properly interpreted Article 3.1(b) of the SCM Agreement when it found that subsidies conditioned on the domestic production of inputs to be used in the manufacture of a subsidized product are not prohibited. For Brazil, this provision does not prevent a Member from conditioning the provision of a subsidy on the performance of production steps in the country granting the subsidy.

ANNEX C-2

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION

I. EXECUTIVE SUMMARY[1]

1. Canada submits that the Appellate Body should uphold the Panel's interpretation of the disciplines on prohibited import-substitution subsidies under Article 3.1(b) of the SCM Agreement but reverse the Panel's interpretation of the compliance obligation under Article 7.8.

II. THE PANEL CORRECTLY INTERPRETED ARTICLE 3.1(B) OF THE SCM AGREEMENT

2. The Appellate Body should uphold the Panel's interpretation that Article 3.1(b) of the SCM Agreement does not prohibit subsidies merely because they require the recipient to engage in the domestic production of aircraft-related goods.

3. Article 3.1(b) does not discipline domestic production subsidies, regardless of whether the activities mandated by those subsidies result in the production of input or finished goods. GATT Article III:8(b), the Appellate Body's findings in *Canada – Autos* and the panel's findings in *US – Tax Incentives* support this view.

4. Furthermore, Article 3.1(b) does not discipline domestic production subsidies even if the activities mandated by those subsidies result in the production of specialized input goods that, because of their specialized nature, are likely to only be used in the production of finished goods by the subsidy recipient. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body found that a subsidy would not be *de facto* export contingent unless it provided the recipient with an incentive to export in a way that did not simply reflect the conditions of supply and demand in the market. Likewise, a subsidy is not a prohibited import-substitution subsidy unless it is geared to change the behaviour of a producer when choosing between domestic and imported inputs in a way that does not reflect market conditions.

III. THE PANEL ERRED IN ITS INTERPRETATION OF ARTICLE 7.8 OF THE SCM AGREEMENT

A. The Correct Interpretation of Article 7.8 of the SCM Agreement

5. Article 7.8 of the SCM Agreement sets out how a Member is to comply with its obligations when it is found to have provided a subsidy that caused adverse effects to the interests of another Member.

6. With respect to the ordinary meaning of the terms of Article 7.8, the phrase "granting or maintaining" indicates that the existence of a subsidy during the implementation period is a precondition for the compliance obligation under Article 7.8. As expired or withdrawn subsidies no longer exist, those subsidies entail no compliance obligation under Article 7.8.

7. Moreover, the phrase "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy" indicates that the compliance options are disjunctive in nature. Therefore, compliance under Article 7.8 can be achieved by withdrawing the WTO-inconsistent subsidy.

8. The following elements of the context of Article 7.8 support this understanding.

9. First, the text of Article 7.9 of the SCM Agreement confirms the compliance options under Article 7.8 are disjunctive.

[1] Canada's Third-Participant Submission consists of 13,558 words. This Executive Summary consists of 1,347 words.

10. Second, the difference in wording between Article 5 and Article 7.8 underscores an asymmetry between the circumstances in which a finding of an actionable subsidy may be made and the resulting compliance obligation. This difference must be afforded meaning. Where causing adverse effects is a constituent element for an actionable subsidy, removing those adverse effects is not the only way to comply with Article 7.8. Members can also comply by withdrawing the subsidy.

11. Third, the compliance obligation for prohibited subsidies and the restrictions on the application of countervailing duties confirm that withdrawal of the subsidy constitutes compliance under Article 7.8. The Appellate Body has indicated that a Member can comply with Article 4.7 of the SCM Agreement by removing a prohibited subsidy. Moreover, if removing the subsidy negates the right to apply countervailing duties, it must also negate the right to apply countermeasures – the remedy for actionable subsidies.

12. Fourth, the general rule of compliance under the DSU is the removal of the WTO-inconsistent measure. Where no subsidy exists, as a result of expiry or withdrawal, no compliance obligation remains.

13. With respect to the object and purpose of the SCM Agreement, it is subsidies that the SCM Agreement disciplines, not the adverse effects that linger after the subsidies no longer exist. Limiting the application of the compliance obligation under Article 7.8 to existing subsidies is consistent with this object and purpose. It is also consistent with the general objective of the WTO agreements to foster security and predictability in the international trading system.

B. Errors in the Panel's Interpretation of Article 7.8

14. The Panel's interpretation of Article 7.8 under which Members are required to remove the adverse effects of subsidies that have ceased to exist is deeply flawed.

15. With respect to the text of Article 7.8, the Panel essentially ignored the "granting or maintaining" requirement in Article 7.8. Where a subsidy has expired or been withdrawn, a Member can no longer be said to be "granting or maintaining" the subsidy. Under these circumstances, the Member is no longer subject to the compliance obligation under Article 7.8.

16. The Panel also deprived the phrase "withdraw the subsidy" of its independent meaning. If Article 7.8 was intended *under all circumstances* to require the removal of the adverse effects caused by the subsidy there would be no reason to refer to the possibility of withdrawing the subsidy.

17. With respect to the context of Article 7.8, the Panel improperly relied on Article 5 of the SCM Agreement and various provisions of the DSU to conclude that "withdraw[ing] the subsidy" under Article 7.8 also requires removing adverse effects. The Panel fails to recognize that conformity with the compliance obligation under the DSU means removal of the WTO-inconsistent measure, and that conformity with the compliance obligation for an actionable subsidy means carrying out one of the two options contemplated under Article 7.8 of the SCM Agreement.

18. The Panel also ignored that withdrawing a subsidy is a complete compliance remedy under the SCM Agreement. Imposing more exacting remedial disciplines on actionable subsidies as compared to prohibited subsidies would be incongruent with the overall structure of the SCM Agreement.

19. Last, with respect to the object and purpose of the SCM Agreement, the Panel failed to take into account that the withdrawal of a subsidy constitutes compliance. Moreover, the Panel's interpretation creates significant uncertainty as to the responsibility of Members for subsidies that no longer exist.

C. The Correct Approach to a Serious Prejudice Analysis in Compliance Proceedings

20. The Panel improperly took into account the effects of expired subsidies when it determined that subsidies were causing serious prejudice and that the European Union had therefore failed to remove the adverse effects of the subsidies.

21. The determination of whether a Member that has not withdrawn certain subsidies has nevertheless complied with Article 7.8 through the removal of the adverse effects of these subsidies should be based on a counterfactual analysis.

22. A counterfactual analysis involves a comparison between the current market situation and a counterfactual situation without subsidies. The Panel's analysis relied on a counterfactual situation where the challenged LA/MSF would not have been granted.

23. This is the wrong counterfactual situation. The correct counterfactual situation is rather one where only the subsidies present at the end of the RPT do not exist. Indeed, there must be consistency between the two options available to a responding Member under Article 7.8. A Member must either withdraw the subsidies or remove their adverse effects by the end of the RPT. If a given subsidy has been withdrawn or has expired, a Member cannot be asked to also remove its adverse effects.

24. It is only through a comparison of the correct counterfactual situation with the current market situation that the Panel could have properly assessed whether the subsidies that remained at the end of the RPT caused serious prejudice and, relatedly, whether the European Union had removed the adverse effects of these subsidies. The Panel failed to do so.

ANNEX C-3

EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION

1. China's Third Party Submission discusses the following three issues on appeal that China considers to be of systemic importance.

2. **First,** China submits that under the correct interpretation of Article 7.8 of *the SCM Agreement* in accordance with customary rules of interpretation of public international law, subsidies that cease to exist prior to the beginning of the implementation period are outside the scope of an implementing Member's obligation under Article 7.8.

3. In China's view, the explicit treaty language in Article 7.8 denotes that, if a subsidy is no longer in existence, there is nothing to be withdrawn and that the Member concerned has fulfilled its obligation under Article 7.8. Nothing in Article 7.8 suggests that the implementing action to withdraw the subsidy must remove any "lingering effects" of past subsidies that are no longer in existence. The Panel's interpretation would deprive the independent meaning of the option under Article 7.8 to "withdraw the subsidy" and render the phrase redundant.

4. China's interpretation finds contextual support in Article 4.7 of *the SCM Agreement*, which requires the Member providing prohibited subsidies to "withdraw the subsidy without delay". To interpret the same compliance option in Article 7.8 in a more onerous way for the less harmful form of subsidization would be against logic. China also considers that Part V of *the SCM Agreement* provides relevant context for interpreting Article 7.8. In particular, Article 19.4 provides that countervailing duties may not be imposed when a subsidy is no longer bestowed on the subject merchandise, regardless of any lingering effects. The limits of remedies available under Part V should also inform the correct interpretation of Article 7.8 in Part III of *the SCM Agreement*.

5. In addition, by first reviewing various provisions of *the DSU* instead of Article 7.8 of *the* SCMAgreement, the Panel has allowed the general provisions of *the DSU* to subsume the "special or additional rules" of Article 7.8. In China's view, the important textual difference between Article 4.7 and Article 7.8 also suggests that Article 7.8 does not necessarily require the removal of any adverse effects, and can be read in a way that maintains its independent meaning while at the same time being in harmony with *the DSU*.

6. Finally, neither in the WTO cases cited by the Panel nor anywhere under the covered agreements does China see the basis to single out actionable subsidies as the only type of measures subject to an implementing obligation requiring the removal of trade effects caused by such measures after they are withdrawn, an obligation more onerous than those generally applicable vis-à-vis all measures under Articles 3.7 and 22.8 of *the DSU*.

7. **Second**, China submits that under the correct interpretation and application of Articles 5(c) and 6.3 of *the SCM Agreement*, the Panel's "but for" approach is not a proper analysis to determine whether the LA/MSF subsidies continue to cause serious prejudice under the present circumstances at issue.

8. For the assessment of causation, although an inquiry seeking to identify what would have occurred "but for" the subsidies is one possible approach suggested by the Appellate Body, the Panel did not examine or consider whether the factual scenario before it is one of the circumstances where the "but for" analysis will show that the subsidy is both a necessary cause of the market phenomenon and a substantial cause. Without such an examination or consideration, the Panel improperly equated the "but for" analysis with the proper legal standard for finding causation under Articles 5(c) and 6.3 of *the SCM Agreement*, which requires for a "genuine and substantial" cause.

9. The Panel's approach effectively leads to a long-lasting causal chain between subsidies and adverse effects in the LCA markets that is inconsistent with the Appellate Body's observation that the effects of any subsidy can be expected to diminish and eventually come to an end

with the passage of time. Furthermore, the Panel seems to have inappropriately allocated the burden of proof between the Parties in its application of Articles 5(c) and 6.3 of the *SCM Agreement* by requiring the European Union to prove that no "genuine and substantial" cause existed in the post-implementation period.

10. **Third,** while China is sceptical if any general rule or threshold could be pre-defined for the purpose of determining the scope of product markets, China agrees with the European Union to the extent that panels should not find two products in the same product market solely on the basis that they exercise any competitive constraints on one another. Instead, a panel must examine the nature and degree of competition so as to determine the scope of the relevant product market on a case-by-case basis. Furthermore, the "nature and degree" of competition found to exist in a given product market should inform the assessment of serious prejudice claims.

ANNEX C-4

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

1. Japan wishes to comment on how the effects of such subsidies including R&D subsidies as the Appellate Body in the original proceeding referred to as subsidies that (i) had the "product effect" on subject products or (ii) "complemented and supplemented" the "product effect" must be assessed.

2. The European Union appealed by arguing that the removal of a subsidy through removal of the "financial contribution" will comply with Article 7.8.

3. However, Japan believes that when "benefits" are removed, the subsidy is thereby withdrawn and consequently the adverse effects are removed. The definition of a subsidy under Article 1.1 and other Appellate Body findings concerning the "life" of subsidy suggest, when the recipient is no longer able to lower the price of products by using the benefit, a Member would then not be further asked to remove anything else. The function of R&D subsidies contemplates that its benefit will normally be consumed, as the recipient sells the resulting 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.

4. The Appellate Body must carefully consider whether LA/MSF subsidies that had "expired" through the "amortization of benefit", as found by the Compliance Panel, may, as a matter of law, be considered tantamount to the removal of the benefit in connection with the projected period or sales amount properly anticipated by the granting Member when the subsidy was granted.

ANNEX D

PROCEDURAL RULINGS

ANNEX D-1

PROCEDURAL RULING OF 25 OCTOBER 2016

1. On 13 October 2016, the Chair of the Appellate Body received a joint letter from the European Union and the United States requesting the Appellate Body Division hearing this appeal to adopt additional procedures to protect business confidential information (BCI) and highly sensitive business information (HSBI) in these appellate proceedings. In their letter, the European Union and the United States suggested that the additional procedures adopted by the Appellate Body in the appeal in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)* (WT/DS353), with certain modifications, should form the basis for any procedural ruling on confidentiality in these appellate proceedings. They argued, *inter alia*, that disclosure of certain sensitive information on the record of the Panel proceedings would be severely prejudicial to the large civil aircraft manufacturers concerned, and possibly to their customers and suppliers.

2. On behalf of the Division hearing this appeal, the Chair of the Appellate Body invited the third participants to comment in writing on the joint request by the European Union and the United States by 12 noon on Wednesday, 19 October 2016. He also informed the participants and the third participants that pending a final decision on the joint request by the participants, the Division had decided to provide interim additional protection to all BCI and HSBI transmitted to the Appellate Body in this dispute on the terms set out below:

(a) Only Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal may have access to the BCI and HSBI contained in the Panel record pending a final decision on the joint request. Appellate Body Members and Appellate Body Secretariat staff shall not disclose BCI or HSBI, or allow either to be disclosed to any person other than those identified in the preceding sentence.
(b) BCI shall be stored in locked cabinets when not in use. When in use by Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal all necessary precautions will be taken to protect the confidentiality of the BCI.
(c) All HSBI shall be stored in a combination safe in a designated secure location in the offices of the Appellate Body Secretariat. Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal may view HSBI only in the designated secure location in the offices of the Appellate Body Secretariat. HSBI shall not be removed from this location.
(d) Pending a decision on the joint request for the protection of BCI/HSBI in these proceedings, neither BCI nor HSBI shall be transmitted electronically, whether by e-mail, facsimile, or otherwise.

3. On Wednesday, 19 October 2016, written comments were received from Australia, Brazil, Canada, and China. Australia and Brazil did not object to the joint request made by the participants, but requested that the Appellate Body ensure that the rights of third participants are taken into account in setting the working schedule for this appeal. China stated that it had no comments regarding the request for additional protection of BCI/HSBI. For its part, Canada stated that, while it agrees that additional procedures for the protection of confidential information are warranted by the specific facts of this case, it considers that the procedures proposed by the participants may not provide third participants with effective access to the BCI they need to adequately prepare and present their positions. In particular, Canada submitted that the procedures set out an overly onerous method for capital-based Third Participant BCI-Approved Persons to obtain access to BCI, and that in previous proceedings where similar procedures were adopted, Canadian Geneva-based BCI-Approved Persons were required to spend many hours transcribing BCI in the designated reading room and then to spend an equivalent amount of time discussing this BCI with capital-based BCI-Approved Persons. Canada therefore proposed that any additional procedures specify that, in addition to the "designated reading room" on the premises of the WTO, there be a "designated reading room" located in an embassy or other diplomatic mission of a participant in the capital of each of the third participants, where capital-based Third Participant BCI-Approved Persons can obtain effective access to BCI. According to Canada, this would ensure that third participants' rights to meaningfully participate in these appellate proceedings are fully protected.

4. On Friday, 21 October 2016, the Division invited the participants and other third participants to comment, if they so wished, on Canada's request regarding access to BCI by 5:00 PM on Monday, 24 October 2016. Comments were received from Australia, Brazil, the European Union, and the United States.

5. Australia supported Canada's proposal. Australia stated that it recognises the importance of protecting sensitive information, while facilitating the meaningful participation of third participants in these appellate proceedings. Brazil indicated that it had no comments regarding Canada's request.

6. The European Union submitted that Canada's request calls for an additional 12 designated reading rooms in the missions of the European Union and the United States in the capitals of each third participant, in addition to the designated reading room at the WTO. According to the European Union, this would impose significant additional burdens on the participants. In particular, the European Union submitted that the adjustment proposed by Canada would require that, for each of the six third participants, the participants would have to: (i) identify an appropriate contact person in each mission; (ii) designate those appropriate persons as BCI approved; (iii) communicate with them and explain what is envisaged; (iv) obtain appropriate and necessary internal authorisations; (v) identify and set aside appropriate secure locations; (vi) identify and set aside appropriate designated reading rooms; (vii) securely transmit to them all the relevant documents; (viii) arrange for copies of the necessary documents to be made; (ix) make arrangements for the appropriate monitoring and surveillance of the designated reading room during use; (x) provide appropriate training to the staff involved; and (xi) make appropriate additional arrangements for the return or destruction of the materials involved at the appropriate time. The European Union indicated that it was therefore opposed to Canada's request. It agreed, however, that third participants could be provided with some additional time to prepare their third participants' submissions. According to the European Union, this would meet the concern raised by Canada, while avoiding the imposition of unnecessary and substantial costs on the participants.

7. The United States argued, as did the European Union, that Canada's proposal would require a total of 12 new BCI reading rooms − one for each of the two participants in six different cities. According to the United States, this would require identifying officials at each site to maintain control over documents containing BCI and to monitor third participant officials during the review of the documents, and providing training to those individuals regarding their responsibilities under the BCI/HSBI procedures. The United States considered that this would impose a significant burden on the participants, with little benefit to the third participants. In particular, the United States argued that Canada's proposal would not have a meaningful effect on the burden placed on third parties because even under the proposal, a capital-based official would still need to review the BCI and take notes as to the relevant information in the reading room, just as under the original rules. Moreover, to the extent that an official considered BCI to be relevant to a third participant's submission, that official would still need to discuss the annotated information with colleagues to prepare and finalize the third participant submission, just as under the original rules. The United States noted that the only difference is that under the adjustment proposed by Canada, capital-based officials would review the BCI instead of Geneva-based officials. In so doing, according to the United States, Canada's proposal appeared to merely shift the burden of reviewing BCI from Geneva-based officials to capital-based officials, rather than reducing the burden in a meaningful way. For these reasons, the United States opposed Canada's request and asked the Appellate Body to adopt the same procedures governing third participants' access to BCI as it did in the original appellate proceedings.

8. The Division has made the following ruling having considered the arguments made by the European Union and the United States in support of their request, and the comments received from the participants and third participants:

9. As an initial matter, we recall that the Appellate Body adopted additional procedures to protect the confidentiality of sensitive information in the appellate proceedings in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)* as well as in the original proceedings in this dispute. In this appeal, the participants suggested that the additional procedures adopted by the Appellate Body in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)* should form the basis for any procedural ruling on confidentiality, and identified certain modifications that could be made to those additional procedures. We further note

that the participants and the third participants involved in this case are the same as those involved in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)*. In the Procedural Ruling adopted in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)*, the Appellate Body explained the considerations relevant to a decision on whether to provide additional protection to certain sensitive information[1]. We believe that those considerations are also relevant to our evaluation of the request made by the European Union and the United States in this appeal and we briefly recall them before addressing the specific points raised in the joint request and in the comments of the third participants.

10. The confidentiality requirements set out in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and in the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*Rules of Conduct*")[2] are stated at a high level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect the confidentiality of that information. The adoption of such arrangements falls within the authority of the Appellate Body to hear the appeal and to regulate its procedures in a manner that ensures that the proceedings are conducted with fairness and in an orderly manner. To the extent that the arrangements elaborate on the confidentiality requirements of the DSU, the adoption of such arrangements in an "appropriate procedure" needs to conform to the requirement in Rule 16(1) of the *Working Procedures*, that any additional "appropriate procedure" not be inconsistent with the DSU, the other covered agreements, and the *Working Procedures* themselves.

11. The determination of whether particular arrangements are appropriate in a given case essentially involves a balancing exercise: the risks associated with the disclosure of the information sought to be protected must be weighed against the degree to which the particular arrangements affect the rights and duties established in the DSU, the other covered agreements, or the *Working Procedures*. Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. Participants requesting particularized arrangements have the burden of justifying that such arrangements are necessary in a given case adequately to protect certain information, taking into account the rights and duties recognized in the DSU, the other covered agreements, and the *Working Procedures*. This burden of justification will increase the more the proposed arrangements affect the exercise by the Appellate Body of its adjudicative duties, the exercise by the participants of their rights to due process and to have the dispute adjudicated, the exercise by the third participants of their participatory rights, and the rights and systemic interests of the WTO membership at large.

12. Additional confidentiality protection implicates the authority of the Appellate Body, and the rights and duties of the participants, third participants, and the membership at large. In the original proceedings in this dispute and in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)*, the Appellate Body adopted additional procedures that it considered struck an appropriate balance between the risks associated with the disclosure of sensitive information, on the one hand, and the adjudicative authority of the Appellate Body and the rights and duties of the participants, third participants and the WTO membership at large. Similar considerations are relevant in these appellate proceedings. The European Union, the United States, and the third participants concur that the additional procedures adopted in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)* provide an appropriate framework and ask that we apply the same practices in this case, with certain modifications.

13. We recall that it is for the adjudicator to decide whether certain information calls for additional protection of confidentiality. Likewise, it is for the adjudicator to decide whether and to what extent specific arrangements are necessary, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection. We also note, however, that neither participant has appealed the Panel's decisions regarding the protection of BCI/HSBI and that there are also issues of practicality to consider. We will therefore proceed on the basis of how the information was treated before the Panel. Nevertheless, we do not exclude revisiting whether a

[1] See Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)*, Procedural Ruling and Additional Procedures to Protect Sensitive Information, Annex III, paras. 8 and 9.

[2] The *Rules of Conduct*, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are incorporated into the *Working Procedures for Appellate Review* (WT/AB/WP/6), as Annex II thereto. (See WT/DSB/RC/2, WT/AB/WP/W/2)

particular piece of information meets the objective criteria justifying additional protection, or the particular degree thereof, should a dispute on the classification of that information arise before us, or should we consider that we need to refer to that information in our report if this is necessary to give a sufficient exposition of our reasoning and findings.

14. Having reaffirmed the relevant considerations that guide our decision, we turn to the modifications requested by the participants to the BCI/HSBI procedures adopted by the Appellate Body in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)*. The participants propose, *inter alia*, that any additional BCI/HSBI procedures in this dispute specify that documents and materials containing BCI shall be sent to the Appellate Body Members by means of encrypted e-mail or courier. They also propose that HSBI contained in any appendix not be transmitted over e-mail but on a CD-ROM, labelled with an indication that it contains HSBI. In addition, the participants suggest certain adjustments to provide clarity on how the electronic version of an unredacted version of a submission by a participant and/or a third participant shall be corrected and transmitted, including an adjustment to avoid accidental inclusion of BCI in third participant submissions.

15. The arrangements that the participants have jointly proposed do not appear to affect the Appellate Body's ability to adjudicate the dispute, the rights of the third participants to be heard, or the rights and interests of the WTO membership at large. We have reflected them in the additional procedures that we adopt below. These procedures ensure that Members of the Appellate Body have sufficient access to the entirety of the Panel Report, the submissions, and the record of the dispute. They also limit the risk of inadvertent disclosure of sensitive information and render the process of correcting and transmitting redacted version of submissions more efficient.

16. We have carefully considered Canada's proposal regarding access by third participants to BCI in capitals, as well as the comments received from the participants and other third participants. It is our responsibility, in adopting any additional procedures, to strike an appropriate balance between the risks associated with the disclosure of sensitive information, the adjudicative duties of the Appellate Body, and the rights of the participants and third participants. While adoption of procedures such as those suggested by Canada may well facilitate access to BCI, we recall that the rights of third participants are more limited than those of the participants, and that third participants' interests lie mainly in the correct legal interpretation of the provisions of the WTO agreements.[3] Moreover, as highlighted in the comments received from the participants, it would be difficult to design and implement a regime whereby there would be a "designated reading room" located in an embassy or other diplomatic mission of a participant in the capital of each of the third participants. For these reasons, we have decided therefore not to adopt the adjustment proposed by Canada. However, we will ensure that the rights of third participants are taken into account in these appellate proceedings, including when we set the working schedule for this appeal.

17. Finally, we note, as we did in the original proceedings and in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)*, that we will make every effort to draft our report without including sensitive information. The additional procedures that we adopt below foresee that the participants will be provided in advance with a copy of the Appellate Body report intended for circulation to WTO Members and will have an opportunity to request the removal of any sensitive information that is inadvertently included in the report. If we were to consider it necessary to include sensitive information in the reasoning in our report, the participants will be given an opportunity to comment. We reiterate that the participants will have a timely opportunity to comment as to the inclusion of any sensitive information in the report; we will provide further guidance at a later point in these proceedings as to the modalities and details of such a procedure.

18. For the reasons set out above, we have decided to provide additional confidentiality protection on the terms set out below. Accordingly, we adopt the following additional procedures for the purposes of this appeal:

[3] See Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, Procedural Ruling and Additional Procedures to Protect Sensitive Information, Annex III, para. 11.

Additional Procedures to Protect Sensitive Information

General

(i) These additional procedures shall apply to information that was treated as business confidential information (BCI) or as highly sensitive business information (HSBI) in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. The additional procedures apply to written and oral submissions made in the appellate proceedings only to the extent that they incorporate information that was treated as BCI or HSBI in the Panel proceedings.

(ii) To the extent that information on the record is submitted to the Appellate Body in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants on the proper treatment of this information, the Appellate Body shall decide after hearing their views.

(iii) Each participant may at any time request that information that it has submitted and that was previously treated as BCI or HSBI no longer be treated as such.

(iv) The participants and third participants shall file their written submissions and executive summaries with the Appellate Body Secretariat in accordance with the Working Schedule drawn up by the Division for this appeal. Where a written submission and/or an executive summary contain BCI or HSBI, redacted versions of the submission and/or the executive summary (that is, a version without BCI and HSBI) shall be filed simultaneously with the Appellate Body Secretariat. Should an executive summary submitted by participants and third participants contain BCI or HSBI, the redacted version of the executive summary will be annexed as addenda to the Appellate Body Report. The redacted version shall be sufficient to permit a reasonable understanding of the substance of the relevant document. The Division may take appropriate action to ensure that this obligation is satisfied. The participants and third participants shall also provide the Appellate Body Secretariat with an electronic version of all submissions, including the redacted versions. The transmittal of participants' submissions to each other and to the third participants, and the transmittal of third participants' submissions to the participants and to the other third participants, are further regulated in the provisions below which apply mutatis mutandis to executive summaries of written submissions.

Appellate Body Members and Appellate Body Secretariat Staff

(v) Only Appellate Body Members, and staff of the Appellate Body Secretariat who have been assigned by the Appellate Body to work on this appeal, may have access to the BCI and HSBI on the Panel record and in the written and oral submissions made in these appellate proceedings. Appellate Body Members and assigned Appellate Body Secretariat staff shall not disclose BCI or HSBI, or allow either to be disclosed, to any person other than those identified in the preceding sentence or to approved persons of the participants and third participants. Appellate Body Members and assigned Appellate Body Secretariat staff are covered by the *Rules of Conduct*. As provided for in the *Rules of Conduct*, evidence of breach of these Rules may be submitted to the Appellate Body, which will take appropriate action.

(vi) BCI shall be stored in locked cabinets when not in use.

(vii) Appellate Body Members who are serving on the Division hearing this appeal may maintain a copy of all relevant documents containing BCI at their places of residence outside Geneva. Appellate Body Members who are not serving on the Division may maintain at their places of residence outside Geneva a copy of the BCI version of the Panel Report, a copy of the BCI version of the written submissions made in these appellate proceedings, a BCI version of the transcripts of any oral hearings, any internal documents containing BCI, and, where necessary, selected BCI exhibits from the Panel record. The documents and materials containing BCI kept by Appellate Body Members at their places of residence outside of Geneva shall be stored in locked cabinets when not in use. Documents and materials containing BCI shall only be sent to Appellate Body Members by secure e-mail or courier.

(viii) Participants shall provide printed copies of their submissions and other documents containing BCI that are intended for use by Appellate Body Members or assigned Appellate Body Secretariat staff on coloured paper and individually watermarked with "Appellate Body" and numbered consecutively ("Appellate Body No. 1", "Appellate Body No. 2", etc.).

(ix) All HSBI shall be stored in a combination safe in a designated secure location on the premises of the Appellate Body Secretariat. Any computer in that room shall be a stand-alone computer, that is, a computer not connected to a network. Appellate Body Members and assigned Appellate Body Secretariat staff may view HSBI only in the designated secure location referred to above. HSBI shall not be removed from this location, except as provided for in paragraph (x), or in the form of handwritten notes that may be used only on the Appellate Body Secretariat's premises and shall be destroyed once no longer used.

(x) Subject to appropriate precautions, BCI and HSBI may be taken outside of the premises of the Appellate Body Secretariat, in hard copy and electronic form, for purposes of any oral hearings that may be held in connection with this appeal.

(xi) Except as provided for in paragraph (xii), all documents and electronic files containing BCI and HSBI shall be destroyed or deleted when the Appellate Body report in this dispute has been adopted by the DSB.

(xii) The Appellate Body shall retain one hard copy and one electronic version of all documents containing BCI and HSBI as part of the appellate record. Documents and electronic media containing BCI shall be kept in sealed boxes within locked cabinets on the Appellate Body Secretariat's premises. Documents and electronic media containing HSBI shall be placed in a sealed container that will be kept in a combination safe on the premises referred to above.

Appellate Body Report

(xiii) The Division will make every effort to draft an Appellate Body report that does not disclose BCI or HSBI by limiting itself to making statements or drawing conclusions that are based on BCI and HSBI. A copy of the Appellate Body report intended for circulation to WTO Members will be provided in advance to the participants, at a date and in a manner to be specified by the Division. Participants will be provided with an opportunity to request the removal of any BCI or HSBI that is inadvertently included in the report. The Division will also indicate to the participants if it has found it necessary to include in the Appellate Body report information that was treated by the Panel as BCI or HSBI and will provide participants with an opportunity to comment. Comments on the inclusion of information previously treated as BCI or HSBI and requests for removal of BCI or HSBI inadvertently included in the report shall be filed with the Appellate Body Secretariat within a time period to be specified by the Division. No other comments or submissions shall be accepted. In coming to a decision on the need to include BCI or HSBI to ensure that the final report is understandable, the Division will strike an appropriate balance between the rights of the WTO membership at large to obtain a report that gives a sufficient exposition of its reasoning and findings, on the one hand, and the legitimate concerns of the participants to protect sensitive information, on the other.

Participants

(xiv) The participants shall provide a list of persons that are "BCI-Approved Persons" and that are "HSBI-Approved Persons". These lists shall be provided to the Appellate Body Secretariat by 5 p.m. on Thursday, 27 October 2016, and shall be served on the other participant and the third participants. Any objections to the designation of an outside advisor as a BCI-Approved Person or HSBI-Approved Person must be filed with the Appellate Body Secretariat and served on the other participant by 5 p.m. on Monday, 31 October 2016. Participants may submit amendments to their lists of BCI-Approved Persons or HSBI-Approved Persons by filing an amended list with the Appellate Body Secretariat and serving it on the other participant and the third participants. A participant may object to the designation on the amended list of an outside advisor by another participant. Any objections must be filed with the Appellate Body Secretariat within two days and simultaneously served on the other participant and the third participants. The Division will reject a request for designation of an outside advisor as a

BCI-Approved Person or an HSBI-Approved Person only upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles reflected in the *Rules of Conduct* and the illustrative list in Annex 2 thereto. BCI-Approved Persons and HSBI-Approved Persons shall not disclose BCI or HSBI, or allow either to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, other BCI-Approved Persons and HSBI-Approved Persons, and Third Participant BCI-Approved Persons.

(xv) Any participant referring in its written submissions to any BCI or HSBI shall clearly identify the information as such in those submissions. If the submissions contain HSBI, the HSBI shall be included in an appendix. In that case, the version of the submission that includes the HSBI appendix shall be transmitted only to HSBI-Approved Persons. The HSBI appendix shall not be transmitted via e-mail, but solely on a CD-ROM, labelled with an indication that it contains the HSBI appendix. Each participant shall simultaneously provide a redacted version of its submissions to the other participant. Submissions containing BCI, and redacted versions of submissions, shall be transmitted only to BCI-Approved Persons of the other participant. The other participant shall have two days to object to the inclusion of any BCI. If there are objections, the Division shall resolve the matter, and instruct, as appropriate, the relevant participant to transmit a correctly redacted version of its submission to the other participant and the third participants, unless the participant concerned agrees to remove the information that was subject to the objection. The electronic copy of the unredacted version of the submission shall be corrected by the participant according to the Division's resolution of the matter and re-transmitted to the Appellate Body Secretariat and other participant; the Appellate Body shall direct BCI-Approved Persons to implement modified confidentiality treatment in any paper copies of the submission as well as to replace the electronic copies. If there are no objections, the redacted version shall be transmitted the following day to the third participants.

Third Participants

(xvi) Third participants may designate up to eight individuals as "Third Participant BCI-Approved Persons". For this purpose, each third participant shall provide a list of Third Participant BCI-Approved Persons to the Appellate Body Secretariat by 5 p.m. on Thursday, 27 October 2016. A copy of the list of Third Participant BCI-Approved Persons shall be served on each participant and on each other third participant. The participants may object to the designation of an outside advisor as a Third Participant BCI-Approved Person. Objections must be filed with the Appellate Body Secretariat by 5 p.m. on Monday, 31 October 2016. Third participants may submit amendments to their lists of BCI-Approved Persons or HSBI-Approved Persons by filing an amended list to the Appellate Body Secretariat and serving it on the participants and the other third participants. A participant may object to the designation in an amended list of an outside advisor by a third participant. Any objections must be filed with the Appellate Body Secretariat within two days and simultaneously served on the other participant and the third participants. The Division will reject the designation of an outside advisor as a Third Participant BCI-Approved Person only upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles in the *Rules of Conduct* and the illustrative list in Annex 2 thereto. Third Participants BCI-Approved Persons shall not disclose BCI, or allow it to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, BCI-Approved Persons, and other Third Participant BCI-Approved Persons.

(xvii) The BCI version of all participants' submissions shall be transmitted to the third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room located on the premises of the WTO. Third Participant BCI-Approved Persons shall be allowed to view in the designated reading room the BCI version of the Panel Report and the BCI version of the submissions filed in these appellate proceedings. Third Participant BCI-Approved Persons shall not bring into that room any electronic recording or transmitting devices, nor shall they remove copies of the BCI version of the Panel Report or the BCI version of the submissions from that room. Upon request, each third participant shall be provided with one copy of the Panel Report as circulated to WTO Members and of the redacted version of the submissions for use in the reading room. Third Participant BCI-Approved Persons may take handwritten notes on the provided copies of the circulated Panel Report and redacted version of the submissions and they may take these copies with them. These documents shall be printed on coloured watermarked paper; shall bear the names of the Third Participant BCI-Approved Persons; state that "This document is not to be copied"; and the cover page of each of the documents shall state that any handwritten BCI added to the document shall only be discussed

or shared with other Third Participant BCI-Approved Persons. The content of any handwritten notes shall not be incorporated, electronically or in handwritten form, into any other copy of the Panel Report or of the submissions. These documents and any other handwritten notes taken by the Third Participant BCI-Approved Persons in the reading room shall be locked in a secure container when not in use. These documents and handwritten notes must be returned to the Appellate Body Secretariat after the final oral hearing held in this appeal.

(xviii) Each Third Participant BCI-Approved Person viewing the BCI version of the Panel Report and submissions in the designated reading room shall complete and sign a log. The Appellate Body Secretariat shall keep such log as part of the record of the appeal.

(xix) Third participants shall transmit their submission to the Appellate Body Secretariat and the participants. It shall also be transmitted to the other third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room referred to in paragraph (xvii) above. If a third participant wishes to refer in its third participant's submission to any BCI, it shall clearly identify such information. A third participant referring to BCI shall also simultaneously provide the participants with a redacted version of its submission. Third participant's submissions containing BCI, and redacted versions of submissions, shall be transmitted only to BCI-Approved Persons of the participants. The participants shall have two days to object to the inclusion of any BCI in a third participant's submission. If there are objections, the Division shall resolve the matter, and instruct, as appropriate, the relevant third participant to transmit a correctly redacted version of its submission to each of the participants and the other third participants, unless the third participant concerned agrees to remove the information that was subject to the objection. The electronic copy of the unredacted version of the submission shall be corrected by the third participant according to the Division's resolution of the matter and re-transmitted to the Appellate Body Secretariat and the participants; the Appellate Body shall direct BCI-Approved Persons to implement modified confidentiality treatment in any paper copies of the submission as well as to replace the electronic copies. If there are no objections, the submission or the redacted submission, as the case may be shall be transmitted the following day to the other third participants and again to the participants.

Oral Hearing

(xx) Appropriate procedures shall be adopted to protect BCI and HSBI from unauthorized disclosure at any oral hearing held in this appeal.

ANNEX D-2

PROCEDURAL RULING OF 21 NOVEMBER 2016

1. On 31 October 2016, the Appellate Body Division hearing the above appeal received a communication from the United States provisionally objecting to the inclusion of Prof. Andreas Klasen on the European Union's proposed list of BCI- and HSBI-Approved Persons. The United States requested the Division to ask the European Union to provide further information concerning Prof. Klasen's employment by the European Aeronautic Defence and Space Company N.V. (EADS), whether he has ongoing involvement with Airbus in his current position, and the reason he would need access to BCI and HSBI.

2. On 1 November 2016, the Division invited the European Union to respond to the United States' provisional objection, and informed the participants and third participants that, in the meantime, the European Union's access to BCI and HSBI on the Panel Record and in written submissions in these appellate proceedings shall be restricted to the other individuals on the European Union's list of BCI-Approved Persons and HSBI-Approved Persons, dated 27 October 2016.

3. On 2 November 2016, the Division received a response from the European Union commenting on the United States' provisional objection, and providing some additional information regarding Prof. Klasen, including his full *curriculum vitae*. The European Union indicated, *inter alia*, that Prof. Klasen "is providing external advice for the European Union as well as the European Union's underlying interests in this case (Airbus)".

4. On 3 November 2016, the Division invited the United States to respond to the letter received from the European Union. On 7 November 2016, the United States reiterated its request for further information regarding Prof. Klasen. The United States explained that "knowing whether and to what extent Prof. Klasen continues to undertake work for Airbus is critical to an understanding of whether his access to Boeing BCI and HSBI would give Airbus an unfair advantage in areas outside of this proceeding." The European Union responded to the United States' letter on 11 November 2016, at the request of the Division. In its letter, the European Union reiterated that Prof. Klasen "is an expert who has been providing advice for the European Union and its underlying interests in this case (Airbus)", and that the European Union wishes to retain the possibility of including him in its delegation for that purpose. The European Union further requested that we confirm Prof. Klasen's designation as BCI- and HSBI-approved.

5. On 16 November 2016, the Division invited the European Union to indicate whether Prof. Klasen is subject to an enforceable code of professional ethics that requires him to protect confidential information, or whether he has been retained by an outside advisor who is subject to such a code of professional ethics and assumes responsibility for compliance with the additional BCI/HSBI procedures adopted by the Appellate Body in these proceedings.

6. On 18 November 2016, the European Union confirmed that Prof. Klasen has been retained by an outside advisor who is subject to an enforceable code of professional ethics and assumes responsibility for compliance with the additional BCI/HSBI procedures adopted by the Appellate Body in these proceedings. The European Union added that it has responsibility, according to the applicable rules, for the constitution and conduct of its delegation, including all of its representatives and outside advisors.

7. We recall that pursuant to paragraph 18(xiv) of our Procedural Ruling of 25 October 2016, the Division will reject a request for designation of an outside advisor as a BCI-Approved Person or an HSBI-Approved Person only upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles reflected in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes and the illustrative list of information to be disclosed in Annex 2 thereto. We further recall that the same paragraph mandates that BCI-Approved Persons and HSBI-Approved Persons shall not disclose BCI or HSBI, or allow either to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, other BCI-Approved Persons and HSBI-Approved Persons, and Third Participant BCI-Approved Persons.

8. In light of the clarifications provided by the European Union, we see no compelling reason to reject the European Union's request to designate Prof. Klasen as a BCI- and HSBI-Approved Person. We therefore consider it appropriate to accept the European Union's request. Accordingly, the European Union's access to BCI and HSBI on the Panel record and in written submissions in these appellate proceedings stands extended to Prof. Klasen as a BCI- and HSBI-Approved Person in addition to the other individuals on the European Union's list of BCI-Approved Persons and HSBI-Approved Persons, dated 27 October 2016.

ANNEX D-3

PROCEDURAL RULING OF 21 NOVEMBER 2016

1. On 14 November 2016, we received a letter from the European Union requesting that certain text in the United States' other appellant's submission be designated as business confidential information (BCI). On 15 November 2016, the Division invited the United States to respond to the European Union's request. The United States responded in writing on 16 November 2016, indicating that it did not object to the changes proposed by the European Union to paragraphs 36, 52, 64, and 69 of the United States' other appellant's submission. However, the United States objected to the other changes proposed by the European Union (to paragraphs 35, 37, 41, 43, 45, 47, 49, 51, 53, 55, and 60) arguing that the European Union was proposing to designate certain information as BCI, even though that information could already be derived from information on the Panel record that the European Union previously did not designate as BCI or HSBI. The United States indicated that, upon resolution of this issue by the Appellate Body, it was prepared to submit revised BCI and BCI-redacted versions of its other appellant's submission and that two days after the Appellate Body's ruling would be sufficient time to complete this task.

2. In our Procedural Ruling of 25 October 2016, we surveyed considerations that are relevant to a decision on whether to provide additional protection to certain sensitive information. We believe that these considerations are also relevant to our evaluation of the European Union's request that certain text in the United States' other appellant's submission be designated as BCI.

3. As an initial matter, we recall that the determination of whether particular arrangements are appropriate in a given case involves a balancing exercise: the risks associated with the disclosure of the information sought to be protected must be weighed against the degree to which the particular arrangements affect the rights and duties established in the DSU and the other covered agreements. Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. It is ultimately for the adjudicator to decide whether certain information calls for additional protection of confidentiality, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection. This involves striking an appropriate balance between the risks associated with the disclosure of sensitive information, the adjudicative duties of the Appellate Body, and the rights of the participants and third participants.

4. The changes to BCI bracketing proposed by the European Union do not appear to affect our ability to hear this appeal or the due process rights of the participants, both of which have access to BCI and HSBI. With regard to the rights of third participants, we further recall that, in accordance with paragraph 18(xvii) of our Procedural Ruling of 25 October 2016, Third Participant BCI-Approved Persons may view in the designated reading room the BCI version of the submissions filed in these appellate proceedings. As we see it, this ensures that third participants have sufficient access to the entirety of the information contained in the United States' other appellant's submission, which the European Union considers should be subject to additional protection.

5. We further note that the United States does not object to the changes proposed by the European Union to paragraphs 36, 52, 64, and 69 of the United States' other appellant's submission. In particular, the United States has not objected to the European Union's request to designate as BCI the four words that the European Union has included between the additional brackets in each of the bullet points following paragraph 69 of the BCI-version of the United States' other appellant's submission, consistent with the designation of the terms of Section 21.14 of the UK A350XWB Repayable Investment Agreement as BCI. Nor has the United States objected to the inclusion between additional brackets of the same four words in paragraph 64 of the United States' other appellant's submission, consistent with the designation of the terms of Section 11 of the Spanish A350XWB *Convenio* as BCI.

6. With respect to the French A350XWB *Protocole*, we note that the four words at issue speak more to the substantive content of Articles 8 and 9, designated as containing BCI, rather than to the headers of those provisions, which, as the United States points out, have not been designated as containing BCI.

7. With respect to the German KfW A350XWB Loan Agreement, while we agree with the United States that the language to which it refers might provide a basis to derive the information which the European Union now seeks to have designated as BCI, we note that this information cannot be found in the Panel Report circulated to WTO Members on 22 September 2016. Nor, as we understand it, has it been argued that this information would have otherwise come into the public domain, or that it would no longer be confidential due to the passage of time.

8. We note, moreover, that there are also issues of practicality to consider. Having considered the European Union's request and the response received from the United States, we have decided to proceed on the basis of the BCI bracketing proposed by the European Union. Nevertheless, we do not exclude revisiting whether a particular piece of such information meets the objective criteria justifying additional protection, or the particular degree thereof, should we consider that we need to refer to that information in our report in this dispute if this is necessary to give a sufficient exposition of our reasoning and findings. However, we reiterate that, if we were to consider it necessary to do so, the participants will be given a timely opportunity to comment.

9. We would request the United States to kindly submit revised copies of the BCI and non-BCI versions of its other appellant's submission to the Appellate Body Secretariat and the European Union, and copies of the non-BCI version of its other appellant's submission, with BCI correctly redacted, to each of the third participants, by 5 p.m. on Wednesday, 23 November 2016. There is no need to resubmit the HSBI Appendix. We further request the BCI-Approved Persons of each of the participants to implement modified confidentiality treatment, as outlined above, in any paper copies of the United States' other appellant's submission, and to replace electronic copies.

ANNEX D-4

PROCEDURAL RULING OF 11 JANUARY 2017

1. On Friday, 6 January 2017, we received a communication from the European Union requesting that the Division modify the deadline for the filing of the appellees' submissions in the present dispute. In its letter, the European Union invokes Rule 16(2) of the Working Procedures for Appellate Review[1] (Working Procedures), and seeks to have this deadline extended by one week from 13 January 2017 to 20 January 2017. According to the European Union, strict adherence to the time periods set by the Division would result in manifest unfairness within the meaning of Rule 16(2). We understand that the United States and the third participants in this dispute were served a copy of the European Union's request.

2. The European Union highlighted that the reasons for its request are similar to those given by the United States in support of its request for extension of the deadline for filing its appellant's submission in *US – Tax Incentives* (WT/DS487). In particular, the European Union submitted that the staff assigned to the appeals in *US – Tax Incentives* and in the current dispute is to a large extent the same, and preparation and filing of submissions in these two related and demanding appeals poses a significant challenge for the European Union's resources. Moreover, the European Union argued that the absence of key staff during the holiday period has significantly impaired the preparation and revision of the European Union's appellee's submission in the present appeal. The European Union also noted that the current working schedule has left it with approximately two months to respond to the United States' other appellant's submission – which includes several aspects of a lengthy panel report – as well as to ensure proper marking of business confidential information (BCI) and highly sensitive business confidential information (HSBI).

3. Also on 6 January 2017, the Division invited the United States and the third participants to comment in writing on the communication from the European Union by 12:00 p.m. on Tuesday, 10 January 2017. Written comments were received from the Australia, Canada, and the United States. Australia requested that to the extent the Division were to grant the European Union's request, it also provide third participants with additional time to review and consider the participants' submissions prior to filing their own submissions. Canada made a similar request asking the Division to extend the deadline for filing of the third participants' submissions from 31 January 2017 to 7 February 2017, should it grant the request made by the European Union. No comments were received from the other third participants.

4. In its written comments, the United States opposed the European Union's request for an extension of the deadline for for the filing of its appellee's submission. Referring to the reasons given by the Division in *US – Tax Incentives* for its denial of the United States' request for extension of the deadline for the filing of its appellant's submission, the United States did not see a basis for granting the European Union's request in the present case. In particular, the United States observed that its staff faces the same challenges as the European Union's staff in filing submissions in *US – Tax Incentives* and the present dispute. Moreover, the United States noted that the European Union's appellee's submission in this appeal responds to a submission that is considerably shorter than the one to which the United States' appellee's submission has to respond in *US – Tax Incentives*.

5. We observe that the European Union filed its appeal in the present dispute on 13 October 2016. In response to a joint letter by the European Union and the United States, the Division hearing this appeal suspended the deadline for the filing of the appellant's submission pending the adoption of additional procedures to protect sensitive information included in the record of this dispute. On 25 October 2016, the Division adopted a procedural ruling to protect sensitive information. On 1 November 2016, the Division communicated to the participants and third participants 10 November 2016 as the filing date for the United States' other appellant's submission. Subsequently, on 22 November 2016, the Division communicated to the participants and third participants 13 January 2017 as the filing date for the appellees' submissions. In setting

[1] WT/AB/WP/6, 16 August 2010.

these deadlines, the Division took into account, in particular, the size and complexity of the present appeal, including the size of the Panel Report, and the need for inclusion of BCI and HSBI in the participants' submissions. Furthermore, in view of the WTO end-of-year closure, the deadline set for the filing of the appellees' submissions in the present dispute was delayed until the second working week of 2017. Finally, notwithstanding the size of the Panel Report, the United States' other appellant's submission to which the European Union has to respond in its appellee's submission is relatively brief. We observe, in this regard, that although the United States must, in its appellee's submission, respond to a very lengthy European Union appellant's submission, it has not requested that the filing deadline of 13 January 2016 be extended.

6. For these reasons, we consider that strict adherence to the time periods set by the Division for the filing of the appellees' submissions will not result in manifest unfairness within the meaning of Rule 16(2) of the Working Procedures, and that it is not, therefore, necessary or appropriate to modify the deadline for the filing of the appellees' submissions in the present dispute.

7. In these circumstances, the Division declines the European Union's request for extension of the deadline for filing the appellees' submissions in the present appeal and, instead, affirms the deadline for filing the appellees' submissions set for Friday, 13 January 2017.

ANNEX D-5

PROCEDURAL RULING OF 19 APRIL 2017

1. By letter dated 4 April 2017, the Appellate Body Division hearing the above appeal invited the participants, the European Union and the United States, to indicate whether they request the oral hearings in this appeal to be open to public observation, and, if so, to propose specific modalities in this respect by 5 p.m. Geneva time on Tuesday, 11 April 2017. We also invited the third participants to provide comments on any request the participants might file, by 12 noon Geneva time on Thursday, 13 April 2017.

2. On 11 April 2017, we received a joint communication from the European Union and the United States. In their letter, they propose additional procedures to protect Business Confidential Information (BCI) and Highly Sensitive Business Information (HSBI) during the oral hearings in this appeal and request that we allow observation by the public of the oral hearing.

3. Specifically, the participants propose that we adopt the same additional procedures that the Appellate Body adopted in *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*[1], pursuant to the procedural ruling dated 26 July 2011 in that appeal. They state that the reasons for their request and proposal are substantially the same as the reasons that were given in their joint letter of 11 July 2011 requesting such additional procedures in the conduct of the oral hearing in that appeal, which are summarized as follows:

- Only BCI-Approved Persons are authorized to access BCI, and the participants and third participants have designated a limited number of persons as BCI-Approved. Only HSBI-Approved Persons are authorized to access HSBI, and the participants have designated a limited number of persons as HSBI-Approved. Third participants may not designate HSBI-Approved Persons.

- As regards BCI that might be uttered during any segment of the hearing, the participants recall that each of them is precluded from disclosing information designated as BCI by the other to non-BCI-Approved persons. Similarly, as regards HSBI that might be uttered during a hearing, the participants recall that each of them is precluded from disclosing information designated as HSBI by the other to non-HSBI-Approved persons. Third participants are precluded from disclosing BCI to non-BCI-Approved persons.

- Accordingly, the participants consider that, as provided for in the Additional Procedures for the Protection of Sensitive Information set out in the Procedural Ruling dated 25 October 2016 in this appeal, the Division can and should adopt a further Procedural Ruling pursuant to Rule 16(1) of the Working Procedures for Appellate Review[2] regulating these matters for the oral hearings. This will involve striking a balance between the systemic interest in protecting sensitive information and the systemic interest in transparency, similar to that struck in the Procedural Ruling dated 25 October 2016 in this appeal and the Procedural Ruling dated 26 July 2011 in *US – Large Civil Aircraft (2nd complaint)*.

- According to the participants, there appear to be two options with respect to HSBI. The first option is that if, during the hearing, one of the participants or a Member of the Division wishes to refer to HSBI, the hearing would be momentarily suspended and the third participants, as well as members of the participants' delegations who are not HSBI-Approved, would be asked to leave the room temporarily. The second option is that the hearing be divided into two parts. The first part would deal with all matters to the greatest extent possible without uttering HSBI. The second part would complete the discussion in a closed session, to the extent necessary, by addressing HSBI. While acknowledging that neither of these options is ideal in all respects, on balance, the

[1] WT/DS353/AB/R, adopted 23 March 2012. The additional procedures with respect to the oral hearing in that appeal are set out in Annex IV to that report.
[2] WT/AB/WP/6, 16 August 2010.

participants prefer the second option. The participants believe that this would limit unnecessary disruption during the hearing. The participants also believe that careful conduct of the first part of the hearing (such as only participants and the Members of the Division having a document before them and discussing it without uttering HSBI) could obviate the need for a second HSBI part of the hearing. In the event that a second closed session of the hearing would be necessary, it could be organized to take place at the end of each day. The participants note that the Appellate Body followed this second approach during the proceedings in *EC and certain member States – Measures Affecting Trade in Large Civil Aircraft*[3] and in *US – Large Civil Aircraft (2nd complaint)*, and that it appears to have been effective.

- The participants further suggest that the Appellate Body establish rules regarding a public segment of the hearing. The participants recall that, to date, a participant's or third participant's oral statements and oral answers to questions have been made in public segment only if the participant or third participant so agreed. In the absence of such agreement, it has proved operationally possible and effective to divide the hearing into an open session (for Members who wish to make their statements public) and a closed session (for Members who do not wish to make their statements public). The European Union and the United States are of the view that as much of the hearing as possible should be open to the public. However, they recognize that, in light of the volume of BCI in this dispute, and its centrality to many of the issues, it may not be feasible to separate the Appellate Body's questions and the participants' answers into public and BCI segments in the same way as the oral statements. For this reason, the European Union and the United States propose that the same approach be adopted in this appeal as was adopted in the appeal in *US – Large Civil Aircraft (2nd complaint)*.

- Thus, with regard to the public segment of the hearing, the participants propose that the participants and third participants (subject to their agreement) deliver opening statements that do not contain BCI or HSBI. These would be videotaped, reviewed by the participants for confirmation that neither BCI nor HSBI has been uttered (with any disagreements to be settled by the Appellate Body), and then transmitted to the public at a later date. The participants also propose that such an approach could be used for the closing statements, or at least that part of them that does not refer to BCI or HSBI.

4. Canada and China submitted comments on the participants' request. Canada expressed its agreement with the joint proposal by the European Union and the United States that the Appellate Body allow observation by the public of the oral hearing. China submitted that the joint proposal by the participants to exclude non-BCI-Approved persons of the third participants from segments of the hearing that are dedicated to questions and answers would significantly constrain the third participants' abilities to engage fully in those segments. China added that, in the circumstances of this appeal, the need for protection of sensitive information cannot sufficiently justify a complete exclusion of non-BCI-Approved persons from hearing segments dedicated to questions and answers. China suggested that the same procedure that is applicable for the protection HSBI from unauthorized disclosure be followed for the protection of BCI in this appeal. In addition, China stated that it does not want to open its statements and oral responses to the questions during the oral hearing to the public. No comments were received from Australia, Brazil, Japan, or Korea.

5. The request of the participants raises issues similar to those that were before the Appellate Body in *EC and certain member States – Large Civil Aircraft* and in *US – Large Civil Aircraft (2nd complaint)*. In this appeal, we have already adopted additional procedures for the protection of sensitive information. Given the amount of information that was treated as BCI and HSBI during the Panel proceedings, we believe that it would be difficult to conduct the oral hearing in these appellate proceedings without referring to sensitive information. In carrying out our adjudicative function, it will be necessary to conduct the oral hearing in a manner that allows us to explore issues that involve sensitive information, while ensuring that this sensitive information is not improperly disclosed.

[3] WT/DS316/AB/R, adopted 1 June 2011. The additional procedures with respect to the oral hearing in that appeal are set out in Annex IV to that report.

6. Pursuant to our Procedural Ruling of 25 October 2016, the participants have provided a list of persons who are authorized to have access to BCI and a list with a more limited number of persons who are authorized to have access to HSBI. These limitations on the participants' representatives who would be authorized to discuss BCI and HSBI during the oral hearing are incidental to the participants' request for additional protection for sensitive information. Therefore, only members of the participants' delegations who are BCI-Approved Persons are invited to attend the sessions of the oral hearing in which BCI will be discussed, and only members of their delegations who are HSBI-Approved Persons are invited to attend segments of the oral hearing where HSBI will be discussed.

7. Moreover, under paragraph 18(xvi) of the Procedural Ruling of 25 October 2016, the third participants have been allowed to designate up to eight individuals as Third Participant BCI-Approved Persons. We consider this to be sufficient to allow the third participants to be represented properly at the oral hearing. In view of the need to provide additional protection to BCI, only Third Participant BCI-Approved Persons are invited to attend segments of the oral hearing where BCI may be discussed, including the question and answer sessions. Having carefully considered the comments provided by China, we do not consider that this will unduly impinge upon the rights of the third participants in this case.

8. Accordingly, and for reasons similar to those adopted by the Appellate Body in *EC and certain member States – Large Civil Aircraft* and in *US – Large Civil Aircraft (2nd complaint)*, we have decided to provide additional confidentiality protection for certain sensitive information during the oral hearings to be held in this appeal on the terms set out below. We also authorize the public observation of certain segments of the oral hearing as further indicated below.

Request for additional procedures to protect sensitive information during the oral hearing

9. We are of the view that the additional procedures adopted in *EC and certain member States –Large Civil Aircraft* provided adequate protection for sensitive information while allowing the Appellate Body to perform its adjudicative function and the third participants to exercise their rights under the Understanding on Rules and Procedures Governing the Settlement of Disputes and the Working Procedures for Appellate Review. The participants share this view and request us to adopt similar procedures in these proceedings. Thus, as in *EC and certain member States –Large Civil Aircraft*, we consider it appropriate to adopt the following arrangements to protect sensitive information during the oral hearing:

- The participants have indicated that they intend to abstain from mentioning BCI or HSBI in their opening statements, and suggest that the third participants may also agree not to mention BCI in their opening statements. In such circumstances, it is unlikely that sensitive information will be uttered in the segments of the oral hearing dedicated to the delivery of oral statements.

- Accordingly, all members of the participants' and third participants' delegations (including non-BCI Approved persons) may attend this initial segment of the oral hearing.

- Similarly, to the extent that it is confirmed by the participants, and the third participants also indicate, that no sensitive information will be referred to in the closing statements, all members of the participants' and third participants' delegations may attend this final segment of the oral hearing.

- In accordance with paragraphs xiv and xvi of our Procedural Ruling of 25 October 2016, the participants and third participants have each designated BCI-Approved Persons, and the participants have designated HSBI-Approved Persons.

- Only members of the participants' and third participants' delegations who have been authorized to have access to BCI are invited to attend the segments of the oral hearing dedicated to questions and answers.

- Only HSBI-Approved Persons of the participants are invited to attend segments of the oral hearing in which HSBI will be discussed.

- The third participants will have access to the BCI versions of the submissions filed in this appeal and the BCI version of the Panel Report in the hearing room during the BCI segments. The third participants will be provided with a single, individually watermarked copy of these documents. Access to these documents will be limited to Third Participant BCI-Approved Persons. These documents may not be removed from the hearing room.

10. The participants have proposed two options for addressing HSBI during the oral hearings. The first involves interrupting the BCI segments of the oral hearing each time reference will be made to HSBI; the second involves having dedicated segments to discuss HSBI. We believe it is important that any additional procedures to protect sensitive information should interfere as little as possible with the regular conduct of the oral hearing and allow the Division to structure its questioning by topic. Therefore, to the extent possible, we prefer to focus on HSBI in dedicated segments in order to avoid interrupting the regular flow of the hearing. It may be, however, that the full exploration of an issue will not allow for deferral of the discussion of HSBI. If such circumstance arises, we may decide to interrupt the BCI segment of the hearing to discuss HSBI with the HSBI-Approved Persons.

Request for public observation of the oral hearing

11. Particular issues arise in this appeal, as they did in *EC and certain member States – Large Civil Aircraft*, in relation to the public observation of the oral hearing because of the need to avoid the disclosure of BCI and HSBI. We believe that the additional procedures adopted by the Appellate Body in *EC and certain member States – Large Civil Aircraft* and in *US – Large Civil Aircraft (2nd complaint)* provided an appropriate means to allow public observation of the hearing, while protecting sensitive information and safeguarding the Appellate Body's adjudicative function and the interests of the third participants.

12. Therefore, and subject to the qualification in paragraph 13 below, we authorize public observation of the delivery of the opening statements only. We will authorize public observation of the closing statements upon indication from the participants and third participants that their closing statements will not include any reference to sensitive information.

13. We authorize observation by the public of the opening statements of only those third participants who will have indicated no objection to such observation. The confidentiality of the closing statements by those third participants that do not wish to make their statements public will be preserved.

14. The participants have proposed that public observation take place by making a videotape of the relevant segments of the oral hearing and showing it to the public only after the participants have had an opportunity to review the videotape for any inadvertent utterance of sensitive information. A similar procedure was used in *EC and certain member States – Large Civil Aircraft* and in *US – Large Civil Aircraft (2nd complaint)*. We agree with the participants that deferred transmission to the public by videotape will minimize the risk of inadvertent disclosure of sensitive information and we will give the participants an opportunity to review the videotape for this purpose before it is shown to the public. In case of disagreement between the participants regarding the sensitive nature of any information referred to during the opening or closing statements, such information will not be subject to public observation.

15. For the reasons set out above, we adopt the following additional procedures for the conduct of all sessions of the oral hearing to be held in this appeal:

Additional Procedures on the Conduct of the Oral Hearing

i. These Additional Procedures shall apply to all sessions of the oral hearing to be held in this appeal and, in particular, to any information that is referred to during the course of the hearing that was treated as business confidential information (BCI) or as highly sensitive business information (HSBI) in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. These Additional Procedures complement the Additional Procedures for the Protection of Sensitive Information that we adopted in our Procedural Ruling of 25 October 2016.

ii. To the extent that information on the record is presented at the hearing in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants as to the proper treatment and the degree of confidentiality of this information, the Appellate Body shall decide the matter after hearing the views of the participants.

iii. Appellate Body Members, Secretariat staff assigned by the Appellate Body to work on this appeal, and interpreters and court reporters retained for this appeal may be present throughout the hearing, including segments dedicated to the discussion of BCI and HSBI.

iv. In addition to the persons indicated in paragraph iii above, BCI shall be disclosed during the hearing only to BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons.[4]

v. In addition to the persons indicated in paragraph iii above, HSBI shall be disclosed during the hearing only to HSBI-Approved Persons of the participants.[5]

vi. The hearing segment dedicated to the opening statements of the participants and third participants shall be open to all members of the delegations of the participants and third participants. The participants and third participants shall abstain from referring to BCI or HSBI in their opening statements.

vii. In order to protect BCI from unauthorized disclosure, only BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons are invited to attend the segments of the hearing dedicated to questions and answers.

viii. Segments of the hearing may be reserved for questioning on issues that may require reference to HSBI. In order to protect HSBI from unauthorized disclosure, only HSBI-Approved Persons of the participants are invited to attend these segments.

ix. To the extent that any participant or third participant indicates that it will make reference to BCI in its closing statement, only BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons will be invited to attend the closing segment of the hearing.

x. If necessary, the Appellate Body Division hearing this appeal may interrupt a BCI segment and hold a segment dedicated to HSBI.

xi. During the segments of the hearing dedicated to questions and answers, the BCI version of the Panel Report and the BCI versions of the submissions filed in this appeal, which will be printed and individually watermarked pursuant to paragraph xvii of our Procedural Ruling of 25 October 2016, shall be made available to each third participant. Only Third Participant BCI-Approved Persons will be allowed to consult these documents. The documents shall not be removed from the hearing room and shall be returned to the Appellate Body Secretariat at the end of each segment addressing BCI.

xii. The parts of the transcript of the oral hearing containing BCI and HSBI shall become part of the appellate record in this appeal and shall be kept in accordance with paragraphs vi, vii, and ix-xii of our Procedural Ruling of 25 October 2016.

Public observation of the oral hearing

xiii. The first segment of the oral hearing, which will consist of the opening statements by the participants and third participants, shall be open to public observation, subject to paragraph xv below. The final segment of the oral hearing, which will be reserved for closing statements, shall be open to public observation to the extent that the participants and

[4] BCI-Approved Persons and Third Participant BCI-Approved Persons are those persons designated as such under paragraphs xiv and xvi of our Procedural Ruling of 25 October 2016.

[5] HSBI-Approved Persons are those persons designated as such under paragraph xiv of our Procedural Ruling of 25 October 2016.

third participants indicate that their closing statements will not refer to any sensitive information and subject to paragraph xiv below.

xiv. The segments open to public observation shall be videotaped. Within two days of the completion of each session of the hearing, either participant may request to review the videotape to verify that no BCI or HSBI has been included inadvertently or otherwise. Upon such request, staff of the Appellate Body Secretariat shall be present while the participant(s) review the videotape. If the videotape contains BCI or HSBI, a redacted version of the videotape shall be produced in which the BCI or HSBI has been deleted. In case of disagreement between the participants regarding the sensitive nature of any information referred to during the opening or closing statements, the relevant segment(s) will not be subject to public observation.

xv. The opening and closing statements of third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation. Any third participant that has not already done so may request that its oral statements remain confidential and not be subject to public observation. Such requests must be received by the Appellate Body Secretariat no later than 5 p.m. Geneva time on Wednesday, 26 April 2017.

xvi. Notice of the oral hearing will be provided to the general public through the WTO website. Members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat. The videotapes, or if applicable the redacted versions of the videotapes, shall be screened to WTO delegates and members of the public who have registered to observe the oral hearing once the review process referred to in paragraph xiv above has, if requested, been completed. The time and location of the videotape screening shall be announced in due course. WTO delegates are invited to indicate to the Appellate Body Secretariat no later than 5 p.m. Geneva time on Wednesday, 26 April 2017 whether they wish to have a reserved seat in the room where the videotape will be screened.

WORLD TRADE ORGANIZATION

WT/DS316/AB/RW/Add.1

15 May 2018

(18-2863)

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

AB-2016-6

Report of the Appellate Body

Addendum

This *Addendum* contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS316/AB/RW.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

LIST OF ANNEXES

ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX D

PROCEDURAL RULINGS

ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

ANNEX A-1

EUROPEAN UNION'S NOTICE OF APPEAL*

Pursuant to Article 16.4 and Article 17.1 of the *DSU*, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Union – Measures Affecting Trade in Large Civil Aircraft (Recourse to Article 21.5 of the DSU by the United States)* (WT/DS316/RW). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

The European Union is restricting its appeal to those errors that it believes constitute serious errors of law and legal interpretation that need to be corrected. Non-appeal of an issue does not signify agreement therewith.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect, the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report[1]:

I. WHETHER THE PANEL PROPERLY INTERPRETED ARTICLE 7.8 OF THE SCM AGREEMENT (SECTIONS 6.6.2 AND 6.6.3 OF THE REPORT)

1. The Panel erred in interpreting Article 7.8 of the *SCM Agreement* to require an implementing Member to "remove the adverse effects" found from an actionable subsidy in original proceedings, even if that subsidy has been "withdraw{n}" and is no longer "maintain{ed}".[2]

2. The Panel additionally erred in its interpretation of Article 7.8 (in conjunction with Article 1.1(a)) of the *SCM Agreement*) when finding that bringing about the end of a financial contribution does *not* result in withdrawal of the subsidy.[3] The European Union requests the Appellate Body to consider this appeal only if the Appellate Body reverses the Panel's interpretation of Article 7.8 and attempts to complete the analysis under a proper interpretation of Article 7.8.

II. WHETHER THE PANEL ERRED BY REFUSING TO ASSESS WHETHER THE EUROPEAN UNION ACHIEVED COMPLIANCE IN RESPECT OF THE MÜHLENBERGER LOCH AND BREMEN AIRPORT RUNWAY SUBSIDIES (SECTIONS 5.10, 6.2.5 AND 6.6.3.4.4 OF THE REPORT)

3. The Panel erred in interpreting Article 21.5 of the DSU as providing an original respondent with the right to seek findings of compliance in Article 21.5 compliance proceedings only in the narrow factual circumstances of the *US/Canada – Continued Suspension* dispute.[4]

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* This notification, dated 13 October 2016, was circulated to Members as document WT/DS316/29.

[1] Paragraph numbers provided in footnotes to the following description of the errors of the Panel are intended to indicate the primary instance of the errors. These errors have consequences throughout the report, and the European Union also appeals all findings and conclusions deriving from or relying on the appealed errors, and in particular the relevant findings and conclusions in Sections 7.1, 7.2, 7.3 and 7.4 of the Panel Report.

[2] Panel Report, paras. 6.803, 6.813, 6.819, 6.822, 6.838, 6.839-6.841, 6.1078, 6.1089, 6.1094, 6.1100, 6.1101-6.1102, 6.1451-6.1452, 6.1463, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(i), 7.1(d)(viii), 7.1(d)(ix), 7.1(d)(xii)-(xvii) and 7.2.

[3] Panel Report, paras. 6.1072-6.1074, 6.1451-6.1452, 6.1463, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(i), 7.1(d)(viii), 7.1(d)(ix), 7.1(d)(xii)-(xvii) and 7.2.

[4] Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.

4. The Panel erred in the application of Article 21.5 of the DSU by finding that no disagreement, within the meaning of Article 21.5 of the DSU, existed between the European Union and the United States, and consequently by failing to make findings concerning the European Union's withdrawal of the Mühlenberger Loch and Bremen airport runway subsidies.[5]

5. Separately, by declining to make findings on a matter that was properly before it, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[6]

III. WHETHER LA/MSF FOR THE A350XWB IS A SUBSIDY (SECTION 6.5.2 OF THE REPORT)

6. The Panel erred when identifying the appropriate point in time from which to draw the *corporate borrowing rate component* of the market benchmark to determine whether each A350XWB launch aid/member state financing ("LA/MSF") contract confers a "benefit", and therefore constitutes a subsidy, under Article 1.1(b) of the *SCM Agreement*.[7] Specifically, in identifying the corporate borrowing rate as "the average yields {on the relevant EADS bond} one-month prior and six-months prior to the conclusion of the contract, in the form of a range",[8] the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.[9]

7. Separately, by rejecting the yield on the day of the conclusion of each contract, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[10]

8. Should the Appellate Body disagree with the European Union and reject the appeals described in paragraphs 6 and 7, the European Union appeals the Panel's inclusion, in its construction of the corporate borrowing rate, of the six-month average yield on the relevant EADS bond within the Panel's range of average yields.[11] Specifically, by including the six-month average yield within its range, the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.[12]

9. Separately, by including the six-month average yield within its range, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[13]

10. Further, the Panel erred in identifying the *project risk premium component* of the market benchmark to determine whether each A350XWB LA/MSF contract confers a "benefit", and therefore constitutes a subsidy, under Article 1.1(b) of the *SCM Agreement*.[14] The Panel selected a single undifferentiated project risk premium for each A350XWB LA/MSF contract, which was developed for a different programme (i.e., the A380) in the original proceedings. In so doing, the Panel committed three sets of error.

11. First, the Panel failed to establish a project-specific risk premium for A350XWB LA/MSF based on the risks associated with the A350XWB programme. As a result, the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.[15]

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[5] Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.

[6] Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.

[7] Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

[8] Panel Report, para. 6.389.

[9] Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

[10] Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

[11] Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

[12] Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

[13] Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

[14] Panel Report, paras. 6.435, 6.459, 6.487, 6.492, 6.527, 6.539-6.542, 6.579, 6.595, 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

[15] Panel Report, paras. 6.435, 6.459, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

12. Separately, by failing to consider more appropriate benchmarks and by deviating from the approach to project-specific benchmarks taken in the original proceedings, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[16]

13. *Second*, by failing to establish similarity between the risks involved in the A350XWB project and the A380 LA/MSF project, as well as between the risks involved in the A350XWB LA/MSF contracts and the A380 LA/MSF contracts, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[17]

14. *Third*, and finally, the Panel erroneously adopted a single project risk premium to benchmark all four A350XWB LA/MSF contracts. As a result, the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.[18]

15. Separately, by failing to adopt a differentiated project risk premium while adopting a differentiated corporate borrowing rate, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[19]

IV. WHETHER THE PANEL ERRED IN IDENTIFYING APPROPRIATE PRODUCT MARKETS (SECTION 6.6.4.4 OF THE REPORT)

16. The Panel erred in its interpretation of the term "market" in Article 6.3 of the *SCM Agreement*, as permitting two products to be placed in the same product market on the basis of any competition between them, rather than on the basis of the existence of significant competitive constraints between them.[20]

17. Should the Appellate Body disagree with the European Union and reject the appeal described in paragraph 16, the Panel erred in the application of Articles 5(c), 6.3 and Article 7.8 of the *SCM Agreement* when it identified the relevant product markets for purposes of assessing the United States' adverse effects claims in a manner that is inconsistent with its own legal standard.[21]

18. Separately, by limiting its assessment of the existence of the relevant product markets for purposes of assessing the United States' adverse effects claims to competition between only those products that the United States had placed in the same product markets, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[22]

V. WHETHER THE PANEL ERRED IN REACHING ITS FINDINGS RELATING TO THE "NON-SUBSIDIZED LIKE PRODUCT" PROVISIONS OF ARTICLES 6.3, 6.4 AND 6.5 OF THE SCM AGREEMENT (SECTION 6.6.4.3 OF THE REPORT)

19. The Panel erred in reaching its findings on whether there is a new matter. Specifically, the Panel erred in its interpretation and application of the term "matter" in Article 11 of the

[16] Panel Report, paras. 6.435, 6.459, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

[17] Panel Report, paras. 6.487, 6.492, 6.527, 6.539-6.542, 6.579, 6.595, 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

[18] Panel Report, paras. 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

[19] Panel Report, paras. 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

[20] Panel Report, paras. 6.1210, 6.1211, 6.1236, 6.1280, 6.1289, 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xi), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[21] Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xi), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[22] Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xi), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

DSU.[23] The Panel also erred in failing to make an objective assessment of the matter, under Article 11 of the DSU.[24]

20. In addition, the Panel erred in reaching its findings on cogent reasons. Specifically, the Panel erred in its interpretation and application of "security and predictability" within the meaning of Article 3.2 of the DSU as it relates to the cogent reasons rule;[25] and, erred in failing to make an objective assessment of the matter, under Article 11 of the DSU.[26]

21. Finally, the Panel erred in its interpretation and application of Articles 6.3(a), 6.3(b), 6.3(c), 6.4 and 6.5 of the *SCM Agreement*.[27]

VI. WHETHER THE PANEL ERRED IN FINDING ADVERSE EFFECTS (SECTION 6.6.4.4 OF THE REPORT)

A. EFFECTS OF LA/MSF ON THE LAUNCH AND MARKET PRESENCE OF AIRCRAFT

22. The Panel erred in the interpretation of Article 5(c) of the *SCM Agreement* in adopting a "but for" approach to causation that failed to consider the passage of time, and events that occurred during that time, and consequently attributing the current market presence of the A320, A330 and A380 families of aircraft to pre-A350XWB LA/MSF.[28]

23. Should the Appellate Body disagree with the European Union and reject the appeal described in paragraph 22, the Panel erred in the application of Articles 5(c) and 7.8 of the *SCM Agreement* in adopting a "but for" approach to causation that failed to consider the passage of time, and events that occurred during that time, and consequently attributing the current market presence of the A320 and A330 families of aircraft to pre-A350XWB LA/MSF.[29]

24. Separately, to the extent the Panel found that LA/MSF for the A380 resulted in "direct effects" on the launch and market presence of the A380, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[30]

25. The Panel additionally erred in the application of Articles 5(c) and 7.8 of the *SCM Agreement* by attributing the market presence of the A350XWB to the "indirect effects" of LA/MSF for the A380.[31]

26. Separately, to the extent the Panel found that LA/MSF for the A350XWB resulted in "direct effects" on the launch and market presence of the A350XWB, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.[32]

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[23] Panel Report, paras. 6.1125-6.1138, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[24] Panel Report, paras. 6.1125-6.1138, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[25] Panel Report, paras. 6.1125-6.1153, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[26] Panel Report, paras. 6.1125-6.1153, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[27] Panel Report, paras. 6.1125-6.1154, 6.1798, 6.1817, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

[28] Panel Report, paras. 6.1515, 6.1527, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-7.1(d)(xvii) and 7.2.

[29] Panel Report, paras. 6.1527, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-7.1(d)(xvii) and 7.2.

[30] Panel Report, paras. 6.1507, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-7.1(d)(xvii) and 7.2.

[31] Panel Report, paras. 6.1747, 6.1771, 6.1773, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

[32] Panel Report, paras. 6.1717, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

B. FINDINGS OF DISPLACEMENT, IMPEDANCE AND LOST SALES

27. The Panel erred in the application of Articles 5(c), 6.3 and 7.8 of the *SCM Agreement* by failing, in its assessment of lost sales, displacement and impedance, to account for the differences in closeness of competition between various aircraft.[33]

28. The Panel erred in the application of Articles 5(c), 6.3 and 7.8 of the *SCM Agreement* by failing, in its assessment of lost sales, displacement and impedance, to account for non-attribution factors.[34]

29. The Panel erred in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* in finding that non-withdrawn subsidies cause "displacement and/or impedance", thereby conflating the two separate forms of serious prejudice.[35]

30. The Panel erred in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* as permitting findings of "displacement" without any assessment of sales volume and market share data.[36]

31. In addition, the Panel also erred in the application of Articles 5(c), 6.3(a), 6.3(b) and 7.8 of the *SCM Agreement* by finding "displacement" without any assessment of sales volume and market share data.[37]

32. The Panel erred in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* as permitting findings of "impedance" without any assessment of sales volume and market share data.[38]

33. In addition, the Panel also erred in the application of Articles 5(c), 6.3(a), 6.3(b) and 7.8 of the *SCM Agreement* by finding "impedance" without any assessment of sales volume and market share data.[39]

[33] Panel Report, paras. 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.
[34] Panel Report, paras. 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.
[35] Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.
[36] Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.
[37] Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.
[38] Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.
[39] Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

ANNEX A-2

UNITED STATES' NOTICE OF OTHER APPEAL*

Pursuant to Rule 23(1) of the Working Procedures for Appellate Review, the United States hereby notifies the Appellate Body of its decision to appeal certain issues of law covered in the Report of the Panel in 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 (WT/DS316/RW & Add.1) ("Panel Report") and certain legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body of the Panel's finding that the United States failed to establish that the French, German, Spanish, and UK LA/MSF subsidies for Airbus's A350 XWB constituted prohibited import substitution subsidies, within the meaning of Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").[1] While the United States agrees with the Panel's interpretation of Article 3.1(b), a competing interpretation is under consideration in another dispute, US − Conditional Tax Incentives for Large Civil Aircraft (DS487). If the Appellate Body were to determine that this competing interpretation of Article 3.1(b) is correct, then the Panel here erred in its interpretation and application of Article 3.1(b) and its finding that the French, German, Spanish, and UK LA/MSF for the A350 XWB do not constitute import substitution subsidies prohibited by Article 3.1(b). The paragraphs relating to these errors include paragraphs 6.745-6.791 of the Panel Report.

2. In addition, the United States conditionally appeals the Panel's findings that the ex ante lives of the French, German, Spanish, and UK LA/MSF subsidies for the A320, A330/A340 Basic, and A330-200 had passively "expired" before December 1, 2011, as a result of the amortization of benefit.[2] These conclusions are in error and are based on erroneous findings of law and related legal interpretations, including an erroneous interpretation and application of Article 1.1(b) of the SCM Agreement. The paragraphs relating to these errors include paragraphs 6.872-6.879 of the Panel Report. However, the United States only requests the Appellate Body to address this issue if it modifies or reverses the Panel's finding that the passive "expiry" events cited by the European Union did not satisfy its obligation to "withdraw the subsidy" for purposes of Article 7.8 of the SCM Agreement.[3]

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* This notification, dated 10 November 2016, was circulated to Members as document WT/DS316/30.

[1] *See* Panel Report, paras. 6.790, 7.1(c)(ii).
[2] *See* Panel Report, paras. 6.879, 7.1(d)(ii) and (iii).
[3] *See* Panel Report, paras. 6.1094, 7.1(d)(viii).

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLANT'S SUBMISSION

1 INTRODUCTION

1. The European Union's Appellant's Submission sets out appeals of a number of serious errors of law and legal interpretation in the Report of the Panel in *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)* ("compliance Panel" or "Panel").

2 THE PANEL ERRED IN THE INTERPRETATION OF ARTICLE 7.8 OF THE *SCM AGREEMENT*[1]

2. The Panel erred in interpreting Article 7.8 to require an implementing Member, found in original proceedings to have granted or maintained subsidies that cause adverse effects, to "remove the adverse effects" of the subsidies, "*irrespective of whether those subsidies continue to exist* in the implementation period".[2] That is, for the Panel, an obligation to "remove the adverse effects" applies even if the implementing Member no longer "grant{s} or maintain{s}" the subsidy at issue after the end of the implementation period, but has, instead, "withdraw{n} the subsidy".

3. Properly interpreted, the terms of Article 7.8, viewed in their context and in light of the object and purpose of the *SCM Agreement*, provide an implementing Member that is "*granting or maintaining*" an actionable subsidy, which was found in original proceedings to cause adverse effects, with the *option* either "to remove the adverse effects *or* ... withdraw the subsidy". Thus, as is the case throughout the covered agreements with regard to any WTO-inconsistent measure, withdrawal of the measure (here, an actionable subsidy) constitutes compliance, regardless whether any historically caused effects of the withdrawn measure temporarily linger in the marketplace. In this respect, compliance under the *SCM Agreement* follows the same principles that apply throughout the covered agreements.

4. Whilst in cases of other WTO-inconsistent measures, an adverse impact is *presumed* pursuant to Article 3.8 of the DSU, for adverse effects claims under Part III of the *SCM Agreement*, an alleged adverse effect must be *demonstrated*. In other words, in the context of adverse effects claims, the burden to establish effects in the marketplace is shifted to the complainant. This places an *additional burden on the complainant*, reflecting the fact that, unlike other measures (including a prohibited subsidy), an actionable subsidy is WTO-inconsistent solely if it is demonstrated to cause adverse effects. Thus, unlike a prohibited subsidy, an actionable subsidy is "not prohibited *per se*".[3] These considerations confirm that compliance with adverse effects findings can be achieved *either* by withdrawing the subsidy measure *or* by removing the adverse effects.

5. In contrast, with its interpretation of Article 7.8, the Panel *placed an additional compliance burden on a respondent* found in original proceedings to have granted an actionable subsidy. Under the Panel's interpretation of Article 7.8, respondents face *a unique and exacting compliance obligation* with regard to an actionable subsidy – an obligation that does not attach to *any* other WTO-inconsistent measure, including prohibited subsidies. Under the Panel's interpretation, compliance with recommendations and rulings concerning an actionable subsidy requires removal of any effects temporary lingering in the marketplace, even if the subsidy has already been withdrawn.

6. The Panel arrived at its erroneous interpretation of Article 7.8 not on the basis of the proper application of the *Vienna Convention* rules on treaty interpretation. Rather, the Panel's

[1] Panel Report, paras. 6.803, 6.813, 6.819, 6.822, 6.838, 6.839, 6.840, 6.1078, 6.1100, 6.1101, 6.1102, 7.1(d)(i), 7.1(d)(viii), 7.1(d)(ix).
[2] Panel Report, para. 6.822 (emphasis in original).
[3] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 238 (emphasis in original).

interpretative approach was *explicitly* outcome-determined, namely to "*avoid ... an outcome*"[4] that would, in the Panel's view, make the ruling secured by the United States in the original proceedings "purely declaratory" with respect to an expired subsidy.[5] To "avoid an outcome" it considered undesirable, the Panel developed a contrived interpretation that conflicts not only with the ordinary meaning of the terms used in Article 7.8, but also with the context of the provision, and with the overall object and purpose of the *SCM Agreement*.

7. The Panel recognised that its interpretation is not rooted in the terms of Article 7.8. Instead, the Panel acknowledged that the reference in Article 7.8 to "granting or maintaining" of a subsidy suggests that compliance obligations regarding an actionable subsidy are triggered whenever "an implementing Member *continues* to grant or maintain a subsidy found to have caused adverse effects in an original proceeding".[6] Moreover, the Panel acknowledged that "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".[7] Although the Panel acknowledged that this was the interpretation flowing from the terms "granting or maintaining", it adopted an interpretation unsupported by the terms actually used in Article 7.8, in their context, and according to the object and purpose of the *SCM Agreement*.

8. The Panel's interpretation also reads the option to "withdraw the subsidy" out of the text of Article 7.8. Under the Panel's interpretation, "withdraw{al of} the subsidy" achieves compliance only if doing so *also* succeeds in "remov{ing} the adverse effects".[8] As a result, the Panel's interpretation renders inutile the phrase "withdraw the subsidy" and the conjunction "or" in Article 7.8. Under the Panel's interpretation, there remains only one option to achieve compliance under Article 7.8, namely through removal of the adverse effects. The Panel's interpretation is inconsistent with the plain language of Article 7.8.

9. The Panel's interpretation also runs contrary to the context of Article 7.8, including the most proximate context (*i.e.*, Articles 7.9, 5, and 4.7 of the *SCM Agreement*), the structure and design of the *SCM Agreement*, and the DSU.

10. In assessing context, the Panel began, not with *proximate* context from the *SCM Agreement* itself, but instead from the DSU. The Panel used the DSU not to *support* the meaning flowing from the terms of Article 7.8, but rather to *replace* the terms of Article 7.8 with the terms of Article 5 of the *SCM Agreement*. Specifically, the Panel stated that, under various provisions of the DSU, implementation must "focus on securing *conformity* with the covered agreements".[9] According to the Panel, this meant that a subsidy found to cause adverse effects in original proceedings must be brought into "*conformity with Article 5*" of the *SCM Agreement*.[10]

11. The Panel misconstrued the DSU and its relevance as context. *First*, the Panel ignores that, as set forth in Article 3.7 of the DSU, compliance under the DSU is focused on the *withdrawal* of the WTO-inconsistent measure. Where a WTO-inconsistent measure is withdrawn, the DSU does *not* impose any additional requirement to remove any lingering effects in the marketplace. On the Panel's view, findings in original proceedings are, therefore, always "purely declarative" with respect to temporary lingering *effects* of a WTO-inconsistent measure in the marketplace. This feature of WTO dispute settlement has not stopped WTO Members from challenging WTO-inconsistent measures and seeking their withdrawal, despite the possibility of a temporarily lingering impact of the withdrawn measure on competitive opportunities in the marketplace.

[4] Panel Report, para. 6.819 (emphasis added).
[5] Panel Report, paras. 6.840, 6.1094. *See also Id.*, para. 6.819 ("merely 'declaratory in nature'"); para. 6.830 ("would also render the disciplines of Article 5 completely ineffective").
[6] Panel Report, para. 6.802 (emphasis in original).
[7] Panel Report, para. 6.802 (emphasis in original).
[8] Panel Report, paras. 6.813, 6.819, 6.840, 6.1078, 6.1088, 6.1098, 6.1099.
[9] Panel Report, para. 6.813 (emphasis added).
[10] Panel Report, para. 6.813 (emphasis added).

12. *Second*, the Panel relied on the DSU in a way that deprives Article 7.8 of independent meaning, distinct from Article 5 of the *SCM Agreement*. The Panel erroneously assumed that, with respect to an actionable subsidy in compliance proceedings, "conformity" with the *SCM Agreement* is defined exclusively by reference to Article 5, with Article 7.8 subsumed by and read exclusively through the prism of Article 5. The Panel's assumption is wrong. The Appellate Body has explained that "*Article 7.8 specifies the actions* that the respondent Member must take when a subsidy granted or maintained by that Member is found to have resulted in adverse effects to the interests of another Member".[11] Thus, to achieve compliance, Article 7.8 – and not Article 5 – "specifies the actions that the respondent must take".

13. Turning to Article 5 as context, the Panel did not explicitly rely on the terms of this provision to shed light on the interpretation of Article 7.8. Instead, it turned to the DSU to reach the erroneous conclusion that Article 7.8 must be subsumed by and read exclusively through the prism of Article 5. In so doing, the Panel collapsed the substantive obligations under Article 5 and the implementation obligations under Article 7.8, despite the textual differences between the provisions. Article 5 (like Article 6) is concerned with "*caus{ing}* .... *adverse effects*" through the use of any subsidy. Article 7.8 is formulated differently, and explicitly gives the implementing Member the *option either* to remove adverse effects, *or* to withdraw a subsidy it is granting or maintaining. Thus, contrary to Article 5, Article 7.8 is *not* "*focus{ed}* on the causing of *adverse effects* through the use of any subsidy".[12]

14. The Panel's interpretation of Article 7.8 is also contradicted by context from Article 4.7 of the *SCM Agreement* – the provision setting out the implementation obligation for prohibited subsidy findings. Article 4.7 provides a single implementation option, namely to "withdraw the subsidy". Although the Panel agreed that the terms "withdraw the subsidy" must be given "parallel" and "consistent" meaning under Articles 4.7 and 7.8, its interpretation of Article 7.8 failed to achieve this outcome.[13] Indeed, the Panel's interpretation of Article 7.8 gives the phrase "withdraw the subsidy" a *very different and inconsistent* meaning than the Panel affords the same phrase in Article 4.7, resulting in more demanding compliance obligations for actionable subsidies than for prohibited subsidies. Under the Panel's interpretation, expiry of a subsidy achieves "withdrawal" of that subsidy under Article 4.7.[14] Under Article 7.8, however, expiry of a subsidy does not achieve "withdrawal" of that subsidy, unless expiry also achieves removal of adverse effects.[15]

15. This also shows that the Panel's interpretation of Article 7.8 blurs the line between *prohibited* export subsidies and *actionable* production subsidies, which is, as the Appellate Body explained, contrary to the overall design and structure of the *SCM Agreement*.[16] The interpretive approach taken by the Panel makes compliance with actionable subsidy-related recommendations *more exacting* than compliance with prohibited subsidy-related recommendations under Article 4.7, despite the fact that Article 4.7 relates to subsidies that are *prohibited per se*, while Article 7.8 relates to subsidies that are merely *actionable*, and are "*not prohibited per se*".[17]

16. Finally, the Panel's interpretation of Article 7.8 also frustrates the object and purpose of the *SCM Agreement*, as it ignores the textual flexibility afforded to implement findings regarding actionable subsidies. Under the Panel's interpretation, an *actionable* subsidy would face a unique and exacting compliance obligation, not present with regard to a *prohibited subsidy*, nor with regard to *any other WTO-inconsistent measure disciplined under the covered agreements*. This outcome cannot be reconciled with the object and purpose of the *SCM Agreement*.

17. The European Union notes that the Panel's erroneous interpretation of Article 7.8 directly informed its erroneous refusal to recognise that, with respect to each subsidy withdrawn as a

[11] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 235 (emphasis added).
[12] Appellate Body Report, *EC – Large Civil Aircraft*, para. 712 (emphasis added).
[13] Panel Report, para. 6.1098.
[14] Panel Report, para. 6.1097. *See also Id.*, paras. 6.1085-6.1086.
[15] Panel Report, paras. 6.1086, 6.1098.
[16] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1054 (emphasis in original).
[17] Appellate Body Report, *EC – Large Civil Aircraft*, para. 708.

result of expiry of the life of the subsidy or otherwise, the compliance remedy specified in Article 7.8 had been provided. Consequently, the Panel's erroneous interpretation of Article 7.8 also undermined the Panel's adverse effects-related findings.[18] The European Union also appeals several of these findings directly, on separate and unrelated grounds.

18. If the Appellate Body reverses the Panel's interpretation of Article 7.8 and attempts to complete the analysis, the European Union raises a conditional appeal. Specifically, the Panel erred in its interpretation of Article 7.8 (in conjunction with Article 1.1(a)) when finding that repayment of a financial contribution does not constitute withdrawal of the subsidy.[19]

19. The Panel acknowledged that the full repayment of the principal of a subsidised loan, plus any interest due under the terms of that loan, would "bring about the end of the financial contribution, in the sense that there would be *no longer any financial contribution in existence*".[20] That is, the Panel accepted that, in this scenario, one of the constituent elements of the subsidy (*i.e.*, a financial contribution) is no longer present. At the same time, the Panel found that bringing about the end of the financial contribution does not suffice to bring about the end of, and thus to withdraw, the subsidy.

20. In so finding, the Panel erred in the interpretation of Article 1 and 7.8 of the *SCM Agreement*. Bringing about the end of one of the constituent element of a "subsidy", within the meaning of Article 1, also brings the life of the subsidy to an end, implying that this subsidy is no longer maintained and is, instead, withdrawn, within the meaning of Article 7.8. In the original proceedings, the Appellate Body made an express finding to this effect, when it stated 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".[21]

3 THE PANEL ERRED IN REFUSING TO ASSESS WHETHER THE EUROPEAN UNION HAS ACHIEVED COMPLIANCE IN RESPECT OF THE MÜHLENBERGER LOCH AND BREMEN AIRPORT RUNWAY SUBSIDIES[22]

21. In its Compliance Communication, the European Union indicated that it had adopted "measures taken to comply" ("MTTCs") that resulted in the withdrawal of the subsidies arising under (i) the leases of the land and the special-purpose facilities in the Mühlenberger Loch, and (ii) the take-off and landing fees at Bremen airport. Specifically, the MTTCs aligned the terms of the leases and the take-off and landing fees with relevant market benchmarks.[23] The United States identified these MTTCs in its panel request.[24] Throughout the Panel proceedings, the Parties continued to disagree as to whether the two EU MTTCs had achieved compliance with the recommendations and rulings in the original proceedings,[25] although the United States declined to substantiate its position that they failed to do so.

22. In these circumstances, the matter was properly before the Panel. Moreover, the European Union was entitled to a finding that it had withdrawn the Mühlenberger Loch and Bremen airport runway subsidies, based on the unrefuted *prima facie* showing of withdrawal it had presented. Yet, the Panel refused to make such a finding, based on a series of errors in the interpretation and application of Article 21.5 of the DSU. The Panel also failed to undertake an objective assessment of the matter properly before it, under Article 11 of the DSU.

[18] Panel Report, paras. 6.1451-6.1452, 6.1463, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-(xvii), 7.2.
[19] Panel Report, paras. 6.1072-6.1074.
[20] Panel Report, para. 6.1073 (emphasis added).
[21] Appellate Body Report, *EC – Large Civil Aircraft*, para. 709 (emphasis and underlining added).
[22] Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.
[23] Communication from the European Union to the DSB, 1 December 2011, WT/DS316/17, items 28, 29, p. 4.
[24] US Request for Establishment of a Compliance Panel, WT/DS316/23, paras. 5(j), 6(a), 6(e).
[25] US FWS, paras. 5 and 97, and footnote 13; US SWS, para. 265 and heading 4; US 12 February 2016 Comments on the EU Comments on Interim Panel Report, para. 48.

23. *First*, the Panel erred in its interpretation of Article 21.5 of the DSU, finding that the right of an original respondent to request a determination of compliance is limited to situations in which (i) an original *respondent* initiates an Article 21.5 proceeding; (ii) the original *complainant* refuses to participate in that Article 21.5 proceeding; and, (iii) the original complainant had already *suspended* concessions *vis-à-vis* the original respondent under Article 22 of the DSU.[26]

24. The terms used in Article 21.5 do not support such an interpretation. The "disagreement" to be resolved in compliance proceedings under Article 21.5 of the DSU relates "to the existence or consistency with a covered agreement of measures taken to comply". Such a disagreement may arise – and indeed regularly arises in Article 21.5 compliance proceedings – *before* concessions are suspended under Article 22.

25. The Panel's interpretation is also inconsistent with the object of "prompt settlement" reflected in Article 3.3 of the DSU, and that of "prompt compliance" set out in Article 21.1 of the DSU. Contrary to these objectives, the Panel's interpretation prolongs the dispute and forces the original respondent to endure suspension of concessions, an "abnormal state of affairs",[27] before it can seek recourse to Article 21.5. Such an interpretation also disturbs the "proper balance between the rights and obligations of Members" that the dispute settlement system is tasked with preserving.[28]

26. *Second*, the Panel erred in the application of Article 21.5 of the DSU, in finding that a "disagreement" did not exist between the Parties in respect of the two MTTCs at issue.[29] According to the Appellate Body, a "disagreement" under Article 21.5 "arises from the existence of conflicting views: the original complainant's view that such a measure is inconsistent with the WTO agreements or brings about only partial compliance, and the original respondent's view that a measure is consistent with the WTO agreements and brings about full compliance with the DSB's recommendations and rulings".[30] The Parties repeatedly expressed "conflicting views" on the effectiveness of the two MTTCs in securing withdrawal of the Mühlenberger Loch and Bremen airport runway subsidies. In particular, while the United States refused to *substantiate* its view that compliance was not achieved with the two EU MTTCs, it nonetheless maintained that view throughout the Panel proceedings, and did not accept that, on the facts, the alignment with market benchmarks achieved withdrawal of the subsidies. The Panel erred in mistaking the US *refusal to substantiate* its views, for a *lack of disagreement* between the Parties.

27. *Third*, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.

28. In original proceedings, where complainant alone enjoys the right to place a matter before the panel and to seek findings, a panel may forego findings on a claim abandoned by the complainant. Being the sole holder of the right to seek findings in an original proceeding, the complainant is at liberty to waive that right. In contrast, in compliance proceedings, the original complainant no longer enjoys the *sole* right to place matters before a panel and seek adjudication in the form of panel findings and conclusions regarding the adequacy of the responding Member's compliance efforts. Instead, as the Appellate Body has clarified, "either party to the original dispute may initiate the proceedings".[31] This principle reflects the fact that both parties have a shared interest in the resolution of disagreements concerning compliance.

29. Accordingly, in compliance proceedings, even if the original complainant waives its own right to adjudication of a particular matter properly placed before a compliance panel, that waiver does not prejudice the *original respondent's right* to have the same matter adjudicated. In the present dispute, the Panel improperly "declined to exercise validly established jurisdiction and

[26] Panel Report, para. 5.77.

[27] Appellate Body Report, *US – Continued Suspension*, para. 310; Appellate Body Report, *Canada – Continued Suspension*, para. 310.

[28] Article 3.3 of the DSU.

[29] Panel Report, paras. 5.76-5.78.

[30] Appellate Body Report, *US – Continued Suspension*, para. 347; Appellate Body Report, *Canada – Continued Suspension*, para. 347.

[31] Appellate Body Report, *US – Continued Suspension*, para. 347; Appellate Body Report, *Canada – Continued Suspension*, para. 347.

abstained from making any finding on the matter before it",[32] despite the European Union's express request to the contrary, and in so doing failed to make an objective assessment of a matter properly before it.

30. The European Union requests the Appellate Body to complete the analysis and find, based on unrefuted evidence in the record, that the European Union has achieved withdrawal of the Mühlenberger Loch and Bremen airport runway subsidies.

4 THE PANEL ERRED IN DETERMINING THE CORPORATE BORROWING RATE COMPONENT OF THE MARKET BENCHMARK FOR A350XWB LA/MSF[33]

31. To determine whether LA/MSF for the A350XWB confers a "benefit", the Panel adopted a benchmark rate of return comprised of two components: (i) a corporate borrowing rate, plus (ii) a project risk premium. This appeal concerns the first component of the benchmark, whereas the appeal in Section 5 , below, concerns the second component.

32. With respect to the corporate borrowing rate component of the benchmark, the Panel erred in identifying the benchmark as "the average yields {on an EADS bond} one-month prior and six-months prior to the conclusion of the contract, in the form of a range".[34] In selecting a *range* of *average* yields, instead of adopting the yield on <u>the day of conclusion</u> of each contract,[35] the Panel erred in the application of Article 1.1(b), and separately failed to make an objective assessment of the matter, under Article 11 of the DSU.

33. The Panel began by correctly identifying the legal standard under Article 1.1(b) of the *SCM Agreement*. As noted by the Appellate Body, borrowing costs "should be observed *at the time* that each particular contract was *concluded*",[36] which requires that "the assessment *focuses on the moment in time when the lender and borrower commit to the transaction*".[37]

34. The Panel's first error arose in its application of this standard to the facts at hand. Specifically, the Panel rejected the use of actual data pertaining to the yield <u>*at* the time</u> each contract was concluded (*i.e.*, on the day of conclusion of each contract), which was "the moment in time when the lender and borrower committ{ed} to the transaction". The Panel replaced the yield at the time each contract was concluded with a *range* based on the *average* yields one- and six-months <u>*prior* to the time</u> each contract was concluded. By using a range of *average* yields, the Panel's approach risks artificially increasing or lowering the market borrowing rate, creating the danger of false positive or false negative findings of subsidisation.

35. In a second error, the Panel rejected the yield on the day of conclusion of each contract without a sufficient evidentiary basis to do so, in contravention of Article 11 of the DSU. The Panel's justification for rejecting the yield on the day of conclusion of each contract was the possibility that the rate "*may* reflect atypical fluctuations".[38] However, undisputed evidence before the Panel demonstrated that no such distortion existed.[39]

36. In light of the demonstrated downward trend in yields during the period leading up to the conclusion of the contracts, the Panel's selection of a range of *average* yields <u>prior</u> to – instead of <u>at the time</u> of – conclusion of each contract, could have but one result, of which the Panel must surely have been aware: an *artificial increase* in the benchmark. These circumstances suggest a lack of objectivity and even-handedness on the part of the Panel in its identification of the corporate borrowing rate element of the benchmark.

37. Should the Appellate Body disagree with the EU's main argument regarding these two errors, the European Union appeals the Panel's erroneous inclusion, within its range of average yields,

[32] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 51.
[33] Panel Report, paras. 6.389, 6.430 (Table 7), 6.632 (Table 10).
[34] Panel Report, para. 6.389.
[35] Panel Report, paras. 6.389, 6.430 (Table 7), 6.632 (Table 10).
[36] Panel Report, para. 6.385 (emphasis added).
[37] Panel Report, para. 6.388 (emphasis added), referring to Appellate Body Report, *EC – Large Civil Aircraft*, paras. 706, 825-836.
[38] Panel Report, para. 6.389 (emphasis added).
[39] Panel Report, para. 6.382 (Table 6).

of the six-month average yield on the relevant EADS bond. In so doing, the Panel erred in the application of Article 1.1(b) of the *SCM Agreement*, and separately failed to make an objective assessment of the matter, under Article 11 of the DSU.[40]

38. *First*, the six-month average yield does not reflect the yield "*at the time* that each particular contract was *concluded*",[41] and does not "focus{} on the moment in time when the lender and borrower *commit to the transaction*".[42] Indeed, the Panel itself found that the six-month average was "*less likely to reflect* expectations during the finalisation period" of each contract than the one-month average.[43] Including the six-month average yield within the range, therefore, amounts to error in the application of Article 1.1(b).

39. *Second*, the Panel failed to provide any explanation, let alone a reasoned and adequate explanation, for its decision to adopt a range of values that includes the six-month average, when – according to the Panel itself[44] – the other part of the range consisted of a more appropriate proxy (*i.e.*, the one-month average). The Panel's reasoning is also internally inconsistent. On the one hand, the Panel criticised the use of an average yield over seven months, due to the *possibility* that such an approach *could* result in an "artificially" lower (or higher) market borrowing rate, and therefore *could* result in a "misplaced" finding of subsidisation (or of no subsidisation).[45] On the other hand, the Panel adopted a six-month average yield as one element of the range used for this component of the benchmark, even though the six-month average *demonstrably resulted in* an "artificial" increase of the market borrowing rate, and a heightened risk of "misplaced" findings of subsidisation. For these reasons, the Panel failed to make an objective assessment of the matter, under Article 11.

40. When the Panel's erroneous selection of the corporate borrowing rate is corrected, based either on the EU's main appeal argument or on its alternative appeal arguments, the Panel's "benefit" findings become more sensitive to the correct identification of the second component of the market benchmark, *i.e.*, the risk premium. The European Union summarises its appeal of the Panel's identification of the project risk premium component of the benchmark in the next Section.

5 THE PANEL ERRED IN USING THE PROJECT-SPECIFIC RISK PREMIUM FOR ASSESSING THE "BENEFIT" FROM A380 LA/MSF AS THE PROJECT RISK PREMIUM FOR A350XWB LA/MSF[46]

41. In addition to identifying the wrong corporate borrowing rate component of the benchmark, the Panel also erred in identifying the second component of the benchmark for A350XWB LA/MSF, *i.e.*, the project risk premium, and, consequently, erred in finding a "benefit" from A350XWB LA/MSF.

42. The Panel's "benefit" findings, as illustrated in Table 10 of its Report, are *highly dependent on precision and accuracy* in the benchmarking exercise, with a *small* change in the project risk premium potentially changing the results, from a finding that a particular LA/MSF loan constitutes a subsidy, to a finding that it does not. However, the project risk premium chosen by the Panel did not result from a precise and accurate benchmarking exercise that was tailored to the A350XWB project risks assumed by the LA/MSF lenders, under the terms of each of the four LA/MSF contracts.

43. Instead, for all four A350XWB LA/MSF contracts, the Panel selected a single, undifferentiated risk premium, which was developed, in the original proceedings, for a *different project*, *i.e.*, the A380, launched at a *different moment in time*, and implicating *different risks*. That is, to benchmark the four A350XWB LA/MSF contracts, the Panel applied the risk premium developed to benchmark *another* aircraft project – the A380 – and another set of LA/MSF

[40] Panel Report, paras. 6.389, 6.430 (Table 7), 6.632 (Table 10).
[41] Panel Report, para. 6.385 (emphasis added).
[42] Panel Report, para. 6.388 (emphasis added).
[43] Panel Report, para. 6.389 (emphasis added).
[44] Panel Report, para. 6.389.
[45] Panel Report, para. 6.385.
[46] Panel Report, paras. 6.1210, 6.1211, 6.1236, 6.1280, 6.1289, 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 7.1(d)(xi), 7.1(d)(xiv), 7.1(d)(xv), 7.1(d)(xvi), 7.1(d)(xvii).

contracts. The Panel did so without making any adjustments to the benchmark, *despite* its acknowledgement of differences in risks as between the A380 project and the A350XWB project, and differences in risks as between the four A350XWB LA/MSF contracts.

44. The approach taken by the compliance Panel is particularly surprising, in light of the concerns expressed by the original panel about this *very same* approach. The original panel expressed significant concern about the use of a single, *undifferentiated* project risk premium across LCA programmes receiving LA/MSF, precisely because such an approach ignores the *differentiated* risks borne by lenders for each specific LCA programme, and in each specific LA/MSF contract.[47] The Appellate Body echoed this concern, adding that it was "the Panel's duty to assess, based on the evidence on record, whether the application of a *constant project risk premium* was the most appropriate approach and, to the extent that it was not, to *consider alternative approaches*".[48]

45. Accordingly, the compliance Panel should have required the United States to establish the project risk premium based on the risks associated *with the A350XWB project itself*, and in light of *the terms of each specific LA/MSF contract*. Instead, the Panel acquiesced in the United States' approach, which purported to establish the existence of a "benefit" on the basis of a single, undifferentiated project risk premium applied across two distinct LCA programmes, launched *six years* apart, and eight distinct LA/MSF contracts, concluded over a period of *10 years*.

46. The degree to which this approach required the Panel to gloss over differences between the two distinct LCA programmes and the eight distinct LA/MSF contracts is astonishing, and is particularly glaring in light, once again, of the conceit of precision reflected in the benchmarking results tabulated in the Panel's Table 10. Even with the use of a single, undifferentiated project risk premium, to which the Panel made no adjustment whatsoever to account for differences in the risk profiles of eight LA/MSF contracts concluded at different points in time over a *ten-year* period, to finance the development of two distinct aircraft launched *six years* apart, the Panel's Table 10 results in nothing more than small "benefits". Those findings are sensitive to small changes in the project risk premium, and potential changes in the result, from a finding that a particular LA/MSF loan constitutes a subsidy, to a finding that it does not.

47. In reaching its "benefit" findings, the Panel committed three sets of errors.

5.1 The Panel failed to establish a project-specific risk premium for A350XWB LA/MSF based on the risks associated with the A350XWB programme[49]

48. The Panel failed to establish a project-specific risk premium for A350XWB LA/MSF based on the risks associated with the A350XWB programme, and therefore erred in the application of Article 1.1(b) of the *SCM Agreement*. For distinct reasons, the Panel's approach also constitutes error under Article 11 of the DSU.

49. Beginning with the Panel's error in the application of Article 1.1(b), the Appellate Body has explained that a benchmark loan must be identified through "a *progressive search*", which must *begin* by assessing the commercial loan that shares "as many elements as possible in common with the investigated loan", *before* progressing to less similar commercial loans.[50] The Panel failed to undertake a "*progressive search*" for and to adopt the benchmark that shared "as many elements as possible in common with" the A350XWB LA/MSF loans, and that was most closely tailored to the risks associated with the A350XWB programme.[51] In fact, the Panel did not engage in *any* search, progressive or otherwise, to identify the project risk premium. The Panel failed to do so despite the fact that it was well aware that there was a

[47] *See* Appellate Body Report, *EC – Large Civil Aircraft*, para. 870 (summary by the Appellate Body of the major concerns expressed by the original panel).

[48] Appellate Body Report, *EC – Large Civil Aircraft*, para. 883 (emphasis added).

[49] Panel Report, paras. 6.608, 6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 7.1(c)(i), 7.1(d)(xiv), 7.1(d)(xv), 7.1(d)(xvii).

[50] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486.

[51] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 476, 486 (emphasis added). *See also* Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345.

more appropriate benchmark that was more closely tailored to the risks associated with the A350XWB programme – that is, A350XWB risk-sharing supplier ("RSS") contracts. The Panel made other findings relating to RSS contracts for the A350XWB, demonstrating that it knew of their existence. Moreover, the Panel evidently thought RSS financing was an appropriate benchmark, because RSS contracts for the A380 served as the basis for the A380 project risk premium that the Panel ultimately applied.

50. The Appellate Body has further explained that, when resort to a less similar commercial loan to serve as the benchmark is necessary, *adjustments* must be made to ensure comparability with the investigated loan.[52] The Panel failed to make *any adjustments* to the project risk premium developed for the A380 project, despite the Panel's own findings of differences in risk between the A380 project and the A350XWB project.

51. The Panel's approach also constitutes error under Article 11 of the DSU. Paraphrasing the Appellate Body's guidance from the original proceedings, the compliance Panel did *not* assess "whether the application of a{n A380-based} constant project risk premium {as suggested by the United States} was *the most appropriate approach* and, to the extent that it was not, *to consider alternative approaches*"[53]. Further, by inappropriately deviating from the approach taken by the original panel in this regard, the compliance Panel committed another, separate error under Article 11.

5.2 The Panel failed to establish similarity between (i) the risks involved in the A350XWB project and the A350XWB LA/MSF contracts, and (ii) the risks involved in the A380 project and the A380 LA/MSF contracts, and therefore failed to make an objective assessment of the matter[54]

52. The Panel erroneously found that the project risk premium developed for the A380 project is a suitable benchmark for the A350XWB project, on the basis that the risks posed by the A380 and the A350XWB projects were purportedly similar. However, the Panel's finding that the risks posed by the A380 and the A350XWB projects are similar is *not* based on an objective assessment of the matter, as required under Article 11 of the DSU.

53. The Panel's errors relate to its assessment of each of the three aspects of risk considered relevant by the Panel to assess the similarity of the risk profiles of, respectively, the A380 and A350XWB projects.

5.2.1 Price of risk

54. The Panel found that the United States did not demonstrate the similarity of the *price of risk* at the time of the provision of A380 and A350XWB LA/MSF. As a result, the Panel's conclusion that the risks (including the price of risk) of providing financing for the A380 project are sufficiently similar to the risks of providing financing for the A350XWB project, is self-evidently based on inconsistent reasoning and lacks sufficient evidentiary support.

5.2.2 Programme risk

55. The Panel next addressed *programme risk*, which consists of "development" risk and "market" risk. From its finding that the A380 and A350XWB projects gave rise to *different* programme risks, the Panel erroneously concluded that the projects bore *similar* programme risks. The leap from "different" to "similar" programme risks was erroneous, because it was based on insufficient support in the evidence, and was additionally not accompanied by a reasoned and adequate explanation. More specifically, the Panel failed to reduce the differences in programme risk to common terms that are relevant under Article 1.1(b), and that allow for the comparison necessary to determine similarity. That is, the Panel failed to express the differences in programme risks between the A380 and the A350XWB projects in terms of the *impact* each project's programme risks had *on the market price* that would be demanded by a market lender as a risk premium to bear those risks.

[52] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486.
[53] Appellate Body Report, *EC – Large Civil Aircraft*, para. 883 (emphasis added).
[54] Panel Report, paras. 6.487, 6.492, 6.527, 6.539, 6.542, 6.579, 6.595, 6.608, 6.609, 6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 7.1(c)(i), 7.1(d)(xiv), 7.1(d)(xv), 7.1(d)(xvii).

56. The Panel's also erred under Article 11 of the DSU in assessing the respective development risks faced by each project. *First*, the Panel failed to account for differences in the mitigation of development risks as between the A350XWB and the A380 projects. Specifically, to find similarity between the development risks of each project, the Panel was forced to ignore its own findings that, at the time the A350XWB contracts were signed, the development risk of the A350XWB project was already mitigated to some extent, whereas the development risk of the A380 was not. *Second*, the Panel made inconsistent findings in assessing the questions of "benefit" and "adverse effects" from LA/MSF for the A350XWB, suggesting a lack of even-handedness. Specifically, in its "benefit" assessment, the Panel emphasised the *novelty* of the A350XWB project (which facilitated its "benefit" findings), whereas, in its assessment of the "effects of the subsidies", the Panel emphasised the *continuity* of the A350XWB project in light of the A380 project (which facilitated its "adverse effects" findings). The Panel did not explain the reason for this disparate treatment of the evidence.

5.2.3 Contract risk

57. Finally, as regards *contract risk*, the Panel failed properly to compare the terms of the A350XWB contracts to those of the A380 contracts. For several reasons, the Panel's comparison between the A350XWB and A380 LA/MSF contracts lacks a sufficient evidentiary basis.

58. *First*, the Panel's finding of similarity in risk-reducing terms between certain A380 LA/MSF and A350XWB LA/MSF contracts is contradicted by the undisputed fact that the risk-reducing terms in certain A350XWB LA/MSF contracts were *more extensive* than in any of the A380 LA/MSF contracts. *Second*, the undisputed evidence shows that *more* A350XWB LA/MSF *contracts* contained certain risk-reducing terms than was the case in the A380 LA/MSF contracts. *Third*, and finally, undisputed evidence shows that risk-reducing terms in the A350XWB LA/MSF contracts are *more consequential* than risk-reducing terms in the A380 LA/MSF contracts, given that, according to the Panel, the A350XWB project would be exposed to a slightly higher development risk than the A380 project.

59. Additionally, and again with regard to contract risks, the Panel failed entirely to compare the terms of the A350XWB LA/MSF contracts to those of the RSS contracts for the A380, which were used in the original proceedings to derive the project risk premium for the A380 LA/MSF contracts. The reason is simple: the A380 RSS contracts do not form part of the record. Without a proper examination of the terms of the A380 RSS contracts, the Panel could not know whether the terms of the A350XWB LA/MSF contracts are *dis*similar to the terms of the A380 RSS contracts.

5.3 The Panel erroneously adopted a single project risk premium to benchmark all four of the A350XWB LA/MSF loans[55]

60. The Panel erroneously found that a single project risk premium could be applied as a benchmark for each of the four distinct LA/MSF contracts for the A350XWB. This constitutes error in the application of Article 1.1(b) of the *SCM Agreement*. The Panel's own factual findings reveal that there are important differences in the terms of the four loans that affect the risk profile – and hence the market price – of each loan. However, in selecting a single, undifferentiated project risk premium, the Panel failed to consider, let alone adjust for, these differences.

61. The Panel also failed to make an objective assessment of the matter, under Article 11 of the DSU. Specifically, the Panel took inconsistent approaches to the identification of the corporate borrowing rate component of its benchmark, and the project risk premium component of that benchmark. Purportedly to avoid the risk of producing false positive or false negative subsidy findings, the differences in timing between the conclusion of the various LA/MSF contracts prompted the Panel to adopt a different corporate borrowing rate for each of the four A350XWB LA/MSF contracts.[56] On the other hand, as regards the project risk premium component of its benchmark, differences between the four A350XWB LA/MSF contracts did *not*

[55] Panel Report, paras. 6.607, 6.608, 6.609, 6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 7.1(c)(i), 7.1(d)(xiv), 7.1(d)(xv), 7.1(d)(xvii).

[56] Panel Report, paras. 6.385-6.388.

prompt the Panel to adopt a different risk premium for each contract, despite a similar risk of producing false subsidy findings.

6 THE PANEL ERRED IN ITS IDENTIFICATION OF THE APPROPRIATE PRODUCT MARKETS[57]

62. The European Union appeals the Panel's finding, in paragraph 6.1411 of the Panel Report, 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.

63. This finding rests on several errors in the interpretation and application of Articles 5 and 6.3 of the *SCM Agreement*; separately, the Panel also failed to make an objective assessment of the matter, under Article 11 of the DSU.

64. *First*, the Panel erred in interpreting the term "market" in Article 6.3 to require the placement of two products in the same product market based solely on the existence of competition between those products, without regard to the nature or degree of the competitive relationship. In other words, the Panel held that, for two products to be in the same product market, it is not necessary "that they impose 'significant competitive constraints' on each other or that those products are 'closely competitive'".[58] This interpretation undermines the very concept of a "market" as envisaged in Article 6.3 of the *SCM Agreement*, and constitutes interpretative error. That interpretative error also undermines the Panel's identification of the relevant product markets, and the adverse effects findings based thereon.

65. As the Appellate Body explained in *US – Upland Cotton*, the ordinary meaning of the word "market" is "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices".[59] The Appellate Body also clarified, in the original proceedings in this dispute, that "the scope of the relevant product market in any given case will depend on the *nature and degree of competition* between the products of the complaining Member and the allegedly subsidized products of the responding Member".[60] It would be erroneous to group products into the same product market based solely on the *existence* of competition between them, without consideration of the "nature and degree" of the competitive relationship.

66. In the original proceedings, the Appellate Body referred to the "small but significant and non-transitory increase in prices" or "SSNIP" test to locate the proper balance, in the product market definition, between the complete absence of competitive constraints (or substitutability), on the one hand, and perfect substitutability, on the other.[61] This conceptual tool underscores the proposition that the mere existence of competition between two products is insufficient to group them into the same product market. Instead, two products may properly be placed in the same market where the "nature and degree of competition" between the products reveals that they exercise "*significant competitive constraints*" on one another. While circumstances may undermine the ability to apply the SSNIP test in a given case, the Appellate Body's choice of this conceptual tool supports the proposition that product markets should be defined on the basis of "significant competitive constraints", and not merely the existence of competition.

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[57] Panel Report, paras. 6.1210, 6.1211, 6.1236, 6.1280, 6.1289, 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 7.1(d)(xi).

[58] Panel Report, para. 6.1211.

[59] Appellate Body Report, *US – Upland Cotton*, para. 408.

[60] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1123.

[61] Appellate Body Report, *EC – Large Civil Aircraft*, footnote 2468, *citing* M. Motta, *Competition Policy: Theory and Practice*, pp. 102, 103.

67. The Panel's approach to identifying product markets based on the mere existence of competition would produce unworkable product market definitions that make identifying the effects of subsidies virtually impossible, thereby undermining the utility of the very exercise of demarcating product markets for purposes of a serious prejudice assessment. For example, under the Panel's product market standard, a product market could readily be composed of, for example, small regional aircraft, large regional aircraft, single-aisle aircraft, twin-aisle aircraft, very large aircraft, and may even include other means of transport.

68. *Second*, should the Appellate Body find that the Panel did *not* err in its interpretation of the term "market" in Article 6.3, and instead agree that two products belong in the same product market as long as competition exists between those products (regardless of the nature or degree of that competitive relationship), the Panel failed in its application of Articles 5(c) and 6.3 to the facts at hand.[62] Specifically, on the facts, the Panel's product market standard should have led inexorably to the conclusion that *all* LCA fall in the same *single* product market. The Panel's factual findings reveal that competition exists *across the product spectrum* covered by the US challenge, such that application of the Panel's own standard should have led it to find a single product market. In fact, in concluding its finding on product markets, the Panel emphasised that "important competitive relationships may also exist between pairings or combinations of aircraft *across* two, or even all three, of the product markets".[63] Thus, even assuming that the legal standard identified by the Panel was correct, *quod non*, the Panel erred in the application of that standard. This error undermines the Panel's identification of the relevant product markets, and the adverse effects findings based thereon.

69. *Third*, and finally, the Panel's failure to test its erroneous product market standard against the competitive dynamics between products that the United States alleged to fall in different product markets constitutes a failure, under Article 11 of the DSU, to make an objective assessment of the matter.[64] The Panel confined its analysis to an enquiry whether there existed some competitive relationship between the aircraft placed by the United States *within* each of the three product markets it alleged, without also enquiring whether there existed a competitive relationship between aircraft that the United States placed into *separate* product markets. For instance, on the sole basis that the United States alleged them to be in different product markets, the Panel neglected altogether to examine whether the A321neo exerts competitive constraints on the 767, or whether the 777-300ER or the A350XWB-1000 exert competitive constraints on the 747-8. In so doing, just as in the original proceedings, the compliance Panel took an undiscerning approach to identifying the product markets, uncritically accepting the markets proposed by the United States.

70. In these circumstances, the European Union requests the Appellate Body to reverse the Panel's product market findings. Having erred in the identification of the product markets at issue, these findings must be reversed, and with them the findings of displacement, impedance and significant lost sales that the Panel made on the basis of its erroneously identified product markets.

7 NON-SUBSIDIZED LIKE PRODUCT[65]

71. The Panel erred in the section of its report that deals with the subsidization of the like product. The Panel should have made an objective assessment of the US claim and the EU arguments under Articles 6.3(b) and 6.4, taking into account the facts and evidence submitted by the parties, and taking into account the Appellate Body's guidance that Article 6.4 provides context for the interpretation and application of Article 6.3(b). The Panel should have assessed not only the EU argument that any subsidization of the like product precludes or defeats the US claim (the original "clean hands" argument) but also the novel interpretative proposition advanced by the EU to the effect that the compliance Panel was bound to take such subsidization into account in its assessment of causation (the "causation" argument). The

[62] Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 7.1(d)(xi).
[63] Panel Report, para. 6.1416.
[64] Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 7.1(d)(xi).
[65] Panel Report, paras. 6.1125-6.1138, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii), 7.2.

Panel was also bound to take into account the multilateral determination in DS353 that Boeing LCA are subsidized to the tune of several billion dollars.

72. Thus, the Panel erred in stating that the EU arguments were "essentially the same" as in the original proceedings, and erred in reducing the matter to two questions: whether or not there was a new matter; and whether or not there were cogent reasons. The Panel further erred in its assessment of whether or not there was a new matter, because it failed to take into account changes in the law and facts, erred in the interpretation of the term "matter" in Article 11 of the DSU, and failed to make an objective assessment. The Panel also erred in its assessment of whether or not there were cogent reasons, including by failing to make an objective assessment under Article 11 of the DSU.

73. Accordingly, the European Union requests the Appellate Body to reverse the Panel's findings that relate to or rely on its findings with respect to the subsidized like product, and complete the legal analysis with respect to the interpretation of Articles 6.3(b) and 6.4. The European Union further submits that the Appellate Body cannot complete the analysis with respect to the US claims of displacement or impedance. The European Union also asks the Appellate Body to take these matters into account when considering and reversing other aspects of the Panel's findings under Article 6, and specifically Articles 6.3(a) and 6.3(c).

8 THE PANEL ERRED IN FINDING THAT THE LA/MSF LOANS ARE A GENUINE AND SUBSTANTIAL CAUSE OF ADVERSE EFFECTS RELATED TO AIRBUS' A320, A330, A380 AND A350XWB FAMILIES OF LCA[66]

74. The European Union appeals several errors in the Panel's causation-related findings.

75. *First*, the Panel erred in finding that, despite the passage of time and events that occurred during that time, "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".[67] This finding is based on a "but for" approach to causation that, in the circumstances of the present dispute, was incapable of taking into account the passage of time, and events that occurred during that time, including the expiry of most of the pre-A350XWB subsidies, resulting in error in the interpretation of Article 5(c) of the *SCM Agreement*.

76. The Panel acknowledged the Appellate Body's guidance on the relevance of the passage of time and events that occurred during that time – in particular, that the effect of any subsidy must "diminish{} and eventually come to an end".[68] However, under the Panel's approach to causation, adverse effects continue to be attributable to the subsidy for as long as the subsidised product exists (as well as any subsequent products manifesting "learning", "scope" or "financial" effects from the subsidised product), since the subsidy will continue to be the necessary "but for" cause of its market presence. This enquiry was, therefore, ill-suited and insufficient to determine whether, at present, and taking into account the passage of time and events that occurred over that time, including the expiry of the subsidies and massive non-subsidised investments by Airbus, the subsidies continue to be a "genuine and substantial" cause of adverse effects.

77. The Panel's "but for" approach to causation, coupled with its approach to the interpretation of Article 7.8, created an anomalous situation in which it is nearly impossible for a Member to bring itself into compliance with the recommendations and rulings of the DSB in relation to an actionable subsidy. Under the Panel's approach to Article 7.8, compliance cannot be achieved through withdrawal of the subsidy, though expressly recognised as an option to achieve compliance, unless accompanied by the removal of adverse effects. And under the Panel's "but for" approach, the finding from the original proceedings that the subsidies were historically a "necessary" cause of adverse effects is extended indefinitely, meaning that the causal link to alleged adverse effects does not "diminish{} and eventually come to an end".

[66] Panel Report, paras. 6.1515, 6.1527, 6.1534, 6.1774, 7.1(d)(xii)-7.1(d)(xiii).
[67] Panel Report, para. 6.1534.
[68] Panel Report, para. 6.1487, *quoting* Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1236-1238.

78. Additionally, the European Union appeals the Panel's error in the application of Article 5(c) and 7.8 of the *SCM Agreement*, by failing to examine whether Airbus' non-subsidised investments diluted the causal link between the subsidies and the alleged adverse effects related to Airbus' A320 and A330 families of LCA, such that the subsidies are no longer a "genuine and substantial" cause of present adverse effects.[69] Having determined that the subsidies were the historical "necessary" cause of the market presence of these aircraft, the Panel outright precluded the possibility that these investments could ever have an impact on the existence of a "genuine and substantial" *present* causal link. To the Panel, the non-subsidised post-launch investments were merely evidence that the adverse effects of the subsidies persisted, because "but for" the subsidies, the programmes into which the non-subsidised investments were made would not have existed in the first place.[70]

79. *Second*, the Panel may have implied that LA/MSF for the A380 resulted in "direct effects".[71] To the extent the Panel did make such a finding, it constitutes error under Article 11 of the DSU. The Panel defined the term "direct effects" as "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".[72] Having (i) expressly found that A380 LA/MSF was "not critical to {the} very existence" of the A380,[73] and (ii) not having found that absent A380 LA/MSF, Airbus would have delayed the launch of the A380, or that the A380 would have been any different in technology, the Panel lacked an evidentiary basis to find that LA/MSF for the A380 resulted in "direct effects".

80. *Third*, in attributing the market presence of the A350XWB to LA/MSF, the Panel erred in the application of Article 5, and under Article 11 of the DSU. Specifically, the Panel appears to have attributed the market presence of the A350XWB to "indirect effects" of LA/MSF for previous aircraft, including LA/MSF for the A380.[74] Moreover, certain of the Panel's statements could be read to imply that the market presence of the A350XWB is attributable to "direct effects" of LA/MSF for the A350XWB.[75]

81. The Panel's attribution of the market presence of the A350XWB to the "indirect effects" of the LA/MSF for the A380 constitutes error in the application of Article 5(c). The Panel's finding that A380 LA/MSF was "not critical to {the} very existence"[76] of the A380 precludes a finding of "direct effects" from that subsidy on the existence of the A380. In these circumstances, any "learning effects", "scope and scale effects" or "financial effects" for the A350XWB associated with the A380 would have existed even absent A380 LA/MSF, and are not attributable to those loans. Thus, as A380 LA/MSF did not result in "direct effects" for the A380, those loans were logically incapable of resulting in "indirect effects" on later LCA such as the A350XWB. Yet, the Panel appears to have erroneously included A380 LA/MSF in the aggregated group of subsidies that had "indirect effects" on the launch and market presence of the A350XWB.[77]

82. To the extent that the Panel attributed the market presence of the A350XWB to "direct effects" from LA/MSF for the A350XWB, the Panel's finding rests on its assertion that "*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".[78] This single sentence – which is, incredibly, the concluding sentence in the concluding paragraph of a 182-paragraph section of the Panel Report dedicated to assessing the effects of A350XWB LA/MSF – is the sole basis on which the Panel appears to have found "direct effects" from A350XWB LA/MSF on the launch and market presence of the A350XWB.

[69] Panel Report, paras. 6.1527, 6.1534, 6.1774, 7.1(d)(xii)-7.1(d)(xiii).
[70] Panel Report, para. 6.1525.
[71] Panel Report, para. 6.1507.
[72] Panel Report, para. 6.1492.
[73] Panel Report, para. 6.1507 and footnote 2597.
[74] Panel Report, paras. 6.1747, 6.1771, 6.1773, 7.1(d)(xiii).
[75] Panel Report, paras. 6.1717, 7.1(d)(xiii).
[76] Panel Report, para. 6.1507 and footnote 2597.
[77] Panel Report, paras. 6.1771, 6.1773, 7.1(d)(xiii).
[78] Panel Report, paras. 6.1717, 7.1(d)(xiii).

83. The Panel's assertion that, without A350XWB LA/MSF, there was a "high likelihood" that Airbus would have had to "make certain compromises" to the timing and features of the aircraft, enjoys no support whatsoever in the 182-paragraph section of the Panel Report dedicated to assessing the effects of A350XWB LA/MSF. Indeed, the Panel does not cite a single piece of evidence to support such a finding; nor does it otherwise provide reasoning in support of any such finding. In fact, the Panel's speculation is *contradicted by* a number of its own factual findings, which collectively demonstrate that Airbus would not have made compromises on the timing or features of the A350XWB.[79] Thus, the Panel's finding of "direct effects" for the A350XWB constitutes error under Article 11 of the DSU.

84. *Fourth*, and finally, the Panel erred in its application of the requirement that there be a "genuine and substantial" causal link, under Article 5(c) and 6.3 of the *SCM Agreement* by failing to account for, in its causation analysis, the differences in the degree of competition between pairings of aircraft, and market-specific and sale-specific non-attribution factors.[80]

85. The Panel clarified that "it {was} *not* {the Panel's} view that the degree of competition existing within each of {the} markets will be identical between all pairings or combinations of aircraft".[81] The Panel also acknowledged that "where the evidence shows that the competitive relationship {between two products} is not direct and 'at most, indirect or remote', *this must be properly taken into account in the {subsequent adverse effects} analysis*".[82] Yet, the Panel failed to account for the differences in the degree of competition between relevant LCA in assessing the US claims of displacement, impedance and lost sales.

86. Similarly, in the context of displacement, impedance and lost sales, the Panel failed to account for the market-specific and sale-specific non-attribution factors that the European Union demonstrated as causing (or contributing to) the observed market phenomena. Having determined that, historically, the LA/MSF subsidies were the "necessary" cause of the market presence of certain Airbus aircraft, the Panel posited that any further discussion of non-attribution factors was "obviously" irrelevant.[83] In so doing, the Panel erred in its application of the requirement that there be a "genuine and substantial" causal link, under Article 5(c) and 6.3 of the *SCM Agreement*

9 THE PANEL ERRED IN FINDING "DISPLACEMENT AND/OR IMPEDANCE" IN VARIOUS COUNTRY AND PRODUCT MARKETS[84]

87. The Panel's findings of "displacement and/or impedance" rest on three sets of errors.

88. *First*, the Panel made undifferentiated findings of "displacement *and/or* impedance" with respect to each of the country and product markets at issue, without clarifying whether it had found, for a particular country and product market, *both* displacement and impedance, or instead *one or the other* of these two distinct forms of adverse effects. Articles 6.3(a) and 6.3(b) employ the words "displace" and "impede", separated by the conjunction "or", which confirms that displacement and impedance are two distinct forms of serious prejudice. Indeed, the Appellate Body has defined the term "displace" to connote a "substitution effect",[85] and the term "impede" to connote "obstructed" or "hindered" imports/exports.[86] The Appellate Body also clarified, in *US – Large Civil Aircraft*, that "'displacement' and 'impedance' are ... not interchangeable concepts".[87] The Panel's undifferentiated findings of "displacement and/or impedance" constitute error in the interpretation of Articles 6.3(a) and 6.3(b), and amount to treating displacement and impedance as interchangeable concepts.

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[79] *Compare* Panel Report, para. 7.1717 *with* Panel Report, paras. 6.1542-6.1544, 6.1546, 6.1547, 6.1548, 6.1555, 6.1569, 6.1572, 6.1579.

[80] Panel Report, paras. 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii).

[81] Panel Report, para. 6.1416.

[82] Panel Report, para. 6.1169 (emphasis added).

[83] Panel Report, para. 6.1814.

[84] Panel Report, paras. 6.1817, 7.1(d)(xiv)-7.1(d)(xv).

[85] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1160. *See also* Appellate Body Report, *US – Large Civil Aircraft*, para. 1071.

[86] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1161. *See also* Appellate Body Report, *US – Large Civil Aircraft*, paras. 1071, 1086.

[87] Appellate Body Report, *US – Large Civil Aircraft*, para. 1071. *See also* Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1160-1162.

89. *Second*, assuming, *arguendo*, that the Panel's findings of "displacement" apply to each country and product market at issue, the European Union demonstrates that all of the Panel's findings of "displacement" are in error.

90. Properly interpreted, the term "displacement" connotes a substitution effect. The Appellate Body has clarified that in deciding a claim of displacement, a panel must "assess whether this phenomenon is discernible by examining *trends* in data relating to export volumes and market shares over an appropriately representative period".[88] The Panel erroneously sought to distinguish the Appellate Body's guidance by postulating that it pertained solely to a "two-step" analysis of causation, and not to the type of "unitary" analysis that the Panel undertook. The Panel's application of the law to the facts confirms that the Panel interpreted Articles 6.3(a) and 6.3(b) to allow a finding of displacement without any engagement with the sales volume and market share data, and without a finding of clearly discernible and identifiable declining trends in sales volume or market shares for each of the country and product markets at issue. This constitutes error in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement.*

91. The Panel additionally erred in the application of Articles 5(c), 6.3(a) and 6.3(b) and 7.8 by effectively confining its analysis to two data points (annual data for 2012 and 2013), which, as the Appellate Body clarified in *US – Large Civil Aircraft*, "by any measure, cannot constitute a trend".[89]

92. The Panel further erred in the application of Articles 5(c), 6.3(a) and 6.3(b) and 7.8 in making findings of displacement entirely divorced from the data. The Panel failed to engage with the data, to determine whether it revealed a "discernible" or "clear" trend of a "substitution effect" in the markets at issue. In several instances, the Panel's findings of displacement cover markets where Boeing's market share *increased* over the period under consideration, evidencing the exact opposite of a substitution effect.

93. *Third*, assuming, *arguendo*, that the Panel's findings of "impedance" apply to each country and product market at issue, the European Union demonstrates that all of the Panel's findings of "impedance" are in error.

94. Contrary to the meaning of the term "impede", and the Appellate Body's guidance, the Panel interpreted Articles 6.3(a) and 6.3(b) to support a finding of impedance without any engagement with the sales volume and market share data, and without a finding of clearly discernible and identifiable trends in sales volume or market shares for each of the country and product markets at issue. This constitutes error in the interpretation of Articles 6.3(a) and 6.3(b).

95. Additionally, the Panel erred in the application of Articles 5(c), 6.3(a) and 6.3(b) by effectively confining its analysis to two data points (annual data for 2012 and 2013), and in making findings of impedance that are entirely divorced from the data.

10 CONSIDERATIONS THAT APPLY WERE THE APPELLATE BODY TO ATTEMPT TO COMPLETE THE ADVERSE EFFECTS ANALYSIS

96. Having set out the bases on which the Appellate Body should reverse (i) the Panel's findings with respect to the withdrawal of subsidies, under Article 7.8 of the *SCM Agreement*, and (ii) the Panel's causation findings, under Articles 5 and 6.3 of the *SCM Agreement*, the European Union addresses considerations that would apply were the Appellate Body to attempt to complete the analysis regarding the United States' assertion of adverse effects.

97. The Panel employed the tools of aggregation and cumulation to undertake a *collective* assessment of the effects of LA/MSF and non-LA/MSF subsidies. Specifically, the Panel found that the aggregated group of LA/MSF subsidies is a "genuine and substantial" cause of adverse

[88] Appellate Body Report, *US – Large Civil Aircraft*, para. 1071.
[89] Appellate Body Report, *US – Large Civil Aircraft*, para. 1087.

effects, and then cumulated the effects of the non-LA/MSF subsidies, which it found to be a "genuine" cause of adverse effects.[90]

98. Should the Appellate Body reverse the Panel's interpretation of Article 7.8 or its causation findings, the basket of subsidies subject to the Appellate Body's analysis of the adverse effects asserted by the United States will be different from the basket considered by the Panel. In the reconstituted basket, there will no longer be a single LA/MSF subsidy or an aggregated group of LA/MSF subsidies to serve as a "genuine and substantial" cause of adverse effects. The Panel's factual findings provide no basis for a conclusion that anything short of the entire group of LA/MSF subsidies considered by the Panel is a "genuine and substantial" cause of adverse effects.

99. Without an "anchor" subsidy (or aggregated group of subsidies) that has been found to be a "genuine and substantial" cause of adverse effects, cumulation will no longer be an appropriate tool for the collective assessment of the effects of the LA/MSF and non-LA/MSF subsidies. Nor can the non-LA/MSF subsidies be aggregated with the LA/MSF subsidies, given the differences in the "design, structure and operation" of these measures. Neither aggregation nor cumulation is appropriate for the collective assessment of the effects of the non-withdrawn LA/MSF and non-LA/MSF subsidies, should the Appellate Body seek to complete the analysis.

100. While the European Union does not believe that the inapplicability of aggregation and cumulation would preclude a collective assessment of the effects of the subsidies, the European Union believes that the Appellate Body would be unable to complete the analysis to make any findings of adverse effects properly attributable to any non-withdrawn subsidies for other reasons:

a. The Panel erred in its identification of the relevant product markets.[91] In doing so, the Panel failed to undertake any examination of the competitive dynamic between products that the United States alleged to be in different product markets. The Panel's failure in this regard renders the Panel Report devoid of factual findings that would allow the Appellate Body to complete the analysis by identifying the appropriate product markets. Nor are there undisputed facts of record to enable the identification of appropriate product markets by the Appellate Body.

b. The Panel erroneously failed to consider whether the United States brought its claim in respect of a "non-subsidized like product", within the meaning of Article 6.4 of the *SCM Agreement.*[92] There are no Panel findings or undisputed facts of record that would allow the Appellate Body to identify which, if any, of the Boeing aircraft in respect of which the United States alleges adverse effects is "non-subsidized".

c. In its causation analysis, the Panel failed to account for the passage of time and events that occurred during that time.[93] There are no Panel findings or undisputed facts of record that would allow the Appellate Body to account for these factors in completing the analysis.

d. The nature of the adverse effects analysis advocated by the United States, and accepted by the Panel, resulted in an absence, from the record, of evidence necessary to assess properly the causal link between a *reconstituted basket* of subsidies and any adverse effects. The United States did not advance any argument or evidence that could have assisted the Panel, or that could assist the Appellate Body, in assessing whether a *reconstituted basket* of subsidies, short of even one of the subsidies that the United States included in its basket, would still be a "genuine and substantial" cause of any adverse effects.

e. The re-constitution of the basket of subsidies at issue would require properly accounting for the effects of those subsidies that are withdrawn, and therefore excluded from the

[90] Panel Report, paras. 6.1838, 6.1846, 6.1847, 7.1(d)(xvii).
[91] Section 6 , above.
[92] Section 7 , above.
[93] Section 8 , above.

basket of subsidies at issue, *as non-attribution factors*. There are no Panel findings or undisputed facts of record that would allow such an exercise by the Appellate Body.

f. With respect to claims of displacement and impedance, the Panel failed to identify, or even look for, clear and discernible trends that are capable of evidencing displacement or impedance.[94] While the Panel tabulated the volume and market share data pertaining to two annual data points in its Report, two data points are insufficient to constitute a trend. As for data for the years preceding 2011, there exist no Panel findings or undisputed facts of record that speak to either the existence of trends, or the data based on which such trends are to be ascertained.

g. In assessing displacement, impedance and lost sales, the Panel failed to account for the closeness of competition and substitutability between products that it placed in the same product market, based solely on the *existence* of competition, without regard to the nature or degree of that competitive relationship.[95] There are no Panel findings or undisputed facts of record that would allow such an exercise by the Appellate Body.

h. In the context of displacement, impedance and lost sales, the Panel erroneously failed to examine the market-specific and sale-specific non-attribution factors that the European Union demonstrated caused or contributed to causing the observed market phenomena.[96] There are no Panel findings or undisputed facts of record that would allow the Appellate Body to account for these factors in an attempt to complete the analysis.

11 CONCLUSION

101. For the reasons set out above, the European Union requests that the Appellate Body reverse or modify the findings and conclusions addressed in this Appellant's Submission.

[94] Section 9 , above.
[95] Section 9 , above.
[96] Section 9 , above.

ANNEX B-2

EXECUTIVE SUMMARY OF THE UNITED STATES' OTHER APPELLANT'S SUBMISSION

1. If the Appellate Body were to reverse the Panel and find that the passive expiry of LA/MSF subsidies could satisfy the obligation under Article 7.8 in at least some cases, then the United States conditionally appeals the Panel's separate findings that the *ex ante* lives of the pre-A380 LA/MSF subsidies passively "expired" prior to December 1, 2011.

2. In line with the Appellate Body's guidance in *EC – Large Civil Aircraft*, the period in which a benefit exists should be based on an *ex ante* assessment of factors such as the nature, amount, and projected use of the challenged subsidy. If at the time of grant, the evidence indicates that the grantor expects the benefit to flow over a period whose length is defined to be contingent on some other variable event, then logically the life of the subsidy should be measured accordingly.

3. Evidently, the Panel assumed that the *ex ante* life of the subsidies must be expressed as a fixed number. It erred by focusing on the wrong expectations. It sought to retrospectively project an expected life to each aircraft program. The Panel failed to recognize that, when Airbus accepted a contingent liability and the governments agreed to make payments contingent, they expected the benefit of below-market repayments to last for a variable period defined by external factors.

4. In addition, the United States raises an appeal regarding a legal interpretive question with respect to Article 3.1(b). The United States demonstrated, and the EU did not contest, that French, German, Spanish, and UK LA/MSF is each conditioned on the production of goods in the grantor's territory to be used by Airbus in the manufacture of the A350 XWB. The Panel found that subsidies conditioned on the domestic production of inputs to be used in the manufacture of the A350 XWB are not prohibited under Article 3.1(b). The Panel determined that the contingencies in the A350 XWB LA/MSF contracts "ensure that the member States are subsidizing a domestic producer. Article 3.1(b), therefore, does not discipline them."

5. Under a competing interpretation also under consideration in a separate dispute, where a subsidy is contingent on domestic production of a good that is an input into a manufacturing process, and substituting an imported version result in the loss of an entitlement to the subsidy, the subsidy is contingent on the use of domestic over imported goods. To be clear, the United States considers this is not the best interpretation. However, the United States has an interest in ensuring that the same legal approach is applied in both proceedings.

6. Moreover, should the Appellate Body determine that this competing interpretation is indeed correct, there is no question that the Panel erred in not finding a violation of Article 3.1(b). Further, applying the competing interpretation to the undisputed facts and findings of this proceeding, the Appellate Body would be able to complete the analysis and conclude that all four instances of A350 XWB LA/MSF breach Article 3.1(b).

7. The competing interpretation – in contradiction to the interpretation adopted by the Panel – is as follows: if (i) a subsidy is granted to a domestic producer conditional on the domestic siting of production activities to produce a domestic input in an industrial process, and (ii) a substitution of imported goods for these inputs would result in the producer's loss of the entitlement to the subsidy, then the subsidy is contingent on the use of domestic over imported goods, and therefore is inconsistent with Article 3.1(b). In addition, the competing interpretation of Article 3.1(b) assumes that any good completed in a domestic territory is "domestic" for purposes of Article 3.1(b), without the need to examine the significance of the operations undertaken in the domestic territory, the proportion of foreign content contained in the good, rules of origin, or any other considerations.

8. If the goods that Airbus must use to manufacture the A350 XWB are required to be produced in the EU, then the goods are "domestic goods" and therefore Airbus is required to use domestic over imported goods to receive the subsidy.

9. The Panel, however, found that this logic reflected an improper interpretation of Article 3.1(b). Critical to the Panel's finding was the need to interpret Article III of the GATT 1994 and Article 3.1(b) of the SCM Agreement consistently. The Panel found that a review of both provisions "suggests that the act of granting subsidies to firms so long 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."

10. This raises a threshold interpretive question that the Appellate Body has yet to consider. Where a subsidy is contingent not only on the production of a finished good, but is also contingent on the production, in the grantor's territory, of intermediate goods for use as inputs (or goods used to produce other goods, *i.e.*, instrumentalities of production) – which are then presumed to be "domestic" – in manufacturing the downstream good, is the subsidy in breach of Article 3.1(b)? Arguably, the subsidy could be viewed as contingent on the use of a domestic good because using an imported good in place of the domestic good would result in a loss of the entitlement to the subsidy.

11. If the Appellate Body considers that this "competing interpretation" of Article 3.1(b) – which is also under consideration in *US – Conditional Tax Incentives for Large Civil Aircraft* – is correct, then the Panel erred.

12. Each instance of LA/MSF for the A350 XWB is conditioned on the domestic siting of production activities for goods to be used by Airbus in the manufacture of the A350 XWB, and a counterfactual substitution of imported versions of these goods would result in Airbus's loss of the entitlement to the LA/MSF. The United States reviews below the undisputed facts from each of the LA/MSF contracts containing the contingencies and other relevant evidence.

13. France granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements contained in the French A350XWB *Protocole* that necessitate the use of domestic goods to manufacture the A350 XWB. If the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts establish that the subsidy is contingent on the use of domestic over imported goods.

14. Germany granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements that necessitate the use of domestic goods to manufacture the A350 XWB. Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts establish that the subsidy is contingent on the use of domestic over imported goods.

15. Spain granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements contained in the Spanish A350XWB *Convenio* that necessitate the use of domestic goods to manufacture the A350 XWB. Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts establish that the subsidy is contingent on the use of domestic over imported goods.

16. The UK granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements contained in the UK A350XWB Repayable Investment Agreement that necessitate the use of domestic goods to manufacture the A350 XWB. Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts contained in the UK A350XWB Repayable Investment Agreement establish that the subsidy is contingent on the use of domestic over imported.

ANNEX B-3

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Before launching into a point-by-point rebuttal of the errors in the European Union's ("EU") appeal of the Panel's findings, it is useful to recall how, after 12 years of WTO dispute settlement, we have arrived at this point. The United States requested consultations in 2004 regarding the EU's massive subsidization of its large civil aircraft industry. In 2010, the original panel issued its report finding that the EU violated its obligations under Articles 5 and 6.3 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") not to use subsidies so as to cause adverse effects to U.S. interests. The Appellate Body upheld the Panel's ultimate finding in 2011.[1] The Dispute Settlement Body ("DSB") adopted its recommendations and rulings in this dispute on June 1, 2011.[2]

2. The key measures, and the ones most central to the original panel and the Appellate Body findings, were approximately USD 15 *billion* in subsidized lending in the form of Launch Aid "LA/MSF" provided by the French, German, Spanish, and U.K. governments to each and every Airbus large civil aircraft ("LCA") development program: the A300/310, A320, A330/340, A340-500/600, and the A380.[3] The adverse effects caused by these and other subsidies were even greater – more than 300 lost aircraft orders worth tens of billions of dollars and displaced exports to seven major country markets in the 2001-2006 period alone.[4] The subsidies found by the original panel and the Appellate Body were unprecedented, both in terms of their immensity and their harmful market effects. As the original panel found:

> Given the amount of funding transferred to Airbus under the individual LA/MSF contracts, and in the light of the formidable risks associated with the LCA business and the learning curve effects that are necessary to successfully participate in this sector, we have found that it would not have been possible for Airbus to have launched all of these models, as originally designed and at the times it did, without LA/MSF. Even assuming this were a possibility, and that Airbus had actually been able to launch these aircraft relying on only market financing, the increase in the level of debt Airbus would have accumulated over the years would have been massive.[5]

In confirming the original panel's findings, the Appellate Body concluded that "{w}ithout 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."[6]

3. The original panel recommended 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."[7] In line with Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the Appellate Body recommended further that "the DSB request the European Union to bring its measures, found in this Report,

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[1] *EC – Large Civil Aircraft (AB)*, para. 1416.

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

[3] *See, e.g.*, *EC – Large Civil Aircraft (Panel)*, para. 7.525 (finding "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"); US First Written Submission, para. 353.

[4] The original panel found, and the Appellate Body confirmed, that Boeing lost sales involving 342 firm orders. *EC – Large Civil Aircraft (Panel)*, paras. 7.1803-7.1832; *EC – Large Civil Aircraft (AB)*, para. 1414(p). The total value of these lost orders amounts to many billions of dollars by any reasonable calculation. The Appellate Body found displacement in the following markets: in the single-aisle product market in Australia and in the single-aisle and twin-aisle product markets in the European Communities, China, and Korea. *EC – Large Civil Aircraft (AB)*, para. 1414(p).

[5] *EC – Large Civil Aircraft (Panel)*, para. 7.1948.

[6] *EC – Large Civil Aircraft (AB)*, para. 1264.

[7] *EC – Large Civil Aircraft (Panel)*, para. 8.7 (ellipsis in original).

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."[8] The DSB adopted the reports of the panel and the Appellate Body.[9] Under Article 7.9 of the SCM Agreement, if the EU did not comply with the DSB's recommendations within six months, the United States could seek DSB authorization to take countermeasures.

4. The responses of the EU and Airbus to the Appellate Body's report signaled from the outset that they did not take this report, or the DSB's request for compliance, seriously. Where the Appellate Body found that without the subsidies, Airbus would most likely not exist at all,[10] the EU asserted that "the economic impact of these support measures in the LCA market has been found to be very limited."[11] For its part, Airbus saw "no significant consequences for Airbus or the European support system from today's decision."[12] In fact, Airbus has interpreted the rulings as an affirmation of past subsidized funding practices – a "big victory for Europe."[13] Airbus CEO Tom Enders responded to the 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.[14]

5. Consistent with these statements, the EU and its member States took *no* affirmative steps to withdraw the LA/MSF subsidies. This is not litigation rhetoric on the part of the United States. The Panel made a factual finding that only two of the 36 steps the EU said it took to comply with the DSB recommendations and rulings were related to ongoing subsidization, and that these related exclusively to the Bremen airport subsidy and the Mühlenberger Loch subsidy. With respect to the other subsidies, including *all* of the LA/MSF, "the remaining 34 alleged compliance 'steps' are not 'actions' relating to the ongoing (or even past) subsidization of Airbus LCA . . . ."[15]

6. The EU did not appeal the Panel's finding that only two of the 36 alleged steps – and none of the LA/MSF-related steps – were affirmative compliance actions. Thus, for purposes of this proceeding, it is a matter of uncontested fact that the EU took no actions to withdraw the LA/MSF subsidies or remove their adverse effects. The EU's appeal is therefore not about alleged failures by the compliance Panel to recognize the efficacy of its nonexistent compliance with respect to LA/MSF subsidies, but about whether the Panel was correct in declining to accept a series of mere assertions and arguments as a substitute for affirmative steps that would have brought the EU's measures into compliance.

7. To make matters even worse, the four Airbus member States actually granted *another* round of LA/MSF to Airbus, this time to launch its latest new model, the A350 XWB, amounting to an additional USD 4.8 billion,[16] for a total of approximately USD 20 billion in LA/MSF principal.

8. After literally thousands of pages of written submissions, 292 questions to the parties, and nearly seven years of WTO dispute settlement, the EU did nothing to withdraw the massive

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[8] *EC – Large Civil Aircraft (AB)*, para. 1418.

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

[10] *EC – Large Civil Aircraft (Panel)*, para. 7.1984.

[11] *WTO Airbus Case – Appellate Body overturns key findings of the Panel in favour of the EU*, EU Press Release (May 18, 2011) (Exhibit USA-3).

[12] *WTO final ruling: Decisive victory for Europe*, Airbus Press Release (May 18, 2011) (Exhibit USA-4).

[13] *WTO final ruling: Decisive victory for Europe*, Airbus Press Release (May 18, 2011) (Exhibit USA-4).

[14] *WTO final ruling: Decisive victory for Europe*, EADS Statement (May 18, 2011) (Exhibit USA-5) (emphasis added). Similarly, Ranier Ohler, Airbus's 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." *WTO final ruling: Decisive victory for Europe*, Airbus Press Release (May 18, 2011) (Exhibit USA-4).

[15] *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*, WT/DS316/RW, circulated 22 September 2016, para. 6.42 ("Compliance Panel Report").

[16] *Airbus set to gain aid for A350*, Kevin Done and Peggy Hollinger, Financial Times (June 15, 2009) (Exhibit USA-7).

amounts of LA/MSF that were the subject of the original U.S. consultation and panel requests. The United States considered that this course of inaction on the earlier LA/MSF and grant of new LA/MSF only served to bring the EU farther out of compliance with Articles 5 and 6.3 of the SCM Agreement. It accordingly commenced this proceeding under Article 21.5 of the DSU. And thus, unsurprisingly, after further thousands of pages of written submissions, 166 additional questions to the parties, and a searching evaluation, the compliance Panel came to the conclusion that the EU had not complied with the recommendations and rulings of the DSB. It found further that, as with past Airbus aircraft, the USD 4 billion in LA/MSF for the A350 XWB conferred a subsidy and caused adverse effects to U.S. interests, including lost sales of 50 airplanes worth billions of dollars.[17] Overall, the compliance Panel found 375 lost orders worth tens of billions of dollars,[18] plus displacement and/or impedance in eight different markets, including in the EU, China, India, and Australia.[19]

9. That brings us to the present day. The EU has appealed the compliance Panel's findings, asserting that the Panel misinterpreted and misapplied the relevant provisions of the SCM Agreement and DSU, and that it failed to conduct an objective assessment of the matter for purposes of Article 11 of the DSU. None of its claims has any merit.

10. **Section II** addresses the standard applied to evaluate whether a party has complied with a recommendation that it come into compliance with its obligation under Article 5 of the SCM Agreement not to cause adverse effects through the use of subsidies. The Panel noted that Article 5 defines WTO inconsistency in terms of the effects of subsidies, and that the Appellate Body found that "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."[20] It accordingly found that the alleged passive expiry of certain LA/MSF subsidies did not relieve the EU of its obligation to come into compliance with Article 5 with respect to the effects of those subsidies. Article 7.8 of the SCM Agreement describes the remedy for inconsistencies with Article as a choice between withdrawing the subsidy *or* removing its adverse effects. The EU argued before the Panel, and now argues on appeal, that the alleged passive expiry of actionable subsidies achieves their "withdrawal," and argues that it accordingly has no obligation with respect to their current adverse effects. This argument fails to account for the Appellate Body's finding in the original proceeding, based on reasoning that applies to the present time, that the EU's LA/MSF subsidies cause adverse effects with respect to all of Boeing's existing aircraft. Thus, the EU's interpretation of Article 7.8 would allow it to continue to act inconsistently with Article 5. This interpretation contradicts the proper interpretation of Article 7.8, in accordance with customary rules of interpretation applicable to the covered agreements, and improperly downplays the massive ongoing lost sales, displacement, and impedance that LA/MSF has been causing for at least a decade, as a "temporary" market effect. They provide no basis to modify or reverse the Panel's findings.

11. **Section III** addresses the EU's argument that the Panel erred in finding that there is no disagreement between the parties as to whether the EU is currently in compliance with its WTO obligations with respect to the Mühlenberger Loch and Bremen runway subsidies and, therefore, no need to make a finding on that issue. The United States has been clear throughout the proceeding that it made no claim of noncompliance with respect to the Bremen runway subsidy, and since its second written submission that it is not pursuing any claim on the Mühlenberger Loch subsidy. The EU has taken the position that any such claim would be unfounded. There is accordingly no disagreement between the parties regarding whether the EU's measures have taken to comply are consistent with the SCM Agreement's relevant disciplines, and no need for a finding by the Panel.

12. **Sections IV and V** respond to the EU's claims of error regarding the Panel's selection of a commercial benchmark for LA/MSF for the A350 XWB. Section IV pertains to the corporate borrowing rate element of the benchmark in particular. The EU argues that the Panel erred by

[17] Compliance Panel Report, para. 6.1781. List prices for the relevant aircraft as of 2011 are provided at paragraph 6.1295 of the compliance Panel's report. The total value of these lost orders runs well into the billions of dollars under any reasonable assumption about discounts from list price.

[18] Compliance Panel Report, para. 6.1781. List prices for the relevant aircraft are provided in paragraphs 6.1239, 6.1295, and 6.1373 of the Compliance Panel Report. The total value of these lost orders runs well into the tens of billions of dollars under any reasonable assumption about discounts from list price.

[19] Compliance Panel Report, paras. 6.1817, 7.1(d)(xv).

[20] Compliance Panel Report, para. 6.820, *quoting EC – Large Civil Aircraft (AB)*, para. 712.

using the one-month and six-month average yield of an EADS bond to establish the corporate borrowing rate. According to the EU, the Panel was required to limit itself to the 24-hour period coinciding with the finalization of the terms and conditions of LA/MSF in selecting data for the commercial benchmark. However, no provision of the covered agreements imposes such a limitation on panels – and in fact, the Appellate Body's guidance suggests that panels should construct commercial benchmarks on the basis of any relevant information that is available at the time of finalization of the terms and conditions of a subsidy, including information that pre-dates finalization.[21] This broader approach is especially suitable on the facts of this case, because the terms and conditions of LA/MSF for the A350 XWB were negotiated through **[BCI]**[22] that extended over a period of approximately **[BCI]** or more.[23]

13. **Section V** pertains to the Panel's selection of the project-specific risk premium ("PSRP") element of the commercial benchmark for LA/MSF for the A350 XWB. The EU argues that the Panel should have undertaken a "progressive search" for a commercial benchmark loan instrument, which supposedly would have led it to devise a PSRP based on Airbus contracts with its risk-sharing suppliers ("RSS") for the A350 XWB project, rather than the PSRP for LA/MSF for the A380 from the original dispute, which is what the Panel actually did. However, the Panel was under no requirement to perform the "progressive search" that the EU advocates. On the contrary, the "progressive search" requirement applies to domestic authorities conducting countervailing duty investigations, whereas in WTO disputes under Parts II and III of the SCM Agreement the burden is on the parties – not the Panel – to establish the appropriate commercial benchmark. The United States met this burden by establishing the suitability of the A380 PSRP for LA/MSF for the A350 XWB, and the EU failed to put forward any alternative. Indeed, the EU did not even submit the RSS contracts that it now argues, belatedly, are so essential to the Panel's benchmark analysis. In any event, a "progressive search" would likely have led the Panel to select the PSRP for the A380, just as it actually did, because LA/MSF for the A380 has terms closer to those of LA/MSF for the A350 XWB than RSS contracts for the A350 XWB, as far as available evidence indicates.

14. **Section VI** addresses the EU challenge to the Panel's finding that adverse effects should be assessed based on three product markets: single-aisle, twin-aisle, and very large aircraft ("VLA"). The EU alleges that the Panel "replaced the Appellate Body's 'significant competitive constraints' standard" with a standard based on the mere existence of a competitive relationship, regardless of the nature or degree of that relationship.[24] Both EU premises are wrong.

15. As the Panel found, the Appellate Body did not endorse a "significant competitive constraints standard" when it used that phrase a single time in a footnote, and "there is 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."[25]

16. Moreover, the Panel did not apply a standard that treated products as competing in the same market where any competitive relationship existed. This is obvious in the Panel's acknowledgment that, while the three product markets it found captures most competitive interactions, some competition exists between aircraft in different markets. Rather, the Panel's 90-page analysis followed the Appellate Body's guidance strictly and carefully assessed extensive argumentation and voluminous evidence, including multiple expert reports and HSBI concerning marketing strategies and sales campaigns. Therefore, the Panel correctly interpreted and applied Article 6.3 and made an objective assessment of the matter as required by DSU Article 11. Accordingly, the EU's allegations of error are meritless, as demonstrated further in Section VI.

[21] *EC – Large Civil Aircraft (AB)*, para. 836.

[22] Compliance Panel Report, para. 6.644 (quoting Tom Williams, Executive Vice President, Programmes, Airbus SAS, May 17, 2013 (Exhibit EU-354(BCI)), para. 3).

[23] *See* Compliance Panel Report, paras. 6.55 and 6.645.

[24] EU Appellant Submission, paras. 602, 624.

[25] Compliance Panel Report, para. 6.1211.

17. **Section VII** addresses the EU argument that the finding in *US – Large Civil Aircraft* that Boeing large civil aircraft were subsidized creates a "new" factual matter. On that basis, the EU contends that "cogent reasons," centered on what the EU purports is intervening Appellate Body guidance, require a review of the original panel's finding that Article 6.4 of the SCM Agreement does not preclude a finding of displacement under Article 6.3(b) when the exports of the complaining Member have themselves been subsidized. The extent to which Boeing aircraft were subsidized played no role in the original panel's legal analysis and finding. The original panel's finding was not appealed, so the Appellate Body did not address this issue of law during the original proceeding. The DSB adopted the original panel report as modified by the Appellate Body. The EU is not entitled in this compliance proceeding to have the Appellate Body consider, pursuant to DSU Article 17.13, whether the legal finding of the original panel and recommendations and rulings of the DSB in respect of Article 6.4 of the SCM Agreement should be upheld, modified, or reversed. Therefore, the Panel did not err when it found that the EU argument fails to justify modifying or reversing the original panel's finding that Article 6.4 does not describe the exclusive basis on which a claim of displacement or impedance under Article 6.3(b) may be demonstrated.

18. **Section VIII** addresses the EU's challenge to the Panel's analysis of causation. According to the EU, the Panel's incorrect approach to causation left it blind to the effects of the the passage of time and Airbus's post-launch investments in the A320 and A330 programs, which the EU believes severed any causal link between LA/MSF and the presence in the market of the A320, A330, and A380. These allegations are demonstrably untrue. The Panel explicitly adhered to the counterfactual approach preferred by the Appellate Body. Using the original findings as its starting point, the Panel exhaustively examined the evidence and argumentation concerning the counterfactual situation in the post-implementation period. In doing so, it carefully evaluated the EU's arguments about the passage of time and intervening causes. It found them wanting because they were factually and legally unsupported, not because of an incorrect analytical approach.

19. The Panel followed the Appellate Body's guidance that the effects of LA/MSF subsidies will at some point come to an end, while recognizing that the determination of when that happens will depend on the evidence, and not expectations as to the "life" of the subsidy. Accordingly, the Panel found that the indirect effects of the earliest rounds of LA/MSF did not have a genuine connection to the launch and market presence of the A350 XWB. This disproves the EU's contention that the Panel's analytical approach was incapable of accounting for the way that subsidy effects dissipate over time. Although the EU repeatedly asserted that the passage of time had deprived past LA/MSF subsidies of any current effect, these were mere assertions, without any evidentiary or logical basis.

20. A similar flaw undermined the EU's critique of the Panel's analysis of Airbus's post-launch investments. The Panel recognized their significance but found that they did not render insubstantial the effects of LA/MSF subsidies, particularly given that the post-launch investments were dependent on those subsidy effects for their existence.

21. Overall, the EU did not provide the Panel with any basis to find that, absent LA/MSF subsidies, Airbus would have taken the sales and market share that it did during the post-implementation period.[26] The EU also contends that the Panel lacked a basis for finding any effects caused by LA/MSF to the A380 and A350 XWB, but these arguments are based on mischaracterizations of the findings in the original proceeding and this proceeding. In sum, the Panel found that LA/MSF and other subsidies continue to cause serious prejudice because that is what the evidence showed when considered in light of the findings in the original proceeding. Airbus's sponsor governments have provided massive subsidies designed to create production programs lasting for decades and enable the financial, technological, and industrial bases for subsequent production programs that are also directly subsidized at a tremendous scale. This pattern continued during the pendency of the original proceedings and this compliance proceeding with the provision of still more LA/MSF subsidies to the A350 XWB.[27] The Panel did not err in recognizing this longstanding pattern of subsidization and its adverse effects on U.S. interests.

[26] *See* Compliance Panel Report, para. 6.1526 ("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.").

[27] *See* Compliance Panel Report, para. 6.145.

22. **Section IX** addresses the EU's critique of the Panel's displacement and/or impedance findings, which reflect an incorrect interpretation of the SCM Agreement and are at odds with the facts found by the Panel. The Panel correctly examined the U.S. claims of displacement and impedance through a unitary counterfactual analysis.[28] Considered together with its findings regarding the absence of Airbus LCA from the market in the plausible counterfactual scenarios, the Panel's assessment of the data demonstrated that the challenged LA/MSF and other subsidies prevented the U.S. LCA industry from realizing improved market positions, either by substituting subsidized Airbus LCA for exports of U.S. LCA (displacement) or by obstructing U.S. LCA export volumes and market share from being higher or materializing at all (impedance). Therefore, the EU has identified no valid reason to reverse or modify the Panel's findings.

23. **Section X** addresses the EU argument that, if the Appellate Body reverses or modifies certain findings by the Panel, there is no basis to complete the Panel's analysis. As Sections II through IX show, the EU has provided no basis to do this. Nonetheless, assuming *arguendo* that the Appellate Body were to reverse one or more of the Panel's findings, the EU errs in arguing that there are insufficient findings of fact and uncontested facts for the Appellate Body to complete the adverse effects analysis. The most glaring error is the contention that partial reversal of the Panel's findings regarding the EU's failure to withdraw LA/MSF subsidies would "*re-constitute the basket of subsidies* that are subject to the Appellate Body's adverse effects assessment,"[29] and transform the effects of any withdrawn subsidies into *non-attribution factors* that preclude findings of adverse effects with respect to unwithdrawn subsidies.[30] In effect, this argument asks the Appellate Body to find that the effects of WTO-inconsistent subsidies have themselves brought the EU fully into compliance.

[28] *EC – Large Civil Aircraft (AB)*, para. 1163.
[29] EU Appellant Submission, para. 1074.
[30] EU Appellant Submission, para. 1097.

ANNEX B-4

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION

1 INTRODUCTION

1. In its Other Appellant's Submission, the United States raises what it characterises as "two limited issues" with the Report of the Panel in *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)* ("compliance Panel" or "Panel").[1] The European Union requests that the Appellate Body reject the United States' appeal regarding both issues.

2 THE APPELLATE BODY SHOULD REJECT THE US APPEAL THAT THE PANEL ERRONEOUSLY FOUND THAT THE LIVES OF PRE-A380 LA/MSF SUBSIDIES HAVE EXPIRED

2. The United States appeals certain elements of the Panel's findings that the lives of the pre-A380 LA/MSF subsidies expired before or shortly after the end of the implementation period on 1 December 2011.[2] The US appeal is contingent on the Appellate Body reversing the Panel's interpretation of Article 7.8 of the *SCM Agreement*.[3]

3. According to the United States, the Panel erred in the interpretation and application of Article 1.1(b) of the *SCM Agreement* with respect to some (but not all) of the pre-A380 LA/MSF subsidies for which it had found had that their *ex ante* expected lives had expired.[4] Although its position is not entirely clear, for the United States, this error seems to arise because *actual* repayment of principal and interest had not been effected, and/or the *actual* marketing life of the corresponding aircraft had not expired, by the end of the implementation period.

4. The Appellate Body should dismiss the US appeal. Despite paying lip-service to the firmly-established principle that the life of a subsidy must be determined on an *ex ante* basis at the time of the grant of a subsidy, the United States' appeal is in fact premised on the firmly-rejected principle that the life of a subsidy depends on how the subsidy *actually* performs following grant. At its most basic level, the Panel correctly interpreted and applied Article 1.1(b) when finding that the lives of all of the pre-A380 LA/MSF subsidies at issue in this appeal have expired, based on *ex ante* considerations regarding the expected life of each subsidy.

5. *First*, the Panel correctly interpreted Article 1.1(b). Based on the text of Article 1.1(b) and in light of its context (Article 14 of the *SCM Agreement*), the Appellate Body in the original

[1] US Other Appellant's Submission, para. 1.

[2] The United States does not appeal the Panel's findings that the seven capital contribution subsidies had expired before the end of the implementation period, or that two regional development grants had expired in 2014. Nor does the United States appeal the Panel's findings that the life of the A300- and A310-related LA/MSF subsidies have come to an end.

[3] US Other Appellant's Submission, Section II.

[4] US Other Appellant's Submission, paras. 17-18.

proceedings found that the "benefit" analysis involves an "*ex ante* analysis that does not depend on how the particular financial contribution actually performed after it was granted".[5]

6. Consistent with the Appellate Body's guidance, the compliance Panel found that it was required to determine the life of each LA/MSF subsidies on the basis of an *ex ante* assessment.[6] The United States does not advance any argument suggesting why this interpretation of Article 1.1(b) is erroneous. To the contrary, the United Sates seems to agree with the Panel – and with the European Union – that Article 1.1(b), properly interpreted, requires determination of the life of a subsidy on the basis of an "*ex ante* assessment".[7] Both Participants thus appear to agree that the Panel properly interpreted Article 1.1(b).[8] There is, therefore, no interpretative appeal.

7. *Second*, the United States' argument that the Panel erred in the application of Article 1.1(b) should also be dismissed. Despite its agreement that Article 1.1(b) calls for an *ex ante* assessment, the United States erroneously applies an *ex post* assessment, focusing on how the particular subsidy *actually performed after it was granted*.

8. The United States submits that the *ex ante* expectations of the grantor and recipient must be determined *ex post*, in light of either (i) the *actual* loan life; and/or (ii) the *actual* marketing life for the aircraft programme. Specifically, in its view, the Panel failed to recognise that "the grantor and recipient would expect the benefit to continue *as long as payments were due*",[9] which the United States asserts is a "variable event" that depends on actual repayment and that is not susceptible to determination *ex ante*.[10] In other instances, the United States asserts that "the parties expected the benefit of LA/MSF to last *throughout the life of the subsidized aircraft programs*".[11]

9. The US argument that the life of a LA/MSF subsidy must be determined in light of how the life of the subsidy or the marketing life of the funded aircraft plays out *ex post*, is contradicted by the United States' acknowledgement that *ex ante* expectations must form the basis for the determination of the life of a subsidy.

10. Contrary to the Appellate Body's guidance, each of the two approaches counselled by the United States by definition "depend on how the particular subsidy *actually* performed after it was granted".[12] Absent the proverbial crystal ball, the *actual* marketing life and *actual* loan life are not time periods that can be determined *ex ante*. They are time periods that, by definition, can be determined only *ex post*, once the *actual* marketing life of the LCA programme has come to an end, or *actual* final repayment have occurred, often decades after the grant of the subsidy.

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[5] Appellate Body Report, *EC – Large Civil Aircraft*, para. 706 (emphasis in original). Appellate Body Report, *EC – Large Civil Aircraft*, para. 1241 (emphasis added). *See also*, *Id.*, paras. 707 ("a benefit analysis under Article 1.1(b) is forward looking and focuses on future projections"; "*ex ante* analysis of benefit"; "the period of time over which the subsidy is expected to be used for future production) (emphasis in original, underlining added), 709 ("{a}t 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"; a panel "must consider the trajectory of the subsidy as it was projected to materialize over a certain period at the time of grant"; "a panel must take into account that a subsidy provided accrues and diminishes over time, and will have a finite life"; "'intervening events' that ... may affect the projected value of the subsidy as determined under the *ex ante* analysis") (emphasis in original, underlining added), 710 ("the depreciation of the subsidy that was projected *ex ante*"), 1236 ("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") (emphasis in original).

[6] Panel Report, paras. 6.876-6.879, 6.890.

[7] US Other Appellant's Submission, paras. 9 , 10.

[8] US Other Appellant's Submission, para. 9.

[9] US Other Appellant's Submission, para. 12 (emphasis added).

[10] US Other Appellant's Submission, paras. 10, 14.

[11] US Other Appellant's Submission, para. 15. *See also*, *Id.*, paras. 8 (footnote 15) ("continue to be marketed"), 18 ("LA/MSF for the A320, A330-200, and A330/A340 Basic had not expired as of December 1, 2011, given that the corresponding large civil aircraft production programs were still active at that time (and still are)"), 17 (footnote 35) ("continue to be marketed").

[12] Appellate Body Report, *EC – Large Civil Aircraft*, para. 706 (emphasis added). *See also*, *Id.*, para. 1241.

11. The European Union notes that, in one instance, namely as regards LA/MSF for the A340-500/600, the United States takes a different approach. Because, in its view, this programme "failed prior to full repayment", the United States submits that the life of the subsidies does not end with the actual marketing life of the A340-500/600 programme, but extends well into the future, namely until the life of any so-called "debt forgiveness" comes to an end.[13] For at least two separate reasons, the US argument must be rejected. *First*, and yet again, the US argument effectively rejects an *ex ante* assessment of the life of a subsidy, in favour of an approach based on an *ex post* assessment of the performance of a subsidy subsequent to grant. *Second*, the United States mischaracterises the nature of the LA/MSF subsidy as involving a second subsidy, in the form of "debt foregiveness", in situations where contingently repayable loans remain un-repaid because the contingency (*i.e.*, delivery of an aircraft) for repayment is not triggered. The US approach results in "double-counting" of the benefit conferred on the recipient.[14]

12. Further, and also regarding LA/MSF for the A340-500/600, the United States argues that the Panel's findings were in any event "irrelevant" to assess EU compliance, because these subsidies expired *after* the end of the implementation period, albeit well before the Panel made its findings and issued its report.[15] The United States errs.

13. It is well established that a panel, including a compliance panel, must assess the WTO-consistency of a measure before it based on the entirety of the evidence.[16] In the present case, in light of the *ex ante* nature of the analysis, all the evidence on the expiry of any pre-A380 LA/MSF subsidy even *predates*, *by more than a decade*, the Panel's establishment. There is, therefore, no obstacle to the assessment of that evidence. In any event, even where evidence *post-dates* the panel's establishment, such developments must be taken into account to assess compliance, because not doing so would frustrate the objective of the DSU to provide for the prompt settlement of disputes.

14. Finally, the European Union notes that the United States does not ask the Appellate Body to reverse the Panel's findings that the lives of LA/MSF subsidies for aircraft programmes that were no longer marketed on 1 December 2011, namely the A300 and A310 models, have expired.[17] This means that, even were the Appellate Body to agree with the United States' conditional appeal, it would still be compelled to reverse most of the Panel's adverse effects-related findings.

15. Indeed, having reversed the Panel's erroneous interpretation of Article 7.8 of the *SCM Agreement* (which is the condition imposed by the United States for the Appellate Body to consider this aspect of its other appeal), the Appellate Body would have to find that these adverse effects-related findings are erroneous, since the adverse effects found by the Panel are fuelled by subsidies that the United States, itself, accepts have expired, and are therefore withdrawn, within the meaning of Article 7.8.

3 THE APPELLATE BODY SHOULD REJECT THE UNITED STATES' ASSERTIONS RELATING TO THE PANEL'S FINDINGS UNDER ARTICLE 3.1(B) OF THE *SCM AGREEMENT*

16. The United States also makes a number of assertions regarding the compliance Panel's findings that the United States failed to demonstrate that French, German, Spanish and UK

[13] US Other Appellant's Submission, para. 17 (footnote 35). *See also*, *Id.*, paras. 10 (footnote 17), 12.

[14] *First*, at the time the loan is concluded, because the expected return on the loan falls below what a commercial lender would have demanded to assume the risk that deliveries would fall short of the number required to effect full repayment of principal and interest; and, *second*, where the number of aircraft deliveries actually made falls short of projections made by the parties at the time the loan agreements were concluded (in which case, the United States considers that an additional subsidy to the recipient in the form of the "forgiveness" of debt is conferred).

[15] US Other Appellant's Submission, footnotes 14 and 35.

[16] *See*, *e.g.*, Panel Report, para. 6.1443; Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.18, 10.105 and 10.248; Panel Report, *EC– Large Civil Aircraft*, paras. 7.1694 and 7.1714; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 121-130.

[17] US Other Appellant's Submission, paras. 17-18.

LA/MSF for the A350XWB constitute prohibited subsidies under Article 3.1(b) of the *SCM Agreement*.[18]

17. The United States does not, however, allege error with respect to those findings.[19] Instead, the United States limits its submissions by reference to what it calls a "competing interpretation" of Article 3.1(b) that it alleges was under consideration by the panel in *US – Conditional Tax Incentives for Large Civil Aircraft* ("DS487"). In particular, the United States requests the Appellate Body to determine the correctness of that alleged "competing interpretation" of Article 3.1(b).[20] Conditional on the Appellate Body agreeing with this alleged "competing interpretation", the United States requests the Appellate Body to reverse the findings of the Panel in the present dispute and to complete the legal analysis.[21]

18. As a threshold matter, the European Union finds it necessary to clarify that the entirety of the United States' "appeal" is premised on an erroneous assumption built into its choice of vocabulary. The United States alleges that "competing interpretations" of Article 3.1(b) are at issue in the present dispute and in DS487. In making that allegation, the United States assumes that *different outcomes* in two different disputes, under the same treaty provision, necessarily indicate the existence of "competing interpretations" of the provision. This assumption is erroneous – different outcomes may well be the result of differences in the application of the same interpretation to *two different fact patterns* at issue in the two disputes.

19. This is precisely what has happened in the present dispute and in DS487. The *interpretation* of Article 3.1(b) advanced by the European Union in both cases and accepted by both Panels is the same: a subsidy contingent upon the production of a particular good does not, without more, breach Article 3.1(b), irrespective of whether or not that good later becomes an input, as a matter of fact; but a subsidy contingent upon the production of an LCA and, in addition, a requirement that a particular input (the wing) be manufactured domestically, does breach the provision. The difference in outcome between the two cases is driven not by different interpretations, but rather by different *fact patterns* (and associated arguments).

20. On three separate grounds, the Appellate Body should reject the US "appeal". *First*, for several reasons, the assertions upon which the United States seeks the Appellate Body's review of the Panel's findings do not properly constitute an "appeal" within the meaning of the DSU. To begin, at its most basic level, the Appellate Body should reject the US "appeal" as invalid, because the United States has failed to allege any error relating to "issues of law covered in the panel report" or "legal interpretations developed by the panel", within the meaning of Article 17.6 of the DSU. In fact, the United States agrees with the interpretation adopted by the Panel.[22] Without an allegation of error, there is no "appeal" for the Appellate Body to adjudicate.

21. Moreover, considerations relating to DS487 cannot serve as a basis for appellate review, in these proceedings, of interpretative findings allegedly under consideration by a *different* panel in a *different* dispute, and cannot serve as a surrogate for a valid allegation of error by the Panel in this dispute. Deciding otherwise would prejudice the procedural rights of (i) the European Union (by forcing the European Union to comment on the correctness of an interpretative position allegedly relevant to DS487, *without the assistance of the record in that* case); and (ii) third parties in DS487 that are not third participants in the present appeal.

22. Further, the United States' professed "interest in ensuring that the same legal approach is applied" in two disputes cannot serve as the basis for the Appellate Body to undertake appellate review in these proceedings of interpretative issues allegedly arising in DS487. Rather than pursuing a pre-emptive appeal, the appropriate course of action for the United States would be to advocate, in its appeal of the panel report in DS487, the interpretive

[18] US Other Appellant's Submission, Section III.
[19] US Other Appellant's Submission, para. 22.
[20] US Other Appellant's Submission, paras. 21-23.
[21] US Other Appellant's Submission, para. 23, Section III.B.
[22] US Notice of Other Appeal, para. 1; US Other Appellant's Submission, para. 22.

approach to Article 3.1(b) adopted by the Panel in the present dispute, with which the United States explicitly "agrees".[23]

23. *Second*, Rule 21(2)(b)(i) of the Working Procedures for Appellate Review requires that an appellant's submission set out "a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof".[24] The United States' "appeal" fails to meet this requirement.

24. *Third*, and finally, the US "appeal" must be rejected because it is based on a case that is entirely different from the case advanced by the United States before the Panel. The United States seeks to litigate before the Appellate Body a fundamentally different case from the one it litigated before the Panel. Appellate proceedings are not the appropriate venue for a party to make fundamental changes to the case it has brought, especially where, as here, doing so requires reliance on factual assertions that are *not the subject of panel findings*, and that *do not constitute undisputed facts* of record.

25. In these appellate proceedings, the United States has abandoned its argument, made to the Panel, that the requirement to produce components domestically, coupled with the *fact* that these components are used in downstream assembly of the aircraft, demonstrates that the LA/MSF lenders "*effectively* require" the subsidy recipient to use domestic over imported goods. Instead, the United States now seeks to identify an express *de jure* requirement to "use" domestic over imported goods in certain provisions of the A350XWB LA/MSF contracts. In advancing this new case, the United States refers on appeal to specific clauses in each of the A350XWB LA/MSF contracts, and asserts that those clauses have a particular meaning. Yet, the meaning of these provisions in municipal law was never raised before the Panel or debated between the Parties, much less the subject of findings of fact by the Panel or agreement between the Parties.

26. In these circumstances, the US "appeal" cannot be sustained. In light of its authority under Article 17.6 of the DSU, the Appellate Body is "manifestly preclude{d}" from following the course requested by the United States, because doing so would require it "to solicit, receive and review new facts that were not before the Panel, and were not considered by it".[25]

27. Finally, even were the Appellate Body to consider it appropriate to address the United States' "appeal", it should nonetheless reject the United States' assertions on the merits.

28. *First*, the Panel did not err in its interpretation of Article 3.1(b) *of the SCM Agreement*. The ordinary meaning of the terms used in Article 3.1(b), in their context and in the light of the object and purpose of the treaty, clarify that a subsidy contingent solely on domestic production of goods is not prohibited. Accordingly, the Panel did not err in finding that "the act of granting subsidies to firms so long 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".[26]

29. *Second*, even were the Appellate Body to find that the Panel erred in its interpretation of Article 3.1(b), *quod non*, it would be unable to complete the legal analysis on the terms requested by the United States. In previous disputes, the Appellate Body has proceeded to complete the legal analysis only where factual findings by the panel or undisputed facts of record have allowed it to do so.[27] The US request for completion is, however, built on factual assertions concerning the meaning of provisions in the A350XWB LA/MSF agreements that are neither supported by factual findings by the Panel or undisputed facts of record. These factual

[23] US Notice of Other Appeal, para. 1; US Other Appellant's Submission, para. 22.

[24] Rule 23(3) makes this requirement applicable to an other appellant's submission.

[25] Paraphrasing Appellate Body Report, *Canada – Aircraft*, para. 211; Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 240-242.

[26] Panel Report, para. 6.785; US Other Appellant's Submission, para. 27.

[27] *See*, *e.g.*, Appellate Body Report, *Australia – Salmon*, paras. 117-118; Appellate Body Report, *US – Section 211*, para. 352; Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 528; Appellate Body Report, *US – Large Civil Aircraft*, para. 649; Appellate Body Report, *Colombia – Textiles*, para. 5.30.

assertions *were never made by the United States before the Panel*, and are, instead, *newly made in this appeal*. The European Union never had an *opportunity* to dispute the factual assertions now raised by the United States; the European Union cannot be said to have left undisputed factual assertions that were not put to it by the United States. Accordingly, there are no findings of fact or undisputed facts of record that would allow the Appellate Body to complete the legal analysis in the manner requested by the United States.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

1. In relation to Article 7.8 of the SCM Agreement, Brazil agrees with the Panel's rejection of the European Union's argument that the end of the life of a subsidy *ipso facto* extinguishes a Member's compliance obligation under Article 7.8 of the SCM Agreement with respect to such subsidies.

2. Brazil recalls that the original panel's findings under Articles 6.3(b) and 6.4 were not appealed. Accordingly, the Appellate Body should not revisit this interpretation in the compliance proceeding.

3. Brazil also considers that the Panel conducted a correct analysis in interpreting "market" under Article 6.3 of the SCM Agreement. There is no support in WTO jurisprudence for the EU's attempt to characterize "market" as requiring a complaining Member to undertake a quantitative assessment of the degree of competition to determine if it is "significant".

4. Finally, the Panel properly interpreted Article 3.1(b) of the SCM Agreement when it found that subsidies conditioned on the domestic production of inputs to be used in the manufacture of a subsidized product are not prohibited. For Brazil, this provision does not prevent a Member from conditioning the provision of a subsidy on the performance of production steps in the country granting the subsidy.

ANNEX C-2

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION

I. EXECUTIVE SUMMARY[1]

1. Canada submits that the Appellate Body should uphold the Panel's interpretation of the disciplines on prohibited import-substitution subsidies under Article 3.1(b) of the SCM Agreement but reverse the Panel's interpretation of the compliance obligation under Article 7.8.

II. THE PANEL CORRECTLY INTERPRETED ARTICLE 3.1(B) OF THE SCM AGREEMENT

2. The Appellate Body should uphold the Panel's interpretation that Article 3.1(b) of the SCM Agreement does not prohibit subsidies merely because they require the recipient to engage in the domestic production of aircraft-related goods.

3. Article 3.1(b) does not discipline domestic production subsidies, regardless of whether the activities mandated by those subsidies result in the production of input or finished goods. GATT Article III:8(b), the Appellate Body's findings in *Canada – Autos* and the panel's findings in *US – Tax Incentives* support this view.

4. Furthermore, Article 3.1(b) does not discipline domestic production subsidies even if the activities mandated by those subsidies result in the production of specialized input goods that, because of their specialized nature, are likely to only be used in the production of finished goods by the subsidy recipient. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body found that a subsidy would not be *de facto* export contingent unless it provided the recipient with an incentive to export in a way that did not simply reflect the conditions of supply and demand in the market. Likewise, a subsidy is not a prohibited import-substitution subsidy unless it is geared to change the behaviour of a producer when choosing between domestic and imported inputs in a way that does not reflect market conditions.

III. THE PANEL ERRED IN ITS INTERPRETATION OF ARTICLE 7.8 OF THE SCM AGREEMENT

A. The Correct Interpretation of Article 7.8 of the SCM Agreement

5. Article 7.8 of the SCM Agreement sets out how a Member is to comply with its obligations when it is found to have provided a subsidy that caused adverse effects to the interests of another Member.

6. With respect to the ordinary meaning of the terms of Article 7.8, the phrase "granting or maintaining" indicates that the existence of a subsidy during the implementation period is a precondition for the compliance obligation under Article 7.8. As expired or withdrawn subsidies no longer exist, those subsidies entail no compliance obligation under Article 7.8.

7. Moreover, the phrase "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy" indicates that the compliance options are disjunctive in nature. Therefore, compliance under Article 7.8 can be achieved by withdrawing the WTO-inconsistent subsidy.

8. The following elements of the context of Article 7.8 support this understanding.

9. First, the text of Article 7.9 of the SCM Agreement confirms the compliance options under Article 7.8 are disjunctive.

[1] Canada's Third-Participant Submission consists of 13,558 words. This Executive Summary consists of 1,347 words.

10. Second, the difference in wording between Article 5 and Article 7.8 underscores an asymmetry between the circumstances in which a finding of an actionable subsidy may be made and the resulting compliance obligation. This difference must be afforded meaning. Where causing adverse effects is a constituent element for an actionable subsidy, removing those adverse effects is not the only way to comply with Article 7.8. Members can also comply by withdrawing the subsidy.

11. Third, the compliance obligation for prohibited subsidies and the restrictions on the application of countervailing duties confirm that withdrawal of the subsidy constitutes compliance under Article 7.8. The Appellate Body has indicated that a Member can comply with Article 4.7 of the SCM Agreement by removing a prohibited subsidy. Moreover, if removing the subsidy negates the right to apply countervailing duties, it must also negate the right to apply countermeasures – the remedy for actionable subsidies.

12. Fourth, the general rule of compliance under the DSU is the removal of the WTO-inconsistent measure. Where no subsidy exists, as a result of expiry or withdrawal, no compliance obligation remains.

13. With respect to the object and purpose of the SCM Agreement, it is subsidies that the SCM Agreement disciplines, not the adverse effects that linger after the subsidies no longer exist. Limiting the application of the compliance obligation under Article 7.8 to existing subsidies is consistent with this object and purpose. It is also consistent with the general objective of the WTO agreements to foster security and predictability in the international trading system.

B. Errors in the Panel's Interpretation of Article 7.8

14. The Panel's interpretation of Article 7.8 under which Members are required to remove the adverse effects of subsidies that have ceased to exist is deeply flawed.

15. With respect to the text of Article 7.8, the Panel essentially ignored the "granting or maintaining" requirement in Article 7.8. Where a subsidy has expired or been withdrawn, a Member can no longer be said to be "granting or maintaining" the subsidy. Under these circumstances, the Member is no longer subject to the compliance obligation under Article 7.8.

16. The Panel also deprived the phrase "withdraw the subsidy" of its independent meaning. If Article 7.8 was intended *under all circumstances* to require the removal of the adverse effects caused by the subsidy there would be no reason to refer to the possibility of withdrawing the subsidy.

17. With respect to the context of Article 7.8, the Panel improperly relied on Article 5 of the SCM Agreement and various provisions of the DSU to conclude that "withdraw[ing] the subsidy" under Article 7.8 also requires removing adverse effects. The Panel fails to recognize that conformity with the compliance obligation under the DSU means removal of the WTO-inconsistent measure, and that conformity with the compliance obligation for an actionable subsidy means carrying out one of the two options contemplated under Article 7.8 of the SCM Agreement.

18. The Panel also ignored that withdrawing a subsidy is a complete compliance remedy under the SCM Agreement. Imposing more exacting remedial disciplines on actionable subsidies as compared to prohibited subsidies would be incongruent with the overall structure of the SCM Agreement.

19. Last, with respect to the object and purpose of the SCM Agreement, the Panel failed to take into account that the withdrawal of a subsidy constitutes compliance. Moreover, the Panel's interpretation creates significant uncertainty as to the responsibility of Members for subsidies that no longer exist.

C. The Correct Approach to a Serious Prejudice Analysis in Compliance Proceedings

20. The Panel improperly took into account the effects of expired subsidies when it determined that subsidies were causing serious prejudice and that the European Union had therefore failed to remove the adverse effects of the subsidies.

21. The determination of whether a Member that has not withdrawn certain subsidies has nevertheless complied with Article 7.8 through the removal of the adverse effects of these subsidies should be based on a counterfactual analysis.

22. A counterfactual analysis involves a comparison between the current market situation and a counterfactual situation without subsidies. The Panel's analysis relied on a counterfactual situation where the challenged LA/MSF would not have been granted.

23. This is the wrong counterfactual situation. The correct counterfactual situation is rather one where only the subsidies present at the end of the RPT do not exist. Indeed, there must be consistency between the two options available to a responding Member under Article 7.8. A Member must either withdraw the subsidies or remove their adverse effects by the end of the RPT. If a given subsidy has been withdrawn or has expired, a Member cannot be asked to also remove its adverse effects.

24. It is only through a comparison of the correct counterfactual situation with the current market situation that the Panel could have properly assessed whether the subsidies that remained at the end of the RPT caused serious prejudice and, relatedly, whether the European Union had removed the adverse effects of these subsidies. The Panel failed to do so.

ANNEX C-3

EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION

1. China's Third Party Submission discusses the following three issues on appeal that China considers to be of systemic importance.

2. **First,** China submits that under the correct interpretation of Article 7.8 of *the SCM Agreement* in accordance with customary rules of interpretation of public international law, subsidies that cease to exist prior to the beginning of the implementation period are outside the scope of an implementing Member's obligation under Article 7.8.

3. In China's view, the explicit treaty language in Article 7.8 denotes that, if a subsidy is no longer in existence, there is nothing to be withdrawn and that the Member concerned has fulfilled its obligation under Article 7.8. Nothing in Article 7.8 suggests that the implementing action to withdraw the subsidy must remove any "lingering effects" of past subsidies that are no longer in existence. The Panel's interpretation would deprive the independent meaning of the option under Article 7.8 to "withdraw the subsidy" and render the phrase redundant.

4. China's interpretation finds contextual support in Article 4.7 of *the SCM Agreement*, which requires the Member providing prohibited subsidies to "withdraw the subsidy without delay". To interpret the same compliance option in Article 7.8 in a more onerous way for the less harmful form of subsidization would be against logic. China also considers that Part V of *the SCM Agreement* provides relevant context for interpreting Article 7.8. In particular, Article 19.4 provides that countervailing duties may not be imposed when a subsidy is no longer bestowed on the subject merchandise, regardless of any lingering effects. The limits of remedies available under Part V should also inform the correct interpretation of Article 7.8 in Part III of *the SCM Agreement*.

5. In addition, by first reviewing various provisions of *the DSU* instead of Article 7.8 of *the* SCMAgreement, the Panel has allowed the general provisions of *the DSU* to subsume the "special or additional rules" of Article 7.8. In China's view, the important textual difference between Article 4.7 and Article 7.8 also suggests that Article 7.8 does not necessarily require the removal of any adverse effects, and can be read in a way that maintains its independent meaning while at the same time being in harmony with *the DSU*.

6. Finally, neither in the WTO cases cited by the Panel nor anywhere under the covered agreements does China see the basis to single out actionable subsidies as the only type of measures subject to an implementing obligation requiring the removal of trade effects caused by such measures after they are withdrawn, an obligation more onerous than those generally applicable vis-à-vis all measures under Articles 3.7 and 22.8 of *the DSU*.

7. **Second**, China submits that under the correct interpretation and application of Articles 5(c) and 6.3 of *the SCM Agreement*, the Panel's "but for" approach is not a proper analysis to determine whether the LA/MSF subsidies continue to cause serious prejudice under the present circumstances at issue.

8. For the assessment of causation, although an inquiry seeking to identify what would have occurred "but for" the subsidies is one possible approach suggested by the Appellate Body, the Panel did not examine or consider whether the factual scenario before it is one of the circumstances where the "but for" analysis will show that the subsidy is both a necessary cause of the market phenomenon and a substantial cause. Without such an examination or consideration, the Panel improperly equated the "but for" analysis with the proper legal standard for finding causation under Articles 5(c) and 6.3 of *the SCM Agreement*, which requires for a "genuine and substantial" cause.

9. The Panel's approach effectively leads to a long-lasting causal chain between subsidies and adverse effects in the LCA markets that is inconsistent with the Appellate Body's observation that the effects of any subsidy can be expected to diminish and eventually come to an end

with the passage of time. Furthermore, the Panel seems to have inappropriately allocated the burden of proof between the Parties in its application of Articles 5(c) and 6.3 of the *SCM Agreement* by requiring the European Union to prove that no "genuine and substantial" cause existed in the post-implementation period.

10. **Third,** while China is sceptical if any general rule or threshold could be pre-defined for the purpose of determining the scope of product markets, China agrees with the European Union to the extent that panels should not find two products in the same product market solely on the basis that they exercise any competitive constraints on one another. Instead, a panel must examine the nature and degree of competition so as to determine the scope of the relevant product market on a case-by-case basis. Furthermore, the "nature and degree" of competition found to exist in a given product market should inform the assessment of serious prejudice claims.

ANNEX C-4

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

1. Japan wishes to comment on how the effects of such subsidies including R&D subsidies as the Appellate Body in the original proceeding referred to as subsidies that (i) had the "product effect" on subject products or (ii) "complemented and supplemented" the "product effect" must be assessed.

2. The European Union appealed by arguing that the removal of a subsidy through removal of the "financial contribution" will comply with Article 7.8.

3. However, Japan believes that when "benefits" are removed, the subsidy is thereby withdrawn and consequently the adverse effects are removed. The definition of a subsidy under Article 1.1 and other Appellate Body findings concerning the "life" of subsidy suggest, when the recipient is no longer able to lower the price of products by using the benefit, a Member would then not be further asked to remove anything else. The function of R&D subsidies contemplates that its benefit will normally be consumed, as the recipient sells the resulting 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.

4. The Appellate Body must carefully consider whether LA/MSF subsidies that had "expired" through the "amortization of benefit", as found by the Compliance Panel, may, as a matter of law, be considered tantamount to the removal of the benefit in connection with the projected period or sales amount properly anticipated by the granting Member when the subsidy was granted.

ANNEX D

PROCEDURAL RULINGS

ANNEX D-1

PROCEDURAL RULING OF 25 OCTOBER 2016

1. On 13 October 2016, the Chair of the Appellate Body received a joint letter from the European Union and the United States requesting the Appellate Body Division hearing this appeal to adopt additional procedures to protect business confidential information (BCI) and highly sensitive business information (HSBI) in these appellate proceedings. In their letter, the European Union and the United States suggested that the additional procedures adopted by the Appellate Body in the appeal in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)* (WT/DS353), with certain modifications, should form the basis for any procedural ruling on confidentiality in these appellate proceedings. They argued, *inter alia*, that disclosure of certain sensitive information on the record of the Panel proceedings would be severely prejudicial to the large civil aircraft manufacturers concerned, and possibly to their customers and suppliers.

2. On behalf of the Division hearing this appeal, the Chair of the Appellate Body invited the third participants to comment in writing on the joint request by the European Union and the United States by 12 noon on Wednesday, 19 October 2016. He also informed the participants and the third participants that pending a final decision on the joint request by the participants, the Division had decided to provide interim additional protection to all BCI and HSBI transmitted to the Appellate Body in this dispute on the terms set out below:

(a) Only Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal may have access to the BCI and HSBI contained in the Panel record pending a final decision on the joint request. Appellate Body Members and Appellate Body Secretariat staff shall not disclose BCI or HSBI, or allow either to be disclosed to any person other than those identified in the preceding sentence.
(b) BCI shall be stored in locked cabinets when not in use. When in use by Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal all necessary precautions will be taken to protect the confidentiality of the BCI.
(c) All HSBI shall be stored in a combination safe in a designated secure location in the offices of the Appellate Body Secretariat. Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal may view HSBI only in the designated secure location in the offices of the Appellate Body Secretariat. HSBI shall not be removed from this location.
(d) Pending a decision on the joint request for the protection of BCI/HSBI in these proceedings, neither BCI nor HSBI shall be transmitted electronically, whether by e-mail, facsimile, or otherwise.

3. On Wednesday, 19 October 2016, written comments were received from Australia, Brazil, Canada, and China. Australia and Brazil did not object to the joint request made by the participants, but requested that the Appellate Body ensure that the rights of third participants are taken into account in setting the working schedule for this appeal. China stated that it had no comments regarding the request for additional protection of BCI/HSBI. For its part, Canada stated that, while it agrees that additional procedures for the protection of confidential information are warranted by the specific facts of this case, it considers that the procedures proposed by the participants may not provide third participants with effective access to the BCI they need to adequately prepare and present their positions. In particular, Canada submitted that the procedures set out an overly onerous method for capital-based Third Participant BCI-Approved Persons to obtain access to BCI, and that in previous proceedings where similar procedures were adopted, Canadian Geneva-based BCI-Approved Persons were required to spend many hours transcribing BCI in the designated reading room and then to spend an equivalent amount of time discussing this BCI with capital-based BCI-Approved Persons. Canada therefore proposed that any additional procedures specify that, in addition to the "designated reading room" on the premises of the WTO, there be a "designated reading room" located in an embassy or other diplomatic mission of a participant in the capital of each of the third participants, where capital-based Third Participant BCI-Approved Persons can obtain effective access to BCI. According to Canada, this would ensure that third participants' rights to meaningfully participate in these appellate proceedings are fully protected.

4. On Friday, 21 October 2016, the Division invited the participants and other third participants to comment, if they so wished, on Canada's request regarding access to BCI by 5:00 PM on Monday, 24 October 2016. Comments were received from Australia, Brazil, the European Union, and the United States.

5. Australia supported Canada's proposal. Australia stated that it recognises the importance of protecting sensitive information, while facilitating the meaningful participation of third participants in these appellate proceedings. Brazil indicated that it had no comments regarding Canada's request.

6. The European Union submitted that Canada's request calls for an additional 12 designated reading rooms in the missions of the European Union and the United States in the capitals of each third participant, in addition to the designated reading room at the WTO. According to the European Union, this would impose significant additional burdens on the participants. In particular, the European Union submitted that the adjustment proposed by Canada would require that, for each of the six third participants, the participants would have to: (i) identify an appropriate contact person in each mission; (ii) designate those appropriate persons as BCI approved; (iii) communicate with them and explain what is envisaged; (iv) obtain appropriate and necessary internal authorisations; (v) identify and set aside appropriate secure locations; (vi) identify and set aside appropriate designated reading rooms; (vii) securely transmit to them all the relevant documents; (viii) arrange for copies of the necessary documents to be made; (ix) make arrangements for the appropriate monitoring and surveillance of the designated reading room during use; (x) provide appropriate training to the staff involved; and (xi) make appropriate additional arrangements for the return or destruction of the materials involved at the appropriate time. The European Union indicated that it was therefore opposed to Canada's request. It agreed, however, that third participants could be provided with some additional time to prepare their third participants' submissions. According to the European Union, this would meet the concern raised by Canada, while avoiding the imposition of unnecessary and substantial costs on the participants.

7. The United States argued, as did the European Union, that Canada's proposal would require a total of 12 new BCI reading rooms − one for each of the two participants in six different cities. According to the United States, this would require identifying officials at each site to maintain control over documents containing BCI and to monitor third participant officials during the review of the documents, and providing training to those individuals regarding their responsibilities under the BCI/HSBI procedures. The United States considered that this would impose a significant burden on the participants, with little benefit to the third participants. In particular, the United States argued that Canada's proposal would not have a meaningful effect on the burden placed on third parties because even under the proposal, a capital-based official would still need to review the BCI and take notes as to the relevant information in the reading room, just as under the original rules. Moreover, to the extent that an official considered BCI to be relevant to a third participant's submission, that official would still need to discuss the annotated information with colleagues to prepare and finalize the third participant submission, just as under the original rules. The United States noted that the only difference is that under the adjustment proposed by Canada, capital-based officials would review the BCI instead of Geneva-based officials. In so doing, according to the United States, Canada's proposal appeared to merely shift the burden of reviewing BCI from Geneva-based officials to capital-based officials, rather than reducing the burden in a meaningful way. For these reasons, the United States opposed Canada's request and asked the Appellate Body to adopt the same procedures governing third participants' access to BCI as it did in the original appellate proceedings.

8. The Division has made the following ruling having considered the arguments made by the European Union and the United States in support of their request, and the comments received from the participants and third participants:

9. As an initial matter, we recall that the Appellate Body adopted additional procedures to protect the confidentiality of sensitive information in the appellate proceedings in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)* as well as in the original proceedings in this dispute. In this appeal, the participants suggested that the additional procedures adopted by the Appellate Body in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)* should form the basis for any procedural ruling on confidentiality, and identified certain modifications that could be made to those additional procedures. We further note

that the participants and the third participants involved in this case are the same as those involved in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)*. In the Procedural Ruling adopted in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)*, the Appellate Body explained the considerations relevant to a decision on whether to provide additional protection to certain sensitive information[1]. We believe that those considerations are also relevant to our evaluation of the request made by the European Union and the United States in this appeal and we briefly recall them before addressing the specific points raised in the joint request and in the comments of the third participants.

10. The confidentiality requirements set out in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and in the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*Rules of Conduct*")[2] are stated at a high level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect the confidentiality of that information. The adoption of such arrangements falls within the authority of the Appellate Body to hear the appeal and to regulate its procedures in a manner that ensures that the proceedings are conducted with fairness and in an orderly manner. To the extent that the arrangements elaborate on the confidentiality requirements of the DSU, the adoption of such arrangements in an "appropriate procedure" needs to conform to the requirement in Rule 16(1) of the *Working Procedures*, that any additional "appropriate procedure" not be inconsistent with the DSU, the other covered agreements, and the *Working Procedures* themselves.

11. The determination of whether particular arrangements are appropriate in a given case essentially involves a balancing exercise: the risks associated with the disclosure of the information sought to be protected must be weighed against the degree to which the particular arrangements affect the rights and duties established in the DSU, the other covered agreements, or the *Working Procedures*. Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. Participants requesting particularized arrangements have the burden of justifying that such arrangements are necessary in a given case adequately to protect certain information, taking into account the rights and duties recognized in the DSU, the other covered agreements, and the *Working Procedures*. This burden of justification will increase the more the proposed arrangements affect the exercise by the Appellate Body of its adjudicative duties, the exercise by the participants of their rights to due process and to have the dispute adjudicated, the exercise by the third participants of their participatory rights, and the rights and systemic interests of the WTO membership at large.

12. Additional confidentiality protection implicates the authority of the Appellate Body, and the rights and duties of the participants, third participants, and the membership at large. In the original proceedings in this dispute and in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)*, the Appellate Body adopted additional procedures that it considered struck an appropriate balance between the risks associated with the disclosure of sensitive information, on the one hand, and the adjudicative authority of the Appellate Body and the rights and duties of the participants, third participants and the WTO membership at large. Similar considerations are relevant in these appellate proceedings. The European Union, the United States, and the third participants concur that the additional procedures adopted in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)* provide an appropriate framework and ask that we apply the same practices in this case, with certain modifications.

13. We recall that it is for the adjudicator to decide whether certain information calls for additional protection of confidentiality. Likewise, it is for the adjudicator to decide whether and to what extent specific arrangements are necessary, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection. We also note, however, that neither participant has appealed the Panel's decisions regarding the protection of BCI/HSBI and that there are also issues of practicality to consider. We will therefore proceed on the basis of how the information was treated before the Panel. Nevertheless, we do not exclude revisiting whether a

[1] See Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)*, Procedural Ruling and Additional Procedures to Protect Sensitive Information, Annex III, paras. 8 and 9.

[2] The *Rules of Conduct*, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are incorporated into the *Working Procedures for Appellate Review* (WT/AB/WP/6), as Annex II thereto. (See WT/DSB/RC/2, WT/AB/WP/W/2)

particular piece of information meets the objective criteria justifying additional protection, or the particular degree thereof, should a dispute on the classification of that information arise before us, or should we consider that we need to refer to that information in our report if this is necessary to give a sufficient exposition of our reasoning and findings.

14. Having reaffirmed the relevant considerations that guide our decision, we turn to the modifications requested by the participants to the BCI/HSBI procedures adopted by the Appellate Body in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)*. The participants propose, *inter alia*, that any additional BCI/HSBI procedures in this dispute specify that documents and materials containing BCI shall be sent to the Appellate Body Members by means of encrypted e-mail or courier. They also propose that HSBI contained in any appendix not be transmitted over e-mail but on a CD-ROM, labelled with an indication that it contains HSBI. In addition, the participants suggest certain adjustments to provide clarity on how the electronic version of an unredacted version of a submission by a participant and/or a third participant shall be corrected and transmitted, including an adjustment to avoid accidental inclusion of BCI in third participant submissions.

15. The arrangements that the participants have jointly proposed do not appear to affect the Appellate Body's ability to adjudicate the dispute, the rights of the third participants to be heard, or the rights and interests of the WTO membership at large. We have reflected them in the additional procedures that we adopt below. These procedures ensure that Members of the Appellate Body have sufficient access to the entirety of the Panel Report, the submissions, and the record of the dispute. They also limit the risk of inadvertent disclosure of sensitive information and render the process of correcting and transmitting redacted version of submissions more efficient.

16. We have carefully considered Canada's proposal regarding access by third participants to BCI in capitals, as well as the comments received from the participants and other third participants. It is our responsibility, in adopting any additional procedures, to strike an appropriate balance between the risks associated with the disclosure of sensitive information, the adjudicative duties of the Appellate Body, and the rights of the participants and third participants. While adoption of procedures such as those suggested by Canada may well facilitate access to BCI, we recall that the rights of third participants are more limited than those of the participants, and that third participants' interests lie mainly in the correct legal interpretation of the provisions of the WTO agreements.[3] Moreover, as highlighted in the comments received from the participants, it would be difficult to design and implement a regime whereby there would be a "designated reading room" located in an embassy or other diplomatic mission of a participant in the capital of each of the third participants. For these reasons, we have decided therefore not to adopt the adjustment proposed by Canada. However, we will ensure that the rights of third participants are taken into account in these appellate proceedings, including when we set the working schedule for this appeal.

17. Finally, we note, as we did in the original proceedings and in *United States – Measures Affecting Trade in Large Civil Aircraft (2nd complaint)*, that we will make every effort to draft our report without including sensitive information. The additional procedures that we adopt below foresee that the participants will be provided in advance with a copy of the Appellate Body report intended for circulation to WTO Members and will have an opportunity to request the removal of any sensitive information that is inadvertently included in the report. If we were to consider it necessary to include sensitive information in the reasoning in our report, the participants will be given an opportunity to comment. We reiterate that the participants will have a timely opportunity to comment as to the inclusion of any sensitive information in the report; we will provide further guidance at a later point in these proceedings as to the modalities and details of such a procedure.

18. For the reasons set out above, we have decided to provide additional confidentiality protection on the terms set out below. Accordingly, we adopt the following additional procedures for the purposes of this appeal:

[3] See Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, Procedural Ruling and Additional Procedures to Protect Sensitive Information, Annex III, para. 11.

Additional Procedures to Protect Sensitive Information

General

(i) These additional procedures shall apply to information that was treated as business confidential information (BCI) or as highly sensitive business information (HSBI) in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. The additional procedures apply to written and oral submissions made in the appellate proceedings only to the extent that they incorporate information that was treated as BCI or HSBI in the Panel proceedings.

(ii) To the extent that information on the record is submitted to the Appellate Body in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants on the proper treatment of this information, the Appellate Body shall decide after hearing their views.

(iii) Each participant may at any time request that information that it has submitted and that was previously treated as BCI or HSBI no longer be treated as such.

(iv) The participants and third participants shall file their written submissions and executive summaries with the Appellate Body Secretariat in accordance with the Working Schedule drawn up by the Division for this appeal. Where a written submission and/or an executive summary contain BCI or HSBI, redacted versions of the submission and/or the executive summary (that is, a version without BCI and HSBI) shall be filed simultaneously with the Appellate Body Secretariat. Should an executive summary submitted by participants and third participants contain BCI or HSBI, the redacted version of the executive summary will be annexed as addenda to the Appellate Body Report. The redacted version shall be sufficient to permit a reasonable understanding of the substance of the relevant document. The Division may take appropriate action to ensure that this obligation is satisfied. The participants and third participants shall also provide the Appellate Body Secretariat with an electronic version of all submissions, including the redacted versions. The transmittal of participants' submissions to each other and to the third participants, and the transmittal of third participants' submissions to the participants and to the other third participants, are further regulated in the provisions below which apply mutatis mutandis to executive summaries of written submissions.

Appellate Body Members and Appellate Body Secretariat Staff

(v) Only Appellate Body Members, and staff of the Appellate Body Secretariat who have been assigned by the Appellate Body to work on this appeal, may have access to the BCI and HSBI on the Panel record and in the written and oral submissions made in these appellate proceedings. Appellate Body Members and assigned Appellate Body Secretariat staff shall not disclose BCI or HSBI, or allow either to be disclosed, to any person other than those identified in the preceding sentence or to approved persons of the participants and third participants. Appellate Body Members and assigned Appellate Body Secretariat staff are covered by the *Rules of Conduct*. As provided for in the *Rules of Conduct*, evidence of breach of these Rules may be submitted to the Appellate Body, which will take appropriate action.

(vi) BCI shall be stored in locked cabinets when not in use.

(vii) Appellate Body Members who are serving on the Division hearing this appeal may maintain a copy of all relevant documents containing BCI at their places of residence outside Geneva. Appellate Body Members who are not serving on the Division may maintain at their places of residence outside Geneva a copy of the BCI version of the Panel Report, a copy of the BCI version of the written submissions made in these appellate proceedings, a BCI version of the transcripts of any oral hearings, any internal documents containing BCI, and, where necessary, selected BCI exhibits from the Panel record. The documents and materials containing BCI kept by Appellate Body Members at their places of residence outside of Geneva shall be stored in locked cabinets when not in use. Documents and materials containing BCI shall only be sent to Appellate Body Members by secure e-mail or courier.

(viii) Participants shall provide printed copies of their submissions and other documents containing BCI that are intended for use by Appellate Body Members or assigned Appellate Body Secretariat staff on coloured paper and individually watermarked with "Appellate Body" and numbered consecutively ("Appellate Body No. 1", "Appellate Body No. 2", etc.).

(ix) All HSBI shall be stored in a combination safe in a designated secure location on the premises of the Appellate Body Secretariat. Any computer in that room shall be a stand-alone computer, that is, a computer not connected to a network. Appellate Body Members and assigned Appellate Body Secretariat staff may view HSBI only in the designated secure location referred to above. HSBI shall not be removed from this location, except as provided for in paragraph (x), or in the form of handwritten notes that may be used only on the Appellate Body Secretariat's premises and shall be destroyed once no longer used.

(x) Subject to appropriate precautions, BCI and HSBI may be taken outside of the premises of the Appellate Body Secretariat, in hard copy and electronic form, for purposes of any oral hearings that may be held in connection with this appeal.

(xi) Except as provided for in paragraph (xii), all documents and electronic files containing BCI and HSBI shall be destroyed or deleted when the Appellate Body report in this dispute has been adopted by the DSB.

(xii) The Appellate Body shall retain one hard copy and one electronic version of all documents containing BCI and HSBI as part of the appellate record. Documents and electronic media containing BCI shall be kept in sealed boxes within locked cabinets on the Appellate Body Secretariat's premises. Documents and electronic media containing HSBI shall be placed in a sealed container that will be kept in a combination safe on the premises referred to above.

Appellate Body Report

(xiii) The Division will make every effort to draft an Appellate Body report that does not disclose BCI or HSBI by limiting itself to making statements or drawing conclusions that are based on BCI and HSBI. A copy of the Appellate Body report intended for circulation to WTO Members will be provided in advance to the participants, at a date and in a manner to be specified by the Division. Participants will be provided with an opportunity to request the removal of any BCI or HSBI that is inadvertently included in the report. The Division will also indicate to the participants if it has found it necessary to include in the Appellate Body report information that was treated by the Panel as BCI or HSBI and will provide participants with an opportunity to comment. Comments on the inclusion of information previously treated as BCI or HSBI and requests for removal of BCI or HSBI inadvertently included in the report shall be filed with the Appellate Body Secretariat within a time period to be specified by the Division. No other comments or submissions shall be accepted. In coming to a decision on the need to include BCI or HSBI to ensure that the final report is understandable, the Division will strike an appropriate balance between the rights of the WTO membership at large to obtain a report that gives a sufficient exposition of its reasoning and findings, on the one hand, and the legitimate concerns of the participants to protect sensitive information, on the other.

Participants

(xiv) The participants shall provide a list of persons that are "BCI-Approved Persons" and that are "HSBI-Approved Persons". These lists shall be provided to the Appellate Body Secretariat by 5 p.m. on Thursday, 27 October 2016, and shall be served on the other participant and the third participants. Any objections to the designation of an outside advisor as a BCI-Approved Person or HSBI-Approved Person must be filed with the Appellate Body Secretariat and served on the other participant by 5 p.m. on Monday, 31 October 2016. Participants may submit amendments to their lists of BCI-Approved Persons or HSBI-Approved Persons by filing an amended list with the Appellate Body Secretariat and serving it on the other participant and the third participants. A participant may object to the designation on the amended list of an outside advisor by another participant. Any objections must be filed with the Appellate Body Secretariat within two days and simultaneously served on the other participant and the third participants. The Division will reject a request for designation of an outside advisor as a

BCI-Approved Person or an HSBI-Approved Person only upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles reflected in the *Rules of Conduct* and the illustrative list in Annex 2 thereto. BCI-Approved Persons and HSBI-Approved Persons shall not disclose BCI or HSBI, or allow either to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, other BCI-Approved Persons and HSBI-Approved Persons, and Third Participant BCI-Approved Persons.

(xv) Any participant referring in its written submissions to any BCI or HSBI shall clearly identify the information as such in those submissions. If the submissions contain HSBI, the HSBI shall be included in an appendix. In that case, the version of the submission that includes the HSBI appendix shall be transmitted only to HSBI-Approved Persons. The HSBI appendix shall not be transmitted via e-mail, but solely on a CD-ROM, labelled with an indication that it contains the HSBI appendix. Each participant shall simultaneously provide a redacted version of its submissions to the other participant. Submissions containing BCI, and redacted versions of submissions, shall be transmitted only to BCI-Approved Persons of the other participant. The other participant shall have two days to object to the inclusion of any BCI. If there are objections, the Division shall resolve the matter, and instruct, as appropriate, the relevant participant to transmit a correctly redacted version of its submission to the other participant and the third participants, unless the participant concerned agrees to remove the information that was subject to the objection. The electronic copy of the unredacted version of the submission shall be corrected by the participant according to the Division's resolution of the matter and re-transmitted to the Appellate Body Secretariat and other participant; the Appellate Body shall direct BCI-Approved Persons to implement modified confidentiality treatment in any paper copies of the submission as well as to replace the electronic copies. If there are no objections, the redacted version shall be transmitted the following day to the third participants.

Third Participants

(xvi) Third participants may designate up to eight individuals as "Third Participant BCI-Approved Persons". For this purpose, each third participant shall provide a list of Third Participant BCI-Approved Persons to the Appellate Body Secretariat by 5 p.m. on Thursday, 27 October 2016. A copy of the list of Third Participant BCI-Approved Persons shall be served on each participant and on each other third participant. The participants may object to the designation of an outside advisor as a Third Participant BCI-Approved Person. Objections must be filed with the Appellate Body Secretariat by 5 p.m. on Monday, 31 October 2016. Third participants may submit amendments to their lists of BCI-Approved Persons or HSBI-Approved Persons by filing an amended list to the Appellate Body Secretariat and serving it on the participants and the other third participants. A participant may object to the designation in an amended list of an outside advisor by a third participant. Any objections must be filed with the Appellate Body Secretariat within two days and simultaneously served on the other participant and the third participants. The Division will reject the designation of an outside advisor as a Third Participant BCI-Approved Person only upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles in the *Rules of Conduct* and the illustrative list in Annex 2 thereto. Third Participants BCI-Approved Persons shall not disclose BCI, or allow it to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, BCI-Approved Persons, and other Third Participant BCI-Approved Persons.

(xvii) The BCI version of all participants' submissions shall be transmitted to the third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room located on the premises of the WTO. Third Participant BCI-Approved Persons shall be allowed to view in the designated reading room the BCI version of the Panel Report and the BCI version of the submissions filed in these appellate proceedings. Third Participant BCI-Approved Persons shall not bring into that room any electronic recording or transmitting devices, nor shall they remove copies of the BCI version of the Panel Report or the BCI version of the submissions from that room. Upon request, each third participant shall be provided with one copy of the Panel Report as circulated to WTO Members and of the redacted version of the submissions for use in the reading room. Third Participant BCI-Approved Persons may take handwritten notes on the provided copies of the circulated Panel Report and redacted version of the submissions and they may take these copies with them. These documents shall be printed on coloured watermarked paper; shall bear the names of the Third Participant BCI-Approved Persons; state that "This document is not to be copied"; and the cover page of each of the documents shall state that any handwritten BCI added to the document shall only be discussed

or shared with other Third Participant BCI-Approved Persons. The content of any handwritten notes shall not be incorporated, electronically or in handwritten form, into any other copy of the Panel Report or of the submissions. These documents and any other handwritten notes taken by the Third Participant BCI-Approved Persons in the reading room shall be locked in a secure container when not in use. These documents and handwritten notes must be returned to the Appellate Body Secretariat after the final oral hearing held in this appeal.

(xviii) Each Third Participant BCI-Approved Person viewing the BCI version of the Panel Report and submissions in the designated reading room shall complete and sign a log. The Appellate Body Secretariat shall keep such log as part of the record of the appeal.

(xix) Third participants shall transmit their submission to the Appellate Body Secretariat and the participants. It shall also be transmitted to the other third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room referred to in paragraph (xvii) above. If a third participant wishes to refer in its third participant's submission to any BCI, it shall clearly identify such information. A third participant referring to BCI shall also simultaneously provide the participants with a redacted version of its submission. Third participant's submissions containing BCI, and redacted versions of submissions, shall be transmitted only to BCI-Approved Persons of the participants. The participants shall have two days to object to the inclusion of any BCI in a third participant's submission. If there are objections, the Division shall resolve the matter, and instruct, as appropriate, the relevant third participant to transmit a correctly redacted version of its submission to each of the participants and the other third participants, unless the third participant concerned agrees to remove the information that was subject to the objection. The electronic copy of the unredacted version of the submission shall be corrected by the third participant according to the Division's resolution of the matter and re-transmitted to the Appellate Body Secretariat and the participants; the Appellate Body shall direct BCI-Approved Persons to implement modified confidentiality treatment in any paper copies of the submission as well as to replace the electronic copies. If there are no objections, the submission or the redacted submission, as the case may be shall be transmitted the following day to the other third participants and again to the participants.

Oral Hearing

(xx) Appropriate procedures shall be adopted to protect BCI and HSBI from unauthorized disclosure at any oral hearing held in this appeal.

ANNEX D-2

PROCEDURAL RULING OF 21 NOVEMBER 2016

1. On 31 October 2016, the Appellate Body Division hearing the above appeal received a communication from the United States provisionally objecting to the inclusion of Prof. Andreas Klasen on the European Union's proposed list of BCI- and HSBI-Approved Persons. The United States requested the Division to ask the European Union to provide further information concerning Prof. Klasen's employment by the European Aeronautic Defence and Space Company N.V. (EADS), whether he has ongoing involvement with Airbus in his current position, and the reason he would need access to BCI and HSBI.

2. On 1 November 2016, the Division invited the European Union to respond to the United States' provisional objection, and informed the participants and third participants that, in the meantime, the European Union's access to BCI and HSBI on the Panel Record and in written submissions in these appellate proceedings shall be restricted to the other individuals on the European Union's list of BCI-Approved Persons and HSBI-Approved Persons, dated 27 October 2016.

3. On 2 November 2016, the Division received a response from the European Union commenting on the United States' provisional objection, and providing some additional information regarding Prof. Klasen, including his full *curriculum vitae*. The European Union indicated, *inter alia*, that Prof. Klasen "is providing external advice for the European Union as well as the European Union's underlying interests in this case (Airbus)".

4. On 3 November 2016, the Division invited the United States to respond to the letter received from the European Union. On 7 November 2016, the United States reiterated its request for further information regarding Prof. Klasen. The United States explained that "knowing whether and to what extent Prof. Klasen continues to undertake work for Airbus is critical to an understanding of whether his access to Boeing BCI and HSBI would give Airbus an unfair advantage in areas outside of this proceeding." The European Union responded to the United States' letter on 11 November 2016, at the request of the Division. In its letter, the European Union reiterated that Prof. Klasen "is an expert who has been providing advice for the European Union and its underlying interests in this case (Airbus)", and that the European Union wishes to retain the possibility of including him in its delegation for that purpose. The European Union further requested that we confirm Prof. Klasen's designation as BCI- and HSBI-approved.

5. On 16 November 2016, the Division invited the European Union to indicate whether Prof. Klasen is subject to an enforceable code of professional ethics that requires him to protect confidential information, or whether he has been retained by an outside advisor who is subject to such a code of professional ethics and assumes responsibility for compliance with the additional BCI/HSBI procedures adopted by the Appellate Body in these proceedings.

6. On 18 November 2016, the European Union confirmed that Prof. Klasen has been retained by an outside advisor who is subject to an enforceable code of professional ethics and assumes responsibility for compliance with the additional BCI/HSBI procedures adopted by the Appellate Body in these proceedings. The European Union added that it has responsibility, according to the applicable rules, for the constitution and conduct of its delegation, including all of its representatives and outside advisors.

7. We recall that pursuant to paragraph 18(xiv) of our Procedural Ruling of 25 October 2016, the Division will reject a request for designation of an outside advisor as a BCI-Approved Person or an HSBI-Approved Person only upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles reflected in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes and the illustrative list of information to be disclosed in Annex 2 thereto. We further recall that the same paragraph mandates that BCI-Approved Persons and HSBI-Approved Persons shall not disclose BCI or HSBI, or allow either to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, other BCI-Approved Persons and HSBI-Approved Persons, and Third Participant BCI-Approved Persons.

8. In light of the clarifications provided by the European Union, we see no compelling reason to reject the European Union's request to designate Prof. Klasen as a BCI- and HSBI-Approved Person. We therefore consider it appropriate to accept the European Union's request. Accordingly, the European Union's access to BCI and HSBI on the Panel record and in written submissions in these appellate proceedings stands extended to Prof. Klasen as a BCI- and HSBI-Approved Person in addition to the other individuals on the European Union's list of BCI-Approved Persons and HSBI-Approved Persons, dated 27 October 2016.

ANNEX D-3

PROCEDURAL RULING OF 21 NOVEMBER 2016

1. On 14 November 2016, we received a letter from the European Union requesting that certain text in the United States' other appellant's submission be designated as business confidential information (BCI). On 15 November 2016, the Division invited the United States to respond to the European Union's request. The United States responded in writing on 16 November 2016, indicating that it did not object to the changes proposed by the European Union to paragraphs 36, 52, 64, and 69 of the United States' other appellant's submission. However, the United States objected to the other changes proposed by the European Union (to paragraphs 35, 37, 41, 43, 45, 47, 49, 51, 53, 55, and 60) arguing that the European Union was proposing to designate certain information as BCI, even though that information could already be derived from information on the Panel record that the European Union previously did not designate as BCI or HSBI. The United States indicated that, upon resolution of this issue by the Appellate Body, it was prepared to submit revised BCI and BCI-redacted versions of its other appellant's submission and that two days after the Appellate Body's ruling would be sufficient time to complete this task.

2. In our Procedural Ruling of 25 October 2016, we surveyed considerations that are relevant to a decision on whether to provide additional protection to certain sensitive information. We believe that these considerations are also relevant to our evaluation of the European Union's request that certain text in the United States' other appellant's submission be designated as BCI.

3. As an initial matter, we recall that the determination of whether particular arrangements are appropriate in a given case involves a balancing exercise: the risks associated with the disclosure of the information sought to be protected must be weighed against the degree to which the particular arrangements affect the rights and duties established in the DSU and the other covered agreements. Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. It is ultimately for the adjudicator to decide whether certain information calls for additional protection of confidentiality, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection. This involves striking an appropriate balance between the risks associated with the disclosure of sensitive information, the adjudicative duties of the Appellate Body, and the rights of the participants and third participants.

4. The changes to BCI bracketing proposed by the European Union do not appear to affect our ability to hear this appeal or the due process rights of the participants, both of which have access to BCI and HSBI. With regard to the rights of third participants, we further recall that, in accordance with paragraph 18(xvii) of our Procedural Ruling of 25 October 2016, Third Participant BCI-Approved Persons may view in the designated reading room the BCI version of the submissions filed in these appellate proceedings. As we see it, this ensures that third participants have sufficient access to the entirety of the information contained in the United States' other appellant's submission, which the European Union considers should be subject to additional protection.

5. We further note that the United States does not object to the changes proposed by the European Union to paragraphs 36, 52, 64, and 69 of the United States' other appellant's submission. In particular, the United States has not objected to the European Union's request to designate as BCI the four words that the European Union has included between the additional brackets in each of the bullet points following paragraph 69 of the BCI-version of the United States' other appellant's submission, consistent with the designation of the terms of Section 21.14 of the UK A350XWB Repayable Investment Agreement as BCI. Nor has the United States objected to the inclusion between additional brackets of the same four words in paragraph 64 of the United States' other appellant's submission, consistent with the designation of the terms of Section 11 of the Spanish A350XWB *Convenio* as BCI.

6. With respect to the French A350XWB *Protocole*, we note that the four words at issue speak more to the substantive content of Articles 8 and 9, designated as containing BCI, rather than to the headers of those provisions, which, as the United States points out, have not been designated as containing BCI.

7. With respect to the German KfW A350XWB Loan Agreement, while we agree with the United States that the language to which it refers might provide a basis to derive the information which the European Union now seeks to have designated as BCI, we note that this information cannot be found in the Panel Report circulated to WTO Members on 22 September 2016. Nor, as we understand it, has it been argued that this information would have otherwise come into the public domain, or that it would no longer be confidential due to the passage of time.

8. We note, moreover, that there are also issues of practicality to consider. Having considered the European Union's request and the response received from the United States, we have decided to proceed on the basis of the BCI bracketing proposed by the European Union. Nevertheless, we do not exclude revisiting whether a particular piece of such information meets the objective criteria justifying additional protection, or the particular degree thereof, should we consider that we need to refer to that information in our report in this dispute if this is necessary to give a sufficient exposition of our reasoning and findings. However, we reiterate that, if we were to consider it necessary to do so, the participants will be given a timely opportunity to comment.

9. We would request the United States to kindly submit revised copies of the BCI and non-BCI versions of its other appellant's submission to the Appellate Body Secretariat and the European Union, and copies of the non-BCI version of its other appellant's submission, with BCI correctly redacted, to each of the third participants, by 5 p.m. on Wednesday, 23 November 2016. There is no need to resubmit the HSBI Appendix. We further request the BCI-Approved Persons of each of the participants to implement modified confidentiality treatment, as outlined above, in any paper copies of the United States' other appellant's submission, and to replace electronic copies.

ANNEX D-4

PROCEDURAL RULING OF 11 JANUARY 2017

1. On Friday, 6 January 2017, we received a communication from the European Union requesting that the Division modify the deadline for the filing of the appellees' submissions in the present dispute. In its letter, the European Union invokes Rule 16(2) of the Working Procedures for Appellate Review[1] (Working Procedures), and seeks to have this deadline extended by one week from 13 January 2017 to 20 January 2017. According to the European Union, strict adherence to the time periods set by the Division would result in manifest unfairness within the meaning of Rule 16(2). We understand that the United States and the third participants in this dispute were served a copy of the European Union's request.

2. The European Union highlighted that the reasons for its request are similar to those given by the United States in support of its request for extension of the deadline for filing its appellant's submission in *US – Tax Incentives* (WT/DS487). In particular, the European Union submitted that the staff assigned to the appeals in *US – Tax Incentives* and in the current dispute is to a large extent the same, and preparation and filing of submissions in these two related and demanding appeals poses a significant challenge for the European Union's resources. Moreover, the European Union argued that the absence of key staff during the holiday period has significantly impaired the preparation and revision of the European Union's appellee's submission in the present appeal. The European Union also noted that the current working schedule has left it with approximately two months to respond to the United States' other appellant's submission – which includes several aspects of a lengthy panel report – as well as to ensure proper marking of business confidential information (BCI) and highly sensitive business confidential information (HSBI).

3. Also on 6 January 2017, the Division invited the United States and the third participants to comment in writing on the communication from the European Union by 12:00 p.m. on Tuesday, 10 January 2017. Written comments were received from the Australia, Canada, and the United States. Australia requested that to the extent the Division were to grant the European Union's request, it also provide third participants with additional time to review and consider the participants' submissions prior to filing their own submissions. Canada made a similar request asking the Division to extend the deadline for filing of the third participants' submissions from 31 January 2017 to 7 February 2017, should it grant the request made by the European Union. No comments were received from the other third participants.

4. In its written comments, the United States opposed the European Union's request for an extension of the deadline for for the filing of its appellee's submission. Referring to the reasons given by the Division in *US – Tax Incentives* for its denial of the United States' request for extension of the deadline for the filing of its appellant's submission, the United States did not see a basis for granting the European Union's request in the present case. In particular, the United States observed that its staff faces the same challenges as the European Union's staff in filing submissions in *US – Tax Incentives* and the present dispute. Moreover, the United States noted that the European Union's appellee's submission in this appeal responds to a submission that is considerably shorter than the one to which the United States' appellee's submission has to respond in *US – Tax Incentives*.

5. We observe that the European Union filed its appeal in the present dispute on 13 October 2016. In response to a joint letter by the European Union and the United States, the Division hearing this appeal suspended the deadline for the filing of the appellant's submission pending the adoption of additional procedures to protect sensitive information included in the record of this dispute. On 25 October 2016, the Division adopted a procedural ruling to protect sensitive information. On 1 November 2016, the Division communicated to the participants and third participants 10 November 2016 as the filing date for the United States' other appellant's submission. Subsequently, on 22 November 2016, the Division communicated to the participants and third participants 13 January 2017 as the filing date for the appellees' submissions. In setting

[1] WT/AB/WP/6, 16 August 2010.

these deadlines, the Division took into account, in particular, the size and complexity of the present appeal, including the size of the Panel Report, and the need for inclusion of BCI and HSBI in the participants' submissions. Furthermore, in view of the WTO end-of-year closure, the deadline set for the filing of the appellees' submissions in the present dispute was delayed until the second working week of 2017. Finally, notwithstanding the size of the Panel Report, the United States' other appellant's submission to which the European Union has to respond in its appellee's submission is relatively brief. We observe, in this regard, that although the United States must, in its appellee's submission, respond to a very lengthy European Union appellant's submission, it has not requested that the filing deadline of 13 January 2016 be extended.

6. For these reasons, we consider that strict adherence to the time periods set by the Division for the filing of the appellees' submissions will not result in manifest unfairness within the meaning of Rule 16(2) of the Working Procedures, and that it is not, therefore, necessary or appropriate to modify the deadline for the filing of the appellees' submissions in the present dispute.

7. In these circumstances, the Division declines the European Union's request for extension of the deadline for filing the appellees' submissions in the present appeal and, instead, affirms the deadline for filing the appellees' submissions set for Friday, 13 January 2017.

ANNEX D-5

PROCEDURAL RULING OF 19 APRIL 2017

1. By letter dated 4 April 2017, the Appellate Body Division hearing the above appeal invited the participants, the European Union and the United States, to indicate whether they request the oral hearings in this appeal to be open to public observation, and, if so, to propose specific modalities in this respect by 5 p.m. Geneva time on Tuesday, 11 April 2017. We also invited the third participants to provide comments on any request the participants might file, by 12 noon Geneva time on Thursday, 13 April 2017.

2. On 11 April 2017, we received a joint communication from the European Union and the United States. In their letter, they propose additional procedures to protect Business Confidential Information (BCI) and Highly Sensitive Business Information (HSBI) during the oral hearings in this appeal and request that we allow observation by the public of the oral hearing.

3. Specifically, the participants propose that we adopt the same additional procedures that the Appellate Body adopted in *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*[1], pursuant to the procedural ruling dated 26 July 2011 in that appeal. They state that the reasons for their request and proposal are substantially the same as the reasons that were given in their joint letter of 11 July 2011 requesting such additional procedures in the conduct of the oral hearing in that appeal, which are summarized as follows:

- Only BCI-Approved Persons are authorized to access BCI, and the participants and third participants have designated a limited number of persons as BCI-Approved. Only HSBI-Approved Persons are authorized to access HSBI, and the participants have designated a limited number of persons as HSBI-Approved. Third participants may not designate HSBI-Approved Persons.

- As regards BCI that might be uttered during any segment of the hearing, the participants recall that each of them is precluded from disclosing information designated as BCI by the other to non-BCI-Approved persons. Similarly, as regards HSBI that might be uttered during a hearing, the participants recall that each of them is precluded from disclosing information designated as HSBI by the other to non-HSBI-Approved persons. Third participants are precluded from disclosing BCI to non-BCI-Approved persons.

- Accordingly, the participants consider that, as provided for in the Additional Procedures for the Protection of Sensitive Information set out in the Procedural Ruling dated 25 October 2016 in this appeal, the Division can and should adopt a further Procedural Ruling pursuant to Rule 16(1) of the Working Procedures for Appellate Review[2] regulating these matters for the oral hearings. This will involve striking a balance between the systemic interest in protecting sensitive information and the systemic interest in transparency, similar to that struck in the Procedural Ruling dated 25 October 2016 in this appeal and the Procedural Ruling dated 26 July 2011 in *US – Large Civil Aircraft (2nd complaint)*.

- According to the participants, there appear to be two options with respect to HSBI. The first option is that if, during the hearing, one of the participants or a Member of the Division wishes to refer to HSBI, the hearing would be momentarily suspended and the third participants, as well as members of the participants' delegations who are not HSBI-Approved, would be asked to leave the room temporarily. The second option is that the hearing be divided into two parts. The first part would deal with all matters to the greatest extent possible without uttering HSBI. The second part would complete the discussion in a closed session, to the extent necessary, by addressing HSBI. While acknowledging that neither of these options is ideal in all respects, on balance, the

[1] WT/DS353/AB/R, adopted 23 March 2012. The additional procedures with respect to the oral hearing in that appeal are set out in Annex IV to that report.
[2] WT/AB/WP/6, 16 August 2010.

participants prefer the second option. The participants believe that this would limit unnecessary disruption during the hearing. The participants also believe that careful conduct of the first part of the hearing (such as only participants and the Members of the Division having a document before them and discussing it without uttering HSBI) could obviate the need for a second HSBI part of the hearing. In the event that a second closed session of the hearing would be necessary, it could be organized to take place at the end of each day. The participants note that the Appellate Body followed this second approach during the proceedings in *EC and certain member States – Measures Affecting Trade in Large Civil Aircraft*[3] and in *US – Large Civil Aircraft (2nd complaint)*, and that it appears to have been effective.

- The participants further suggest that the Appellate Body establish rules regarding a public segment of the hearing. The participants recall that, to date, a participant's or third participant's oral statements and oral answers to questions have been made in public segment only if the participant or third participant so agreed. In the absence of such agreement, it has proved operationally possible and effective to divide the hearing into an open session (for Members who wish to make their statements public) and a closed session (for Members who do not wish to make their statements public). The European Union and the United States are of the view that as much of the hearing as possible should be open to the public. However, they recognize that, in light of the volume of BCI in this dispute, and its centrality to many of the issues, it may not be feasible to separate the Appellate Body's questions and the participants' answers into public and BCI segments in the same way as the oral statements. For this reason, the European Union and the United States propose that the same approach be adopted in this appeal as was adopted in the appeal in *US – Large Civil Aircraft (2nd complaint)*.

- Thus, with regard to the public segment of the hearing, the participants propose that the participants and third participants (subject to their agreement) deliver opening statements that do not contain BCI or HSBI. These would be videotaped, reviewed by the participants for confirmation that neither BCI nor HSBI has been uttered (with any disagreements to be settled by the Appellate Body), and then transmitted to the public at a later date. The participants also propose that such an approach could be used for the closing statements, or at least that part of them that does not refer to BCI or HSBI.

4. Canada and China submitted comments on the participants' request. Canada expressed its agreement with the joint proposal by the European Union and the United States that the Appellate Body allow observation by the public of the oral hearing. China submitted that the joint proposal by the participants to exclude non-BCI-Approved persons of the third participants from segments of the hearing that are dedicated to questions and answers would significantly constrain the third participants' abilities to engage fully in those segments. China added that, in the circumstances of this appeal, the need for protection of sensitive information cannot sufficiently justify a complete exclusion of non-BCI-Approved persons from hearing segments dedicated to questions and answers. China suggested that the same procedure that is applicable for the protection HSBI from unauthorized disclosure be followed for the protection of BCI in this appeal. In addition, China stated that it does not want to open its statements and oral responses to the questions during the oral hearing to the public. No comments were received from Australia, Brazil, Japan, or Korea.

5. The request of the participants raises issues similar to those that were before the Appellate Body in *EC and certain member States – Large Civil Aircraft* and in *US – Large Civil Aircraft (2nd complaint)*. In this appeal, we have already adopted additional procedures for the protection of sensitive information. Given the amount of information that was treated as BCI and HSBI during the Panel proceedings, we believe that it would be difficult to conduct the oral hearing in these appellate proceedings without referring to sensitive information. In carrying out our adjudicative function, it will be necessary to conduct the oral hearing in a manner that allows us to explore issues that involve sensitive information, while ensuring that this sensitive information is not improperly disclosed.

[3] WT/DS316/AB/R, adopted 1 June 2011. The additional procedures with respect to the oral hearing in that appeal are set out in Annex IV to that report.

6. Pursuant to our Procedural Ruling of 25 October 2016, the participants have provided a list of persons who are authorized to have access to BCI and a list with a more limited number of persons who are authorized to have access to HSBI. These limitations on the participants' representatives who would be authorized to discuss BCI and HSBI during the oral hearing are incidental to the participants' request for additional protection for sensitive information. Therefore, only members of the participants' delegations who are BCI-Approved Persons are invited to attend the sessions of the oral hearing in which BCI will be discussed, and only members of their delegations who are HSBI-Approved Persons are invited to attend segments of the oral hearing where HSBI will be discussed.

7. Moreover, under paragraph 18(xvi) of the Procedural Ruling of 25 October 2016, the third participants have been allowed to designate up to eight individuals as Third Participant BCI-Approved Persons. We consider this to be sufficient to allow the third participants to be represented properly at the oral hearing. In view of the need to provide additional protection to BCI, only Third Participant BCI-Approved Persons are invited to attend segments of the oral hearing where BCI may be discussed, including the question and answer sessions. Having carefully considered the comments provided by China, we do not consider that this will unduly impinge upon the rights of the third participants in this case.

8. Accordingly, and for reasons similar to those adopted by the Appellate Body in *EC and certain member States – Large Civil Aircraft* and in *US – Large Civil Aircraft (2nd complaint)*, we have decided to provide additional confidentiality protection for certain sensitive information during the oral hearings to be held in this appeal on the terms set out below. We also authorize the public observation of certain segments of the oral hearing as further indicated below.

Request for additional procedures to protect sensitive information during the oral hearing

9. We are of the view that the additional procedures adopted in *EC and certain member States –Large Civil Aircraft* provided adequate protection for sensitive information while allowing the Appellate Body to perform its adjudicative function and the third participants to exercise their rights under the Understanding on Rules and Procedures Governing the Settlement of Disputes and the Working Procedures for Appellate Review. The participants share this view and request us to adopt similar procedures in these proceedings. Thus, as in *EC and certain member States –Large Civil Aircraft*, we consider it appropriate to adopt the following arrangements to protect sensitive information during the oral hearing:

- The participants have indicated that they intend to abstain from mentioning BCI or HSBI in their opening statements, and suggest that the third participants may also agree not to mention BCI in their opening statements. In such circumstances, it is unlikely that sensitive information will be uttered in the segments of the oral hearing dedicated to the delivery of oral statements.

- Accordingly, all members of the participants' and third participants' delegations (including non-BCI Approved persons) may attend this initial segment of the oral hearing.

- Similarly, to the extent that it is confirmed by the participants, and the third participants also indicate, that no sensitive information will be referred to in the closing statements, all members of the participants' and third participants' delegations may attend this final segment of the oral hearing.

- In accordance with paragraphs xiv and xvi of our Procedural Ruling of 25 October 2016, the participants and third participants have each designated BCI-Approved Persons, and the participants have designated HSBI-Approved Persons.

- Only members of the participants' and third participants' delegations who have been authorized to have access to BCI are invited to attend the segments of the oral hearing dedicated to questions and answers.

- Only HSBI-Approved Persons of the participants are invited to attend segments of the oral hearing in which HSBI will be discussed.

- The third participants will have access to the BCI versions of the submissions filed in this appeal and the BCI version of the Panel Report in the hearing room during the BCI segments. The third participants will be provided with a single, individually watermarked copy of these documents. Access to these documents will be limited to Third Participant BCI-Approved Persons. These documents may not be removed from the hearing room.

10. The participants have proposed two options for addressing HSBI during the oral hearings. The first involves interrupting the BCI segments of the oral hearing each time reference will be made to HSBI; the second involves having dedicated segments to discuss HSBI. We believe it is important that any additional procedures to protect sensitive information should interfere as little as possible with the regular conduct of the oral hearing and allow the Division to structure its questioning by topic. Therefore, to the extent possible, we prefer to focus on HSBI in dedicated segments in order to avoid interrupting the regular flow of the hearing. It may be, however, that the full exploration of an issue will not allow for deferral of the discussion of HSBI. If such circumstance arises, we may decide to interrupt the BCI segment of the hearing to discuss HSBI with the HSBI-Approved Persons.

Request for public observation of the oral hearing

11. Particular issues arise in this appeal, as they did in *EC and certain member States – Large Civil Aircraft*, in relation to the public observation of the oral hearing because of the need to avoid the disclosure of BCI and HSBI. We believe that the additional procedures adopted by the Appellate Body in *EC and certain member States – Large Civil Aircraft* and in *US – Large Civil Aircraft (2nd complaint)* provided an appropriate means to allow public observation of the hearing, while protecting sensitive information and safeguarding the Appellate Body's adjudicative function and the interests of the third participants.

12. Therefore, and subject to the qualification in paragraph 13 below, we authorize public observation of the delivery of the opening statements only. We will authorize public observation of the closing statements upon indication from the participants and third participants that their closing statements will not include any reference to sensitive information.

13. We authorize observation by the public of the opening statements of only those third participants who will have indicated no objection to such observation. The confidentiality of the closing statements by those third participants that do not wish to make their statements public will be preserved.

14. The participants have proposed that public observation take place by making a videotape of the relevant segments of the oral hearing and showing it to the public only after the participants have had an opportunity to review the videotape for any inadvertent utterance of sensitive information. A similar procedure was used in *EC and certain member States – Large Civil Aircraft* and in *US – Large Civil Aircraft (2nd complaint)*. We agree with the participants that deferred transmission to the public by videotape will minimize the risk of inadvertent disclosure of sensitive information and we will give the participants an opportunity to review the videotape for this purpose before it is shown to the public. In case of disagreement between the participants regarding the sensitive nature of any information referred to during the opening or closing statements, such information will not be subject to public observation.

15. For the reasons set out above, we adopt the following additional procedures for the conduct of all sessions of the oral hearing to be held in this appeal:

Additional Procedures on the Conduct of the Oral Hearing

i. These Additional Procedures shall apply to all sessions of the oral hearing to be held in this appeal and, in particular, to any information that is referred to during the course of the hearing that was treated as business confidential information (BCI) or as highly sensitive business information (HSBI) in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. These Additional Procedures complement the Additional Procedures for the Protection of Sensitive Information that we adopted in our Procedural Ruling of 25 October 2016.

ii. To the extent that information on the record is presented at the hearing in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants as to the proper treatment and the degree of confidentiality of this information, the Appellate Body shall decide the matter after hearing the views of the participants.

iii. Appellate Body Members, Secretariat staff assigned by the Appellate Body to work on this appeal, and interpreters and court reporters retained for this appeal may be present throughout the hearing, including segments dedicated to the discussion of BCI and HSBI.

iv. In addition to the persons indicated in paragraph iii above, BCI shall be disclosed during the hearing only to BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons.[4]

v. In addition to the persons indicated in paragraph iii above, HSBI shall be disclosed during the hearing only to HSBI-Approved Persons of the participants.[5]

vi. The hearing segment dedicated to the opening statements of the participants and third participants shall be open to all members of the delegations of the participants and third participants. The participants and third participants shall abstain from referring to BCI or HSBI in their opening statements.

vii. In order to protect BCI from unauthorized disclosure, only BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons are invited to attend the segments of the hearing dedicated to questions and answers.

viii. Segments of the hearing may be reserved for questioning on issues that may require reference to HSBI. In order to protect HSBI from unauthorized disclosure, only HSBI-Approved Persons of the participants are invited to attend these segments.

ix. To the extent that any participant or third participant indicates that it will make reference to BCI in its closing statement, only BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons will be invited to attend the closing segment of the hearing.

x. If necessary, the Appellate Body Division hearing this appeal may interrupt a BCI segment and hold a segment dedicated to HSBI.

xi. During the segments of the hearing dedicated to questions and answers, the BCI version of the Panel Report and the BCI versions of the submissions filed in this appeal, which will be printed and individually watermarked pursuant to paragraph xvii of our Procedural Ruling of 25 October 2016, shall be made available to each third participant. Only Third Participant BCI-Approved Persons will be allowed to consult these documents. The documents shall not be removed from the hearing room and shall be returned to the Appellate Body Secretariat at the end of each segment addressing BCI.

xii. The parts of the transcript of the oral hearing containing BCI and HSBI shall become part of the appellate record in this appeal and shall be kept in accordance with paragraphs vi, vii, and ix-xii of our Procedural Ruling of 25 October 2016.

Public observation of the oral hearing

xiii. The first segment of the oral hearing, which will consist of the opening statements by the participants and third participants, shall be open to public observation, subject to paragraph xv below. The final segment of the oral hearing, which will be reserved for closing statements, shall be open to public observation to the extent that the participants and

[4] BCI-Approved Persons and Third Participant BCI-Approved Persons are those persons designated as such under paragraphs xiv and xvi of our Procedural Ruling of 25 October 2016.

[5] HSBI-Approved Persons are those persons designated as such under paragraph xiv of our Procedural Ruling of 25 October 2016.

third participants indicate that their closing statements will not refer to any sensitive information and subject to paragraph xiv below.

xiv. The segments open to public observation shall be videotaped. Within two days of the completion of each session of the hearing, either participant may request to review the videotape to verify that no BCI or HSBI has been included inadvertently or otherwise. Upon such request, staff of the Appellate Body Secretariat shall be present while the participant(s) review the videotape. If the videotape contains BCI or HSBI, a redacted version of the videotape shall be produced in which the BCI or HSBI has been deleted. In case of disagreement between the participants regarding the sensitive nature of any information referred to during the opening or closing statements, the relevant segment(s) will not be subject to public observation.

xv. The opening and closing statements of third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation. Any third participant that has not already done so may request that its oral statements remain confidential and not be subject to public observation. Such requests must be received by the Appellate Body Secretariat no later than 5 p.m. Geneva time on Wednesday, 26 April 2017.

xvi. Notice of the oral hearing will be provided to the general public through the WTO website. Members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat. The videotapes, or if applicable the redacted versions of the videotapes, shall be screened to WTO delegates and members of the public who have registered to observe the oral hearing once the review process referred to in paragraph xiv above has, if requested, been completed. The time and location of the videotape screening shall be announced in due course. WTO delegates are invited to indicate to the Appellate Body Secretariat no later than 5 p.m. Geneva time on Wednesday, 26 April 2017 whether they wish to have a reserved seat in the room where the videotape will be screened.