



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

**RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN UNION  
AND CERTAIN MEMBER STATES**

REPORT OF THE PANEL

BCI deleted, as indicated [\*\*\*]

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**CASES CITED IN THIS REPORT**

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , <a href="#">WT/DS70/AB/RW</a> , adopted 4 August 2000, DSR 2000:IX, p. 4299
<i>Canada – Continued Suspension</i>	Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , <a href="#">WT/DS321/AB/R</a> , adopted 14 November 2008, DSR 2008:XIV, p. 5373
<i>Canada – Continued Suspension</i>	Panel Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , <a href="#">WT/DS321/R</a> and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report <a href="#">WT/DS321/AB/R</a> , DSR 2008:XV, p. 5757
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , <a href="#">WT/DS207/AB/RW</a> , adopted 22 May 2007, DSR 2007:II, p. 513
<i>Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)</i>	Panel Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Colombia / Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Panama</i> , <a href="#">WT/DS461/RW</a> and Add.1, circulated to WTO Members 5 October 2018 (Currently under appeal)
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , <a href="#">WT/DS27/AB/R</a> , adopted 25 September 1997, DSR 1997:II, p. 591
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , <a href="#">WT/DS141/AB/RW</a> , adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , <a href="#">WT/DS26/AB/R</a> , <a href="#">WT/DS48/AB/R</a> , adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC and certain member States – Large Civil Aircraft</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , <a href="#">WT/DS316/R</a> , adopted 1 June 2011, as modified by Appellate Body Report <a href="#">WT/DS316/AB/R</a> , DSR 2011:II, p. 685
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , <a href="#">WT/DS316/AB/R</a> , adopted 1 June 2011, DSR 2011:I, p. 7
<i>EC and certain member States – Large Civil Aircraft (Article 21.5 – US)</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , <a href="#">WT/DS316/AB/RW</a> and Add.1, adopted 28 May 2018
<i>EC and certain member States – Large Civil Aircraft (Article 21.5 – US)</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , <a href="#">WT/DS316/RW</a> and Add.1, adopted 28 May 2018, as modified by Appellate Body Report <a href="#">WT/DS316/AB/RW</a>
<i>EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)</i>	Decision by the Arbitrator, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 22.6 of the DSU by the European Union</i> , <a href="#">WT/DS316/ARB</a> and Add.1, 2 October 2019
<i>Japan – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , <a href="#">WT/DS336/AB/R</a> and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
<i>Japan – DRAMs (Korea)</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , <a href="#">WT/DS336/R</a> , adopted 17 December 2007, as modified by Appellate Body Report <a href="#">WT/DS336/AB/R</a> , DSR 2007:VII, p. 2805
<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , <a href="#">WT/DS320/AB/R</a> , adopted 14 November 2008, DSR 2008:X, p. 3507
<i>US – Continued Suspension</i>	Panel Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , <a href="#">WT/DS320/R</a> and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report <a href="#">WT/DS320/AB/R</a> , DSR 2008:XI, p. 3891
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , <a href="#">WT/DS212/AB/R</a> , adopted 8 January 2003, DSR 2003:I, p. 5
<i>US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , <a href="#">WT/DS212/RW</a> , adopted 27 September 2005, DSR 2005:XVIII, p. 8950

Short Title	Full Case Title and Citation
US – FSC (Article 21.5 – EC II)	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , <a href="#">WT/DS108/AB/RW2</a> , adopted 14 March 2006, DSR 2006:XI, p. 4721
US – Large Civil Aircraft (2 <sup>nd</sup> complaint)	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , <a href="#">WT/DS353/AB/R</a> , adopted 23 March 2012, DSR 2012:I, p. 7
US – Large Civil Aircraft (2 <sup>nd</sup> complaint)	Panel Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , <a href="#">WT/DS353/R</a> , adopted 23 March 2012, as modified by Appellate Body Report <a href="#">WT/DS353/AB/R</a> , DSR 2012:II, p. 649
US – Large Civil Aircraft (2 <sup>nd</sup> complaint) (Article 21.5 – EU)	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 21.5 of the DSU by the European Union</i> , <a href="#">WT/DS353/AB/RW</a> and Add.1, adopted 11 April 2019
US – Lead and Bismuth II	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , <a href="#">WT/DS138/AB/R</a> , adopted 7 June 2000, DSR 2000:V, p. 2595
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , <a href="#">WT/DS58/AB/RW</a> , adopted 21 November 2001, DSR 2001:XIII, p. 6481
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , <a href="#">WT/DS257/AB/RW</a> , adopted 20 December 2005, DSR 2005:XXIII, p. 11357
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , <a href="#">WT/DS381/AB/RW</a> and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)	Panel Reports, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States</i> , <a href="#">WT/DS381/RW/USA</a> and Add.1 / <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico</i> , <a href="#">WT/DS381/RW2</a> and Add.1, adopted 11 January 2019, as upheld by Appellate Body Report <a href="#">WT/DS381/AB/RW/USA</a> / <a href="#">WT/DS381/AB/RW2</a>
US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States</i> , <a href="#">WT/DS381/AB/RW/USA</a> and Add.1 / <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico</i> , <a href="#">WT/DS381/AB/RW2</a> and Add.1, adopted 11 January 2019
US – Upland Cotton	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , <a href="#">WT/DS267/AB/R</a> , adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton (Article 21.5 – Brazil)	Panel Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , <a href="#">WT/DS267/RW</a> and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report <a href="#">WT/DS267/AB/RW</a> , DSR 2008:III, p. 997
US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , <a href="#">WT/DS267/AB/RW</a> , adopted 20 June 2008, DSR 2008:III, p. 809
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , <a href="#">WT/DS294/AB/RW</a> and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , <a href="#">WT/DS322/AB/RW</a> , adopted 31 August 2009, DSR 2009:VIII, p. 3441

**EXHIBITS REFERRED TO IN THIS REPORT**

<b>Exhibit No.</b>	<b>Short Title</b>	<b>Title</b>
EU-7 (BCI)	BEIS Letter to Airbus, [***]	Department of Business, Energy & Industrial Strategy letter to Airbus, [***]
EU-8 (BCI)	BEIS Invoice to Airbus, [***]	Department of Business, Energy & Industrial Strategy invoice to Airbus, [***]
EU-9 (BCI) (English translation)	German A350XWB [***] amendment	[***] Addendum to the Loan Agreement dated [***] between KfW and Airbus Operations GmbH, [***]
EU-10 (HSBI/BCI) (English translation)	German A350XWB LA/MSF Agreement	German Loan Agreement between KfW and Airbus Operations GmbH and Airbus S.A.S, Toulouse, [***]
EU-11 (HSBI/BCI)	TradeRx A350XWB LA/MSF Report	Professor Klasen Report, "Market Consistency of the [***] Amendment to German MSF Agreement", 8 October 2018
EU-12 (BCI)	French A380 LA/MSF Agreement	Protocole d'Accord entre l'Etat et Airbus France, [***]
EU-13 (BCI)	-	Convention n° [***]81035002277545, [***]
EU-14 (BCI) (English translation)	German A380 LA/MSF Agreement	MSF Agreement for the A380, Germany, [***] (English translation)
EU-15 (BCI)	Spanish A380 LA/MSF Agreement	Convenio de colaboración entre el Ministerio de Ciencia y Tecnología y la empresa EADS Airbus S.L., relativo a la financiación de la participación de dicha empresa en el desarrollo del programa de la familia de aviones Airbus A-380, [***]
EU-16 (BCI)	UK A380 LA/MSF Agreement	Agreement between the Secretary of State for Trade and Industry, BAE Systems (Operations) Limited and British Aerospace public limited company for the provision of launch investment of the A380, [***]
EU-17 (HSBI/BCI)	PwC A380 LA/MSF Report	PwC Report, "Review of Negotiated Restructurings of A380 MSF Loan Agreements", 8 October 2018
EU-18 (HSBI)	-	Minutes of a meeting of the board of directors of Airbus SE, [***]
EU-19 (BCI)	-	Declaration by [***], 4 October 2018
EU-20 (HSBI/BCI) (English translation)	[***] German A380 LA/MSF Amendment	German [***] Addendum to the Loan Agreement of [***] (English translation)
EU-21 (BCI)	[***] French A380 LA/MSF Amendment	Avenant [***] au protocole d'accord entre l'Etat et Airbus Operations S.A.S. relatif au programme Airbus A380 (Annexe 2 à la convention Airbus A380 no [***] 81 035, notifiée le [***]), [***]
EU-22 (BCI)	[***] UK A380 Amendment	Deed of amendment in relation to the agreement for launch investment in Airbus A380, [***]
EU-23 (BCI)	[***] Spanish A380 LA/MSF Amendment	[***] addenda al convenio de colaboración entre el extinto Ministerio de Ciencia y Tecnología y la empresa EADS Airbus S.L. relativo a la financiación de la participación de dicha empresa en el desarrollo de la familia de aviones Airbus A380, [***]
EU-24 (HSBI/BCI)	TradeRx Report on Expected Life of LA/MSF	Professor Klasen, "Expected Life of MSF Subsidies for the A380 and A350XWB Programmes", 8 October 2018
EU-28 (BCI)	[***] UK A350XWB LA/MSF Agreement	Repayable investment agreement between the Secretary for Business, Innovation and Skills and Airbus Operations Limited [***] in relation to the Airbus A350XWB, [***]
EU-30 (HSBI)	-	Annual Continuing Support and Continuing Development for the A350XWB (2013-2018), Proprietary Information Extracted from Airbus' Accounts
EU-40, USA-47	Wessels Report	Professor David Wessels "Assessing Airbus' Capacity to Fund Large Scale Projects Without LA/MSF", (Oct. 17, 2012); submitted in the first compliance proceeding as USA-364

Exhibit No.	Short Title	Title
EU-43	-	"One Journey: One Team – Interview with Tom Enders", Airbus Annual Review 2014
EU-45	-	EADS, "Financial Statements and Corporate Governance", 2006
EU-53 (HSBI)	-	Annual Continuing Support and Continuing Development for the A380 (2013-2018), Proprietary Information Extracted from Airbus' Accounts
EU-78 (HSBI)	-	A380 Business Case
EU-81 (BCI)	Excerpts from Airbus accounting system in relation to the A350XWB UK loan	Excerpts from Airbus' accounting system in relation to the A350XWB MSF loan
EU-86 (BCI)	PwC Response Report	PwC, "Response on U.S. Submission from December 19, 2018 regarding i.e. PwC's 'Review of Negotiated Restructuring of A380 MSF Loan Agreements'", 25 January 2019
EU-89 (HSBI)	Letter from [***]	Letter from [***]
EU-90	-	Reuters, "Airbus may cut A380 production to six planes a year: sources", 11 December 2017
EU-92 (HSBI/BCI)	Airbus Counterfactual Launch Statement	Statement by [***], 4 November 2018
EU-94 (BCI)	-	Airbus, "Status of A380 orders and deliveries"
EU-99 (BCI)	-	Airbus, "Timing of remaining Emirates A380 deliveries"
EU-101 (BCI)	-	[***]
EU-102 (BCI)	-	Letter from [***]
EU-105 (BCI)	KPMG Assessment of [***]	KPMG Report, Assessment of [***], 28 May 2019
EU-106 (BCI) (English translation)	-	Email from [***], 20 March 2015
EU-113 (BCI)	[***]	[***]
EU-114 (BCI)	-	[***]
EU-115 (BCI)	-	Email from [***] to Airbus, 8 August 2019
USA-1	Airbus SE Special Earnings Call January 2018	Fair Disclosure Wire, "Full Year 2017 Airbus SE Commercial Aircraft Orders and Deliveries Call – Final", (15 January 2018)
USA-3	Airbus SE Special Earnings Call February 2018	Fair Disclosure Wire, "Full Year 2017 Airbus SE Earnings Call", (15 February 2018)
USA-5	-	Emirates press release, "Emirates welcomes 100 <sup>th</sup> A380 to its fleet", (2 November 2017)
USA-8 (HSBI/BCI)	NERA A380 LA/MSF Report	Effects of the [***] Amendment of German LA/MSF for the A350 XWB on Pre-Existing LA/MSF, NERA (19 December 2018)
USA-9	Airbus Annual Report, 2017	Annual Report 2017, Connecting the skies, Airbus
USA-16	-	FlightGlobal, "Airbus assures on A380 break-even this year, David Kaminski-Morrow", (27 February 2015)
USA-26 (HSBI/BCI)	NERA German A350XWB LA/MSF Report	NERA A350 XWB Report
USA-36	-	EFFICOMP Project, CORDIS website
USA-37	-	LPA GAM 2018 Project, CORDIS website
USA-38	-	Aerostructures Manufacturer, Graphene Flagship website
USA-49	Airbus Orders & Deliveries Data	Airbus Orders & Deliveries Data (Nov. 2018)
USA-50	-	A330 Family, Airbus website
USA-51	Airbus A330neo Presentation	The A330neo: Powering into the future, John Leahy, Airbus presentation
USA-53	-	Airbus press release, "Airbus launches the A330neo", (14 July 2014)
USA-54	-	Airbus press release, "AirAsia X orders 34 more A330neo", (19 July 2018)
USA-55	-	Airbus website, "A330-900"
USA-78	-	Airbus website, "A330-800"
USA-119	Clean Sky 2 Joint Undertaking: Work Plan 2018-2019	Clean Sky 2 Joint Undertaking: Work Plan 2018-2019 (October 2018)
USA-126	-	Boeing press release, "Boeing Delivers First Lufthansa 747-8 Intercontinental", (25 April 2012)
USA-128	-	Airbus press release, "Amedeo Firms Up Order for 20 A380s", (12 February 2014)

Exhibit No.	Short Title	Title
USA-129	-	AIN online, "Singapore Order Tally Grows to USD 30 Billion", (12 February 2014)
USA-130	-	Airbus press release, "ANA Group Selects the A380", (29 January 2018)
USA-138	Ascend data	Ascend aircraft database
USA-143	-	Airbus press release, "Virgin Atlantic Selects the A350 XWB as its Future Flagship", (11 July 2016)
USA-144	-	Airways, "First Virgin Atlantic A350-1000 Spotted in Toulouse (+photo)", (25 October 2018)
USA-149	Clean Sky 2 Joint Undertaking: Work Plan 2014-2015	<i>Clean Sky 2 Joint Undertaking: Work Plan 2014-2015</i> (July 2014)
USA-153	Boeing CMO 2015-2034	Boeing Current Market Outlook 2015-2034
USA-158	Updated Ascend data	Updated Ascend aircraft database
USA-173 (HSBI/BCI)	Third NERA German A350XWB LA/MSF Report	Third NERA Report on German A350 XWB LA/MSF

**ABBREVIATIONS USED IN THIS REPORT**

Abbreviation	Description
A320ceo	Airbus A320 "current engine option" aircraft
A320neo	Airbus A320 "new engine option" aircraft
A350XWB	Airbus A350 "eXtra widebody" aircraft
A380	Airbus A380 aircraft
ANA	All Nippon Airways
BCI	business confidential information
BEIS	UK Department of Business, Energy & Industrial Strategy
CEO	Chief Executive Officer
CORDIS	Community Research and Development Information Service
CMO	current market outlook
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EADS	European Aeronautic Defence and Space Company
EC	European Communities
EFFICOMP	Efficient Composite parts manufacturing programme
EUR	Euro
GATT 1994	General Agreement on Tariffs and Trade 1994
GBP	British pound
GmbH	<i>Gesellschaft mit beschränkter Haftung</i>
HSBI	highly sensitive business information
IRR	internal rate of return
KfW	Kreditanstalt Für Wiederaufbau
LA/MSF	Launch Aid/Member State Financing
LCA	large civil aircraft
LPA	large passenger aircraft
LuFo	Luftfahrtforschungsprogramm (Aviation Research Programme)
NERA	National Economics Research Associates
NPV	net present value
PROFIT	Programa de Fomento de la Investigación Técnica (Funding Programme for Technological Research)
PwC	PricewaterhouseCoopers
R&TD	Research and Technological Development
RSP	risk-sharing partner
RSS	risk-sharing supplier
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TRL	Technology readiness level
UK	United Kingdom
US	United States
USD	United States Dollar
VLA	very large aircraft
WTO	World Trade Organization

## 1 INTRODUCTION

### 1.1 Prior proceedings in DS316

1.1. This is the second recourse to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) concerning the alleged failure by the European Union to comply with the Dispute Settlement Body's (DSB) recommendations and rulings in the original proceeding in *EC and Certain member States – Measures Affecting Trade in Large Civil Aircraft*.

1.2. On 1 June 2011, the DSB adopted the Appellate Body report, and the panel report as modified by the Appellate Body report, in *EC and Certain member States – Measures Affecting Trade in Large Civil Aircraft*. The DSB's recommendations called upon the European Union to secure compliance with its WTO obligations in respect of "launch aid" or "member State financing" (LA/MSF) for the A300, A310, A320, A330, A330-200, A340, A340-500/600, and A380 models of large civil aircraft (LCA). The recommendations and rulings also covered certain infrastructure measures, equity infusions and regional development grants.

1.3. On 1 December 2011, the European Union informed the DSB of the steps taken to implement the DSB's recommendations.<sup>1</sup> The United States disagreed with the European Union regarding the sufficiency of the compliance steps communicated by the European Union to the DSB. Following consultations, and at the request of the United States, on 13 April 2012, the DSB referred the parties' disagreement to a compliance panel established under Article 21.5 of the DSU.

1.4. On 28 May 2018, the DSB adopted the reports of the panel and the Appellate Body in the first compliance proceeding. The compliance panel report, as modified by the Appellate Body report, found that the European Union had failed to comply with the DSB recommendations and rulings in connection with LA/MSF for the A350XWB<sup>2</sup> and the A380 models of LCA.

1.5. Prior to the adoption of the panel and the Appellate Body reports in the first compliance proceeding, the European Union notified the DSB on 17 May 2018 of the adoption of a series of additional measures, which the European Union considered to have brought the European Union into full substantive compliance with the DSB's recommendations and rulings. At the meeting of the DSB on 28 May 2019, the United States again expressed its disagreement that the European Union had achieved full substantive compliance with the DSB's recommendations and rulings.<sup>3</sup>

### 1.2 Complaint by the European Union

#### 1.2.1 Request for consultations

1.6. On 29 May 2018, the European Union<sup>4</sup> requested consultations with the United States pursuant to Articles 4 and 21.5 of the DSU, Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Articles 7.1 and 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).<sup>5</sup> The European Union indicated that its request was made with respect to a "disagreement", under Article 21.5 of the DSU, "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB in *EC and Certain member States – Measures Affecting Trade in Large Civil Aircraft*.<sup>6</sup>

1.7. The European Union and the United States held consultations on 27 June 2018, but the consultations failed to resolve the dispute.

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<sup>1</sup> Communication from the European Union, WT/DS316/17.

<sup>2</sup> The A350XWB was launched after the initiation of the original panel proceeding.

<sup>3</sup> DSB, Minutes of the meeting held on 28 May 2018, WT/DSB/M/413.

<sup>4</sup> The European Union replaced and succeeded the European Communities as of 1 December 2009. Unless the context otherwise requires, references in this report to the European Union include the "certain member States" (France, Germany, Spain and the United Kingdom of Great Britain and Northern Ireland ("United Kingdom" or "UK")) against which the United States commenced the original dispute.

<sup>5</sup> Request for consultations by the European Union, WT/DS316/36 (European Union's request for consultations).

<sup>6</sup> European Union's request for consultations.

## 1.2.2 Panel establishment and composition

1.8. On 31 July 2018, the European Union requested the establishment of a panel pursuant to Article 21.5 of the DSU with standard terms of reference.<sup>7</sup> At its meeting on 27 August 2018, the DSB agreed, pursuant to Article 21.5 of the DSU, to refer the dispute to the original panel, if possible.<sup>8</sup>

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

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union and certain member States in document WT/DS316/39 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.10. On 17 September 2018, the European Union requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU, read together with Article 21.5 of the DSU.

1.11. In accordance with these provisions and given the unavailability of two members of the original panel, the Panel was composed on 28 September 2018 as follows<sup>9</sup>:

Chairman: Mr Hugo Cayrús

Members: Mr Christian Etter  
Mr Thinus Jacobsz

1.12. Australia, Brazil, Canada<sup>10</sup>, China, India, Japan and the Russian Federation notified their interest in participating in the Panel proceedings as third parties.

## 1.3 Panel proceedings

### 1.3.1 General

1.13. The Panel held an organizational meeting with the parties on 19 October 2018.

1.14. After consulting the parties, the Panel adopted its Working Procedures<sup>11</sup> and timetable on 23 October 2018. The Panel made various modifications to its timetable throughout the proceeding. On 16 September 2019, the Panel informed the parties of the expected date of the issuance of the Interim Report.

1.15. The European Union and the United States filed their first written submissions on 26 October 2018 and 19 December 2018, respectively. Third parties filed their written submissions on 11 January 2019. The second written submissions of the European Union and the United States were filed on 28 January 2019 and 21 March 2019, respectively.

1.16. The Panel held one substantive meeting with the parties on 7-8 May 2019. A session with the third parties took place on 8 May 2019. At the request of the parties, the Panel's meeting with the parties was opened to the public by means of a delayed video showing. A portion of the Panel's meeting with the third parties was also opened to the public by means of a delayed video showing.<sup>12</sup>

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<sup>7</sup> *EC and certain member States – Large Civil Aircraft*, Recourse to Article 21.5 of the DSU by the European Union: Request for the establishment of a panel, WT/DS316/39, (European Union's panel request).

<sup>8</sup> DSB, Minutes of the meeting held on 27 August 2018, WT/DSB/M/417.

<sup>9</sup> Constitution note of the Panel related to European Union's recourse to Article 21.5 of the DSU, WT/DS316/40 and WT/DS316/40/Rev.1.

<sup>10</sup> See section 1.3.3 below, discussing Canada's request to participate in the proceeding as a third party.

<sup>11</sup> The Panel's Working Procedures are attached in Annex A-1.

<sup>12</sup> See Additional Working Procedures on Open Panel Meetings in Annex A-2. Brazil, Canada and Japan consented to having their statements videotaped for delayed showing. China, India and the Russian Federation did not make any statement.

1.17. The Panel posed questions to the parties and third parties on 10 May 2019.

1.18. On 10 September 2019, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 17 October 2019. The Panel issued its Final Report to the parties on 25 November 2019.

### **1.3.2 Protection of Business Confidential Information and Highly Sensitive Business Information**

1.19. Before the organisational meeting, the European Union sent a letter to the Panel asking the Panel to adopt additional procedures for the protection of confidential and highly sensitive business information. After consulting the parties, the Panel adopted the Additional Procedures to Protect Business Confidential Information and Highly Sensitive Business Information (BCI/HSBI Procedures) on 23 October 2018.<sup>13</sup>

### **1.3.3 Canada's request to participate in the proceeding as a third party**

1.20. On 30 November 2018, Canada sent a letter to the Chairman of the Panel, the parties and the Chair of the DSB, requesting the Panel's authorization to participate in these compliance proceedings as a third party.<sup>14</sup> In its letter, Canada submitted that it had omitted to notify the DSB of its third-party interest due to internal coordination issues.<sup>15</sup> Canada further submitted that it had a "substantial interest" in the present dispute in light of Canada's participation as the responding party in *Canada – Measures Concerning Trade in Commercial Aircraft*.<sup>16</sup> Canada also submitted that it would not be unprecedented for the Panel to accept its request, nor would it interfere with the due process rights of the parties to the proceeding.<sup>17</sup>

1.21. The Panel asked the parties and third parties to comment on Canada's request, considering that Canada made its request more than three months after the Panel was established on 27 August 2018. The European Union indicated it has no objection to Canada's request.<sup>18</sup> The United States also agreed with Canada's request.<sup>19</sup> Third parties provided no comments on Canada's request.

1.22. On 7 December 2018, the Panel informed the parties and third parties that it had decided to accept Canada's request. In reaching its decision, the Panel carefully considered the relevant provisions of the DSU and the relevant practice concerning third-party notifications made after panel composition. The Panel also considered that Canada's incorporation to the proceeding would not disturb the development of the proceeding and would not impair the due process rights of the parties, who had, in fact, expressed no objections on Canada's request.

### **1.3.4 Preliminary ruling on the Panel's terms of reference**

1.23. On 21 December 2018, following the United States' issuance of its first written submission, the European Union requested the Panel to rule that the United States' claims in relation to certain European research and technological development (R&TD) measures are not within or properly within the scope of this compliance proceeding. The European Union asked "the Panel, urgently and on a preliminary basis, to find that the United States' claims in relation to the R&TD measures are not properly within the scope of the Panel's terms of reference".<sup>20</sup>

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<sup>13</sup> The BCI/HSBI Procedures were subsequently revised several times. The final version is attached in Annex A-3.

<sup>14</sup> Canada's communication (30 November 2018).

<sup>15</sup> Specifically, Canada submitted that unexpected staff changes at Canada's Permanent Mission to the WTO in August 2018, coupled with miscommunications between Canada's Geneva- and capital-based officials, resulted in Canada not notifying its third-party interest at the DSB meeting in which the Panel was established or during the ten-day notification period following that meeting. (Canada's letter dated 30 November 2018).

<sup>16</sup> Canada's communication (30 November 2018).

<sup>17</sup> Canada's communication (30 November 2018).

<sup>18</sup> European Union's communication (30 November 2018).

<sup>19</sup> United States' communication (4 December 2018).

<sup>20</sup> European Union's request for a preliminary ruling, para. 1.

1.24. After seeking the views of the United States, the Panel decided on 11 January 2019 to deny the European Union's request for a preliminary ruling, finding that the mere fact that the R&TD measures are not specifically identified in the European Union's panel request should not preclude the Panel from considering the United States' arguments related to the R&TD measures. The Panel indicated that its decision to deny the European Union's request for a preliminary ruling and consider the United States' arguments concerning the R&TD measures was without prejudice to either party's right to advance further arguments regarding whether the United States is otherwise precluded from raising claims concerning those measures, or regarding the merits of the United States' claims. Accordingly, the Panel invited the parties to address the matters related to these measures in their submissions to the Panel.<sup>21</sup>

1.25. The Panel's findings and underlying reasoning in relation to the European Union's preliminary ruling request are set out in section 7.3 below.

### **1.3.5 Request to file an additional submission regarding the future of the A380 LCA programme**

1.26. On 25 February 2019, the European Union requested leave to file an additional submission addressing the implications of Airbus' announcement on 14 February 2019 to wind down the A380 programme and to complete all deliveries by 2021.<sup>22</sup> The European Union argued that Airbus' announcement has a direct bearing on the object of these compliance proceedings. Specifically, the European Union argued that the announcement is a "relevant fact that provides evidence of compliance with the DSB's recommendations and rulings"; "is an event that falls within the terms of the European Union's Panel Request"; and "is inextricably linked to, and falls within a continuum of, measures that have explicitly been identified in the EU Panel Request as achieving compliance under Article 7.8".<sup>23</sup> The European Union further argued that it is necessary for the Panel to take this event into account as part of its mandate of determining whether the European Union has achieved compliance.<sup>24</sup>

1.27. After seeking the views of the United States, the Panel decided on 28 February 2019 to grant the European Union's request to file the additional submission regarding Airbus' 14 February 2019 announcement. Taking into account the timing of the European Union's request, the Panel also decided to extend the United States' deadline to file its second written submission by two weeks to ensure that the United States had an adequate opportunity to address the European Union's additional submission.<sup>25</sup>

### **1.3.6 Request relating to the United States' comments**

1.28. On 12 July 2019, the European Union requested the Panel to issue a ruling rejecting as "untimely filed" certain arguments and evidence contained in the United States' comments on the European Union's responses to the Panel's questions following the substantive meeting.<sup>26</sup> The European Union requested the Panel to either: (i) reject as "untimely filed" certain new arguments and evidence; or alternatively, (ii) afford the European Union an opportunity to comment on the alleged new arguments and evidence, if the Panel were to decline to reject those arguments and evidence as untimely filed.<sup>27</sup> The European Union additionally requested the Panel to deny various United States requests to pose unnecessary additional questions to the European Union, and further deny what the European Union considers to be an assertion made by the United States that the European Union did not engage in good faith in the first compliance proceedings.<sup>28</sup> The

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<sup>21</sup> Panel communication to the parties regarding the European Union's preliminary ruling request (11 January 2019).

<sup>22</sup> European Union's communication (25 February 2019).

<sup>23</sup> European Union's communication (25 February 2019), p. 2.

<sup>24</sup> European Union's communication (25 February 2019), p. 3. The European Union further argued that granting the European Union leave to file a submission concerning the A380 programme wind-down does not undermine the due process rights of the United States or third parties. (European Union's communication (25 February 2019), p. 3).

<sup>25</sup> Panel communication to the parties regarding the United States' request to extend filing deadline (28 February 2019).

<sup>26</sup> European Union's communication (12 July 2019).

<sup>27</sup> European Union's communication (12 July 2019), pp. 5-7.

<sup>28</sup> European Union's communication (12 July 2019), pp. 7-11.

European Union argued that the United States' belated and untimely filing of new arguments and evidence, as well as its invitation to the Panel to pose additional questions to the European Union, appear designed to prolong the proceeding, and raised serious due process concerns.<sup>29</sup>

1.29. On 5 August 2019, the Panel declined the European Union's request to reject the United States' arguments and evidence but decided to provide the European Union an opportunity to comment on certain of the arguments and evidence that the European Union had identified. The Panel additionally declined the European Union's request to deny any United States requests to pose additional questions to the European Union. The Panel did not consider it necessary to address the European Union's request concerning whether the European Union engaged in good faith in the first compliance proceeding.

1.30. The Panel's findings and underlying reasoning in relation to the European Union's ruling request are set out in Annex D-1 of this Report.

## **2 FACTUAL ASPECTS**

### **2.1 Product at issue**

2.1. The product at issue in this dispute is the same as the product that was the subject of the original proceeding and the first compliance proceeding, i.e. LCA, as distinguished from smaller (regional) aircraft and military aircraft. LCA can generally be described as large (weighing over 15,000 kg) "tube and wing" aircraft, with turbofan engines carried under low-set wings, designed for subsonic flight. LCA are designed for transporting 100 or more passengers and/or a proportionate amount of cargo across a range of distances serviced by airlines and air freight carriers. LCA are covered by tariff classification heading 8802.40 of the Harmonized System ("Airplanes and other aircraft, of an unladen weight exceeding 15,000 kg").<sup>30</sup>

### **2.2 Measures at issue**

2.2. On 17 May 2018, the European Union filed a communication informing the DSB that the European Union has adopted a series of additional measures to comply that, in the European Union's view, constitute "appropriate steps to address the remaining and additional elements of the DSB's recommendations and rulings, either through the withdrawal of subsidies or the removal of the adverse effects".<sup>31</sup> Those measures are discussed in further detail in section 7.2 below.

## **3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS**

3.1. The European Union requests that the Panel find that the European Union and certain member States have achieved full substantive compliance with the recommendations and rulings of the DSB, within the meaning of Article 7.8 of the SCM Agreement. Specifically, the European Union submits that it has withdrawn the A380-related LA/MSF subsidies and the German and UK LA/MSF subsidies for the A350XWB. In the event that the Panel finds that these subsidies have not been withdrawn, the European Union submits that appropriate steps have been taken to remove their adverse effects. Additionally, the European Union submits that it has taken appropriate steps to remove the adverse effects of the French and Spanish A350XWB LA/MSF subsidies.<sup>32</sup>

3.2. The United States requests that the Panel reject the entirety of the European Union's claims that the European Union has brought its measures "into full compliance with its WTO obligations".<sup>33</sup>

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<sup>29</sup> European Union's communication (12 July 2019), p. 2.

<sup>30</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 2.1.

<sup>31</sup> Communication by the European Union, WT/DS316/34 (Compliance communication), para. 12.

<sup>32</sup> European Union's first written submission, para. 405; and second written submission, para. 554.

<sup>33</sup> United States' first written submission, para. 305; and second written submission, para. 360.

## 4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 22 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

## 5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada and Japan are reflected in their executive summaries, provided in accordance with paragraph 22 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2 and C-3). Australia, China, India and the Russian Federation did not submit written or oral arguments to the Panel.

## 6 INTERIM REVIEW

6.1. On 17 October 2019, the Panel issued its Interim Report to the parties. On 31 October 2019, the European Union and the United States submitted their written requests for review. On 14 November 2019, the parties submitted comments on the other parties' written requests for review.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-4.

## 7 FINDINGS

### 7.1 Introduction

#### 7.1.1 Procedural background

7.1. This proceeding represents the second occasion on which a Panel has been established under Article 21.5 of the DSU to rule on whether the European Union has achieved compliance with the DSB's adopted recommendations and rulings in *EC and certain member States – Large Civil Aircraft*.

##### 7.1.1.1 Original proceeding

7.2. In the original proceeding in this dispute, the United States claimed that the European Communities and certain of its member States 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). The original panel found that the United States had demonstrated that the European Communities and certain member States had caused adverse effects, in the form of certain kinds of serious prejudice to the United States' interests, within the meaning of Articles 5(c), 6.3(a), (b) and (c) of the SCM Agreement, through the use of specific subsidies. These findings pertained to the use of LA/MSF for the A300, A310, A320, A330, A330-200, A340, A340-500/600, and A380 LCA models; the use of certain challenged equity infusions and infrastructure measures, and research and technological development (R&TD) funding provided by the European Communities and certain member States.<sup>34</sup> The original panel also concluded that the United States had established that the German, Spanish and UK A380 LA/MSF agreements constituted prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement.<sup>35</sup>

7.3. On appeal, the Appellate Body reversed the original panels' finding that the German, Spanish and UK A380 LA/MSF agreements constituted prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement, and was unable to complete the legal analysis

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<sup>34</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.290(a)(i)-(vii), 7.482-7.496, and 8.1(a)(i) 7.1245-7.1249, 7.1302, 7.1323-7.1326, 7.1380-7.1384, 7.1414, and 8.1(c) and (d), and 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).

<sup>35</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.689 and 8.1(a)(ii).

with regard to Article 3.1(a).<sup>36</sup> The Appellate Body, however, upheld the original panel's conclusion that the effects of the challenged LA/MSF measures caused serious prejudice to the United States' interests within the meaning of Article 6.3(a), (b) and (c) of the SCM Agreement.<sup>37</sup> In addition, the Appellate Body upheld the original panel's findings that the effects of the challenged equity infusions and infrastructure measures "complemented and supplemented" the effects of the challenged LA/MSF measures<sup>38</sup>, while reversing the original panel's finding that the R&TD subsidies "complemented and supplemented" the effects of the LA/MSF measures.<sup>39</sup>

7.4. The Appellate Body report and the report of the original panel, as modified by the Appellate Body report, were adopted by the DSB on 1 June 2011.<sup>40</sup> The DSB recommended that the European Communities and certain member States comply with the Panel's recommendation pursuant to Article 7.8 of the SCM Agreement, 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'".<sup>41</sup>

### 7.1.1.2 First compliance proceeding

7.5. Following the adoption of the original panel report and the Appellate Body report, on 1 December 2011, the European Union filed a communication informing the DSB that it had taken "appropriate steps to bring its measures fully into conformity with its WTO obligations, and to comply with the DSB's recommendations and rulings".<sup>42</sup> 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.<sup>43</sup> On 13 April 2012, the DSB referred the parties' disagreement to a first compliance panel established under Article 21.5 of the DSU.<sup>44</sup> The first compliance panel circulated its report on 22 September 2016.

7.6. The panel in the first compliance proceeding concluded that the United States had failed to demonstrate that the A380 and A350XWB LA/MSF subsidies are prohibited export and/or prohibited import substitution subsidies within the meaning of Articles 3.1 and 3.2 of the SCM Agreement.<sup>45</sup> The first compliance panel, however, rejected the European Union's argument that the expiration of the lives of certain subsidies amounted to "withdrawal" of those subsidies for the purpose of Article 7.8.<sup>46</sup> The first compliance panel concluded that the effects arising from the LA/MSF subsidies provided for the A300, A310, A320, A330, A330-200, A340, A340-500/600, A380 and A350XWB, caused serious prejudice to the United States' interests within the meaning of Article 6.3(a), (b) and

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<sup>36</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1414(j) and 1415(b).

<sup>37</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1414(e)(iv), (l), (m), (p), and (q).

<sup>38</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1414(g) and (r).

<sup>39</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1414(s).

<sup>40</sup> DSB, Minutes of the meeting held on 1 June 2011, WT/DSB/M/297.

<sup>41</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 8.7; Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1416 and 1418.

<sup>42</sup> Communication from the European Union dated 1 December 2011, WT/DS316/17, 5 December 2011, para. 1. The European Union provided "information concerning the steps" it had taken to achieve compliance in a list containing 36 numbered paragraphs attached to its communication. (Communication from the European Union dated 1 December 2011, WT/DS316/17, 5 December 2011, para. 3).

<sup>43</sup> Communication by the United States, WT/DS316/19 and Corr.1 (Request for Consultations). On 9 December 2011, the United States also requested the DSB to authorise countermeasures against the European Union in accordance with Article 7.9 of the SCM Agreement and Article 22.2 of the DSU (WT/DS316/18). At the DSB meeting of 22 December 2011, the European Union objected to the level of countermeasures proposed by the United States and also claimed that the United States had not followed the principles and procedures set forth in Article 22.3 of the DSU. As a result, the matter was referred to arbitration under Article 22.6 of the DSU (WT/DS316/20). On 12 January 2012, the European Union and the United States concluded an agreement, pursuant to which the parties agreed to request the arbitrator to suspend its work (WT/DS316/21; WT/DS316/22). Following a request from the United States on 13 July 2018, the arbitrator agreed to resume its work.

<sup>44</sup> Constitution of the panel, WT/DS316/24.

<sup>45</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 7.1(c)(ii) and (iii).

<sup>46</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 7.1(d)(viii)-(ix).

(c) of the SCM Agreement in the single-aisle LCA, twin-aisle LCA and Very Large Aircraft (VLA) markets.<sup>47</sup> By continuing to be in violation of Articles 5(c) and 6.3(a), (b) and (c) of the SCM Agreement, the first compliance panel concluded that the European Union and certain member States had failed to comply with the DSB recommendations and rulings.<sup>48</sup>

7.7. The report of the compliance panel was appealed by both parties, and the Appellate Body circulated its report on 15 May 2018. The Appellate Body reversed the compliance panel's interpretation of Article 7.8 of the SCM Agreement, as well as its finding that the European Union's compliance obligations extended to the LA/MSF subsidies provided for the A300, A310, A320, A330, A330-200, A340, and A340-500/600. According to the Appellate Body, no compliance obligation existed in relation to these LA/MSF subsidies because, in each case, the "lives" of the subsidies had expired before the end of the European Union's implementation period - 1 December 2011.<sup>49</sup> The Appellate Body also reversed the compliance panel's findings under Articles 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement insofar as they related to the single-aisle LCA market.<sup>50</sup> However, the Appellate Body upheld the compliance panel's conclusions that the European Union and certain member States had failed to comply with the DSB recommendations and rulings insofar as the "lives" of the LA/MSF subsidies provided for the A380 and A350XWB had not expired, and continued to cause adverse effects in the twin-aisle LCA and Very Large Aircraft (VLA) markets in the post-implementation period.<sup>51</sup> The DSB adopted the Appellate Body report and the report of the compliance panel, as modified by the Appellate Body report, on 28 May 2018.<sup>52</sup>

### 7.1.1.3 Second compliance proceeding

7.8. Prior to the DSB's adoption of the reports of the panel and the Appellate Body in the first compliance proceedings, the European Union informed the DSB on 17 May 2018 that it had adopted a series of additional measures that, in the European Union's view, constitute "appropriate steps to address the remaining and additional elements of the DSB's recommendations and rulings, either through the withdrawal of subsidies or the removal of the adverse effects".<sup>53</sup> In a statement at the DSB meeting of 28 May 2018, the United States expressed the view that the European Union had not yet fully complied with the recommendations and rulings of the DSB.<sup>54</sup>

7.9. On 29 May 2018, the European Union requested consultations with the United States with respect to their "disagreement", under Article 21.5 of the DSU, "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB.<sup>55</sup> The United States and the European Union held consultations on 27 June 2018, but the consultations failed to resolve the dispute. On 27 August 2018, the DSB referred the parties' disagreement to a second compliance panel established under Article 21.5 of the DSU.<sup>56</sup>

### 7.1.2 The Panel's task in this compliance proceeding

7.10. The European Union initiated this compliance proceeding in light of its disagreement with the United States as to whether it has achieved full substantive compliance with the recommendations

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<sup>47</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 7.1(d)(xiv)-(xvi).

<sup>48</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 7.2.

<sup>49</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.11(a) and 6.12(a).

<sup>50</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.27(a).

<sup>51</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.43(a) and (b).

<sup>52</sup> Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU, *Action by the Dispute Settlement Body*, WT/DS316/35.

<sup>53</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, para. 12.

<sup>54</sup> DSB, Minutes of the meeting held on 28 May 2018, WT/DSB/M/413. ("Based on the US review since WTO Members had received this communication, the EU document did not reflect new developments that might somehow resolve this long-standing dispute").

<sup>55</sup> European Union's request for consultations.

<sup>56</sup> DSB, Minutes of the meeting held on 27 August 2018, WT/DSB/M/417.

and rulings of the DSB following the adoption of the panel and the Appellate Body reports in the first compliance proceeding.

7.11. As in the first compliance proceeding, our task here is to decide and resolve the dispute between the parties arising out of their "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings". We must evaluate whether the European Union has achieved full, substantive, compliance with the requirements of Article 7.8 of the SCM Agreement, which defines an implementing Member's obligation in compliance disputes involving actionable subsidies<sup>57</sup> in the following terms:

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.

7.12. In this proceeding, the European Union asserts that it has taken steps that achieve full substantive compliance with the DSB's recommendations and rulings. Through these steps, the European Union argues that it has demonstrated that there are currently no non-withdrawn subsidies that cause present adverse effects, and thus, it can no longer be demonstrated that the European Union is causing nullification or impairment to the United States or the US LCA industry that would entitle the United States to adopt countermeasures.<sup>58</sup> Specifically, the European Union argues that it has withdrawn all of the A380 LA/MSF subsidies and the German and UK A350XWB LA/MSF subsidies that were found to cause adverse effects in the preceding stages of this dispute, thereby achieving full substantive compliance in respect of those subsidies and their adverse effects. In addition, the European Union argues that it has also demonstrated that it has taken steps to remove any adverse effects of those subsidies and the French and Spanish A350XWB LA/MSF subsidies. The European Union maintains that it has no compliance obligations with respect to any other subsidies.

7.13. Rather than achieving compliance, the United States argues that the actions taken by the European Union have exacerbated the European Union's non-compliance. The United States contends that the European Union has failed to demonstrate the withdrawal of any of the LA/MSF subsidies covered by the DSB's recommendations and rulings. The United States argues that a series of amendments to the original A380 LA/MSF agreements and the original German A350XWB LA/MSF agreement have both increased the amount of the subsidies provided to Airbus and prolonged their "lives". The United States furthermore argues that the repayment of the UK A350XWB LA/MSF simply reflects Airbus' fulfilment of the terms of an agreement that was already found to constitute a WTO-inconsistent subsidy, and not a step that achieves compliance. In addition, the United States maintains that the European Union has failed to remove the extensive, on-going adverse effects that the LA/MSF subsidies were found to cause. Finally, the United States submits that the European Union has maintained and expanded the use of certain research and technological development (R&TD) subsidies, which alone or together with the LA/MSF subsidies at issue in this dispute, continue to cause adverse effects to the United States' interests.

7.14. We begin our assessment of the merits of the parties' submissions by reviewing the steps the European Union alleges have either withdrawn the LA/MSF subsidies or otherwise removed the adverse effects of any of the LA/MSF subsidies that have not been withdrawn.<sup>59</sup> We then turn to examine the United States' contention that our assessment of the European Union's compliance must take into account the alleged effects of a series of R&TD measures, which the European Union maintains are not properly within the scope of this proceeding, before addressing the disagreement between the parties as to whether the European Union and certain member States have complied with their obligations under Article 7.8 of the SCM Agreement.

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<sup>57</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 235.

<sup>58</sup> European Union's first written submission, para. 7.

<sup>59</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, p. 3.

## 7.2 The European Union's 17 May 2018 compliance communication to the DSB

### 7.2.1 Introduction

7.15. On 17 May 2018, the European Union informed the DSB that it had adopted a series of measures, which according to the European Union "achieve the withdrawal of the subsidies at issue, constitute appropriate steps to remove their adverse effects, or both"<sup>60</sup>, thereby bringing the European Union into compliance with the DSB's recommendations and rulings.<sup>61</sup>

7.16. The European Union identified the measures or steps that it allegedly took to achieve compliance listing 18 numbered items.<sup>62</sup> Certain of the measures or steps took place in close proximity with the adoption of the recommendations and rulings in the first compliance proceeding; while others did not, and either pre-dated or post-dated the adoption of the recommendations and rulings in this dispute, or the European Union's compliance communication of 17 May 2018.

7.17. We briefly describe below our understanding of the European Union's compliance measures, as articulated in the European Union's 17 May 2018 compliance communication to the DSB and further discussed in the parties' submissions in this dispute. The European Union's asserted measures or steps taken to achieve compliance are broadly divided into two main categories: (i) measures alleged to achieve withdrawal of the A380 and A350XWB LA/MSF subsidies and to contribute to removal of their adverse effects (section 7.2.2 below); and (ii) measures alleged to constitute appropriate steps to remove the adverse effects of any non-withdrawn A380 and A350XWB LA/MSF subsidies (section 7.2.3 below).

### 7.2.2 Measures alleged to achieve withdrawal of the A380 LA/MSF and A350XWB LA/MSF subsidies and to contribute to the removal of their adverse effects within the meaning of Article 7.8 of the SCM Agreement

#### 7.2.2.1 The [\*\*\*] amendments to the French, German, Spanish and UK A380 LA/MSF agreements (measures 1–4)

7.18. The first compliance measures the European Union lists in its 17 May 2018 notification to the DSB are four amendments made to the original A380 LA/MSF agreements between Airbus and France, Germany, Spain and the United Kingdom. The German A380 LA/MSF amendment was concluded on [\*\*\*], the French A380 LA/MSF amendment on [\*\*\*], the UK A380 LA/MSF amendment on [\*\*\*], and the Spanish A380 LA/MSF amendment on [\*\*\*].<sup>63</sup> The European Union argues that these amendments "achieve prospective consistency {of the A380 LA/MSF measures} with a contemporaneous market benchmark" thereby procuring the "withdrawal of the subsidies conferred by each of the A380 MSF loans".<sup>64</sup>

7.19. According to the European Union, Airbus and the four member States concluded the four A380 LA/MSF loan amendments at a point in time when Airbus faced faltering demand for the A380 and needed to make a critical decision as to whether to continue the programme or [\*\*\*].<sup>65</sup> The European Union submits that the amendments were advantageous to the member State lenders because failing to do so would mean "the member State lenders would have suffered significant losses on their MSF investments, given the risk sharing and success-dependent nature of the

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<sup>60</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, para. 13.

<sup>61</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, para. 14.

<sup>62</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, para. 15.

The 18 "steps" identified by the European Union are described and explained in more detail below.

<sup>63</sup> European Union's first written submission, para. 144; [\*\*\*] French A380 LA/MSF Amendment, (Exhibit EU-21 (BCI)); [\*\*\*] German A380 LA/MSF Amendment, (Exhibit EU-20 (HSBI/BCI) (English translation)); [\*\*\*] Spanish A380 LA/MSF Amendment, (Exhibit EU-23 (BCI)); and [\*\*\*] UK A380 LA/MSF Amendment, (Exhibit EU-22 (BCI)).

<sup>64</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, para. 19.

<sup>65</sup> European Union's first written submission, paras. 128-129 and 142; PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), Section C.II; and Minutes of a meeting of the board of directors of Airbus SE, [\*\*\*], (Exhibit EU-18 (HSBI)), p. 2.

A380 MSF loans".<sup>66</sup> Thus, in the view of the European Union, the amendments would "enable the lenders to salvage their investments".<sup>67</sup>

7.20. The four A380 LA/MSF amendments are discussed in further detail in section 7.4.5.1.2.1 below. While the terms of the amendments differ, a core feature of each amendment [\*\*\*]. In this respect, the European Union explains that the amendments are designed to ensure that Airbus would receive [\*\*\*].<sup>68</sup> In particular, Emirates Airlines had been the main A380 customer and considered ordering additional A380 aircraft [\*\*\*].<sup>69</sup>

7.21. The United States submits that the [\*\*\*] amendments represent nothing more than "Airbus' successful attempt to shift from itself to the funding governments the mounting costs of keeping the A380 program alive" following "many years of lower-than-anticipated demand for the A380, as well as massive problems pertaining to production and supply chain".<sup>70</sup> Rather than achieving the withdrawal of the subsidies, the United States argues that the amendments "increased the projected amounts of the subsidies and prolonged their lives"<sup>71</sup>, and therefore, "agreeing to these amendments, the Airbus governments conformed to their decades-old pattern of propping up Airbus' risky LCA ventures with massive subsidies".<sup>72</sup> Accordingly, the United States argues that the [\*\*\*] amendments fail to bring the European Union into compliance with the DSB's recommendations and rulings in respect of the A380 LA/MSF subsidies.

### 7.2.2.2 The [\*\*\*] amendment to the German A350XWB LA/MSF agreement (measure 5)

7.22. The European Union identifies a [\*\*\*] amendment to the German A350XWB LA/MSF Agreement as one of the compliance steps. According to the European Union, this amendment ensures that the German A350XWB LA/MSF contract is consistent "with a contemporaneous market benchmark, such that the subsidy conferred by German A350XWB MSF is withdrawn".<sup>73</sup>

7.23. Airbus and Kreditanstalt für Wiederaufbau (KfW) signed the original German A350XWB LAMSF agreement on [\*\*\*]. Under the loan agreement, Airbus was entitled to draw-down [\*\*\*] for the purpose of funding a portion of the development costs related to the Airbus A350XWB.<sup>74</sup> Airbus drew [\*\*\*]. Airbus drew-down [\*\*\*].<sup>75</sup> On [\*\*\*], Airbus and KfW agreed to amend the original loan agreement.<sup>76</sup> The preamble to the amendment states that Airbus had "asked KfW to [\*\*\*] the arrangements it had entered into in order to [\*\*\*] on the loan tranches, and to provide {Airbus} with new [\*\*\*] for these [\*\*\*]".<sup>77</sup> The preamble also states that "[\*\*\*]".<sup>78</sup> Overall, the European Union submits that the [\*\*\*] amendment retains the basic structure of the original

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<sup>66</sup> European Union's first written submission, para. 140; PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), Section F.II, Table 15; Minutes of a meeting of the board of directors of Airbus SE, [\*\*\*], (Exhibit EU-18 (HSBI)), p. 4 item (A).

<sup>67</sup> European Union's first written submission, para. 129; PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), Section F.II, Table 15; Minutes of a meeting of the board of directors of Airbus SE, [\*\*\*], (Exhibit EU-18 (HSBI)), p. 4 item (A). The European Union submits that only the [\*\*\*] would avoid any losses from programme termination because, [\*\*\*]. (See [\*\*\*]; PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), [\*\*\*]).

<sup>68</sup> European Union's first written submission, para. 128, PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), Section C.II.

<sup>69</sup> European Union's first written submission, para. 129; Minutes of a meeting of the board of directors of Airbus SE, [\*\*\*], (Exhibit EU-18 (HSBI)); and PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 39.

<sup>70</sup> United States' first written submission, para. 25.

<sup>71</sup> United States' first written submission, para. 41.

<sup>72</sup> United States' first written submission, para. 27.

<sup>73</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, para. 21.

<sup>74</sup> German A350XWB LA/MSF Agreement, (Exhibit EU-10 (HSBI/BCI) (English translation)), Clause 3.2; and Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.237.

<sup>75</sup> In [\*\*\*], Airbus and KfW agreed to a [\*\*\*] to the original agreement, which introduced changes to the disbursement schedule, [\*\*\*]. (Email from [\*\*\*], 20 March 2015, (Exhibit EU-106 (BCI) (English translation)); and TradeRx A350XWB LA/MSF Report, (Exhibit EU-11 (HSBI/BCI)), para. 35).

<sup>76</sup> German A350XWB [\*\*\*] amendment, (Exhibit EU-9 (BCI) (English translation)). [\*\*\*]. (See KPMG Assessment of [\*\*\*], (Exhibit EU-105 (BCI)), p. 5).

<sup>77</sup> German A350XWB [\*\*\*] amendment, (Exhibit EU-9 (BCI) (English translation)), preamble.

<sup>78</sup> German A350XWB [\*\*\*] amendment, (Exhibit EU-9 (BCI) (English translation)), preamble.

A350XWB LA/MSF loan by continuing to provide for (a) [\*\*\*]<sup>79</sup>; (b) repayments of principal over deliveries of A350XWB aircraft<sup>80</sup>; (c) [\*\*\*]<sup>81</sup>, and (d) [\*\*\*].<sup>82</sup>

7.24. The United States submits that, like the [\*\*\*] A380 LA/MSF amendments, the [\*\*\*] amendment to German LA/MSF for the A350XWB "increased the pre-existing LA/MSF subsidy and prolonged its life", which "made Airbus better off financially than it otherwise would have been".<sup>83</sup> Accordingly, the United States argues that the amendment took the European Union further out of compliance with the DSB's recommendations and rulings from the first compliance proceeding.

### **7.2.2.3 Repayment of outstanding UK A350XWB LA/MSF in 2018 (measure 6)**

7.25. The European Union asserts that on [\*\*\*], Airbus repaid the full outstanding principal and interest accrued under the UK A350XWB LA/MSF loan contract, such that the subsidy conferred by UK A350XWB LA/MSF has been withdrawn.<sup>84</sup> Specifically, the European Union refers to a payment of [\*\*\*] made to the UK Department of Business, Energy & Industrial Strategy (BEIS) on [\*\*\*].<sup>85</sup>

7.26. The United States does not dispute that Airbus made the specified payment on [\*\*\*]. The United States disputes, however, that this payment amounts to [\*\*\*].<sup>86</sup> Furthermore, the United States argues that repaying a subsidised loan on its own subsidised terms does not result in withdrawal for purposes of Article 7.8 of the SCM Agreement, in line with findings by the first compliance panel.<sup>87</sup> Accordingly, the United States considers that the European Union has failed to achieve compliance with the DSB's recommendations and rulings in respect of UK A350XWB LA/MSF.

### **7.2.2.4 Withdrawal, through amortisation of the "benefit" conferred by the A380 and A350XWB LA/MSF agreements (measures 7 and 8)<sup>88</sup>**

7.27. The European Union also refers to the amortisation of the "benefit" conferred by the A380 LA/MSF agreements and A350XWB LA/MSF agreements in its 17 May 2018 compliance notification.<sup>89</sup> In the course of this proceeding, the European Union submitted an analysis conducted by TradeRx GmbH of the expected life of the A380 LA/MSF and A350XWB LA/MSF subsidies found to have been conferred by the original panel and the first compliance panel. Consistent with the approach taken by TradeRx, in its submissions to the Panel, the European Union argues that the full amortization of the benefit under the Spanish A380 LA/MSF loan will occur by [\*\*\*], thereby achieving the withdrawal for purposes of Article 7.8 and bringing the European Union into compliance with respect to that subsidy.<sup>90</sup> The European Union does not argue that any of the other A380 LA/MSF or A350XWB LA/MSF subsidies have been withdrawn through full amortization of benefit.

7.28. The United States has criticized the European Union's reliance on the TradeRx report and the approach followed in that report. The United States thus disagrees that the TradeRx analysis can provide a basis for finding that any of the LA/MSF loans have been withdrawn for purposes of

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<sup>79</sup> German A350XWB [\*\*\*] amendment, (Exhibit EU-9 (BCI) (English translation)), para. 36.

<sup>80</sup> German A350XWB [\*\*\*] amendment, (Exhibit EU-9 (BCI) (English translation)), Annex 2; and TradeRx A350XWB LA/MSF Report, (Exhibit EU-11 (HSBI/BCI)), para. 39.

<sup>81</sup> German A350XWB [\*\*\*] amendment, (Exhibit EU-9 (BCI) (English translation)), Clause 4; and TradeRx A350XWB LA/MSF Report, (Exhibit EU-11 (HSBI/BCI)), para. 40.

<sup>82</sup> German A350XWB [\*\*\*] amendment, (Exhibit EU-9 (BCI) (English translation)); and TradeRx A350XWB LA/MSF Report, (Exhibit EU-11 (HSBI/BCI)), para. 40.

<sup>83</sup> United States' first written submission, para. 87.

<sup>84</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, para. 22. See also European Union's first written submission, paras. 86-89; and second written submission, paras. 59-72.

<sup>85</sup> European Union's first written submission, para. 88; BEIS Invoice to Airbus, [\*\*\*], (Exhibit EU-8 (BCI)); and BEIS Letter to Airbus, [\*\*\*], (Exhibit EU-7 (BCI)).

<sup>86</sup> United States' response to Panel question No. 18, para. 47.

<sup>87</sup> United States' first written submission, para. 101.

<sup>88</sup> In the "List of Measures Taken To Comply" in paragraph 15 of the European Union's compliance notification, the European Union refers to the withdrawal, through amortisation or otherwise, of the 'benefit' conferred by the French, German, Spanish and UK A380 LA/MSF Agreements and A350XWB LA/MSF Agreements, both in the context of achieving withdrawal of the subsidies and as constituting an appropriate step to remove adverse effects. (See Communication from the European Union dated 17 May 2018, WT/DS316/34, paras. 15(A)(vii), 15(A)(viii), 15(B)(ix) and 15(B)(xiv)).

<sup>89</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, paras. 20-23.

<sup>90</sup> European Union's first written submission, paras. 177-181.

Article 7.8. In addition, the United States considers that the European Union's argument that Spanish A380 LA/MSF has been withdrawn fails to take into account that the Spanish government negotiated to amend the terms and conditions of A380 LA/MSF in [\*\*\*], which extended the life of Spanish A380 LA/MSF "well past [\*\*\*]", according to the United States.<sup>91</sup>

### **7.2.3 Measures alleged to constitute appropriate steps to remove the adverse effects of the A380 LA/MSF and A350XWB LA/MSF subsidies within the meaning of Article 7.8 of the SCM Agreement**

#### **7.2.3.1 Amortisation of the "benefit" conferred by the A380 LA/MSF agreements and A350XWB LA/MSF agreements (measures 9 and 14)**

7.29. In addition to addressing the alleged amortization of benefit in connection with its argument that the A380 LA/MSF and A350XWB LA/MSF subsidies have been withdrawn for purposes of Article 7.8 (see section 7.2.2.4 above), the European Union submits that the amortisation of the benefit conferred by the French, German, Spanish and UK A380 LA/MSF and A350XWB LA/MSF subsidies is also a relevant factor that must be taken into account in determining whether the A380 LA/MSF and A350XWB LA/MSF subsidies continue at present to be a genuine and substantial cause of present adverse effects, for purposes of assessing whether the European Union has taken steps to remove adverse effects of any non-withdrawn subsidies.<sup>92</sup>

7.30. As explained in paragraph 7.28, the United States rejects the approach taken in the TradeRx report to assess the expected life of each of the loans.<sup>93</sup> The United States also submits that the European Union has not established that an assessment of the supposed reduction in benefit through amortization of LA/MSF is relevant to assessing whether the adverse effects of the subsidies continue, considering the "product effects" causal pathway that was established to exist.<sup>94</sup>

#### **7.2.3.2 Non-subsidised investments in A380 and A350XWB family aircraft (measures 10 and 15)**

7.31. As an additional compliance "step", the European Union submits that alleged significant post-launch, non-subsidised investments that Airbus made in the A380 and A350XWB families of LCA, which, according to the European Union, attenuate the requisite causal link between the subsidy and any alleged present adverse effects, such that the A380 or A350XWB LA/MSF can no longer be considered a genuine and substantial cause of sales or deliveries of either aircraft or any associated adverse effects.<sup>95</sup> For both the A380 and the A350XWB programmes, the European Union alleges that Airbus has invested in the continuing development of the aircraft, including the development of new model variants and continuing support for the two programmes.<sup>96</sup>

7.32. The United States submits that the European Union's arguments concerning "non-subsidised" investments in the A380 and A350XWB are "a recycled version of the EU's failed 'non-subsidized investment' arguments from the first compliance proceeding and should be rejected once again".<sup>97</sup> In this regard, the United States submits that the European Union unsuccessfully argued that the causal link between LA/MSF and the continued market presence of the A320 and A330 families was attenuated by "'massive' and allegedly non-subsidized investments Airbus made with its own funds", in connection with "{c}ontinuing {d}evelopment", "{c}ontinuing {s}upport", the design and manufacture of new variants of the A320 and A330 families, and setting up new A330 production lines.<sup>98</sup> The United States submits that the compliance panel rejected this line of argument on the

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<sup>91</sup> United States' first written submission, para. 83.

<sup>92</sup> European Union's first written submission, paras. 204, 300-308, and 371-378.

<sup>93</sup> United States' first written submission, para. 83 and fn 140.

<sup>94</sup> United States' first written submission, para. 196.

<sup>95</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, paras. 31 and 41.

<sup>96</sup> European Union's first written submission, paras. 315-323 and 384-388.

<sup>97</sup> United States' first written submission, para. 199.

<sup>98</sup> United States' first written submission, para. 199 (referring to *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1516).

basis that the subsidies had enabled the existence of the aircraft in the first place, and there would have been nothing to improve absent the subsidies.<sup>99</sup>

### **7.2.3.3 Reduced draw down of principal under the French A380 LA/MSF agreement and the French and UK A350XWB LA/MSF agreements (measures 11 and 16)**

7.33. The European Union further submits that the reduced draw-down of the loan amounts under the French A380 LA/MSF agreement and the French and UK A350XWB LA/MSF agreements are measures taken to comply.<sup>100</sup> The European Union considers that the reduced draw-down of the full amount of these loans means that the "monetary consequences" of the LCA programme risks assumed by the lenders are correspondingly reduced, and therefore, the subsidies can no longer be considered a genuine and substantial cause of sales or deliveries of A380 aircraft, or any adverse effects.<sup>101</sup>

7.34. The United States argues that the European Union failed to establish that less than full drawdown reduces the *ex ante* benefit of the subsidy. The United States also rejects the European Union's argument that Airbus' drawing down of less than the full amount of any of the LA/MSF subsidies should have any bearing on the Panel's assessment of whether the causal link established between the existing subsidies and Airbus' ability to offer and deliver the A380 and A350XWB continues in the post-implementation period.<sup>102</sup>

### **7.2.3.4 Attenuation of the causal link between A380 LA/MSF and A350XWB LA/MSF and the launches of the A380 and the A350XWB due to the passage of time (measures 13 and 17)**

7.35. The European Union has also identified as an additional measure taken to comply the alleged attenuation of the causal link between A380 LA/MSF and A350XWB LA/MSF and the launches of the A380 and A350XWB due to the passage of time. In the case of both aircrafts, the European Union argues that A380 and A350XWB LA/MSF had limited accelerating effects on the development of the two aircraft, and therefore the subsidies can no longer be considered a cause of the actual launch of either aircraft, and of resulting sales or deliveries or any associated adverse effects.<sup>103</sup>

7.36. The United States argues that the European Union's counterfactual assessment of the launch dates of the A380 and A350XWB is flawed and based on a misreading of the findings by the original panel and compliance panel and therefore should be rejected.<sup>104</sup> In particular, the United States argues that the European Union's argument contradicts previously adopted DSB findings from the first compliance proceeding that both the A380 LA/MSF and A350XWB LA/MSF subsidies were a cause of adverse effects found to have occurred in the 2011-2013 period.<sup>105</sup>

### **7.2.3.5 Cancellation or completion of A380 deliveries and pending deliveries, and the completion or conversion of A350XWB deliveries in certain country markets (measures 12 and 18)**

7.37. Finally, the European Union identifies as further steps to remove the adverse effects of existing A380 LA/MSF or A350XWB LA/MSF subsidies the cancellation or completion of A380

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<sup>99</sup> United States' first written submission, paras. 200-206. The United States additionally argues that the alleged "non-subsidised" investments were independent of the R&TD subsidies and hence, the European Union has not demonstrated the investments were in fact, not subsidised investments. (United States' first written submission, para. 203).

<sup>100</sup> Specifically, the European Union submits that Airbus opted not to draw down [\*\*\*] or [\*\*\*] of the anticipated principal under the French A380 LA/MSF loan, allegedly because [\*\*\*]. The European Union submits that Airbus opted not to draw down [\*\*\*] or [\*\*\*] of the anticipated principal under the French A350XWB loan, allegedly due to the [\*\*\*]. Finally, the European Union submits that Airbus did not draw down approximately [\*\*\*] or [\*\*\*] under the UK A350XWB LA/MSF loan. (European Union's second written submission, paras. 330-332).

<sup>101</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, paras. 30 and 38; and European Union's second written submission, paras. 338-342.

<sup>102</sup> United States' first written submission, paras. 189-190.

<sup>103</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, paras. 33 and 40.

<sup>104</sup> United States' first written submission, paras. 210-216.

<sup>105</sup> United States' first written submission, paras. 220-235.

deliveries and pending deliveries and completion or conversion of A350XWB deliveries. Specifically, the European Union has referred to the cancellation or completion of A380 deliveries corresponding to the Transaero 2012 and Emirates 2013 orders, and delivery of any outstanding A380 aircraft to certain country markets covered by the finding of impedance in the VLA market<sup>106</sup>; and the completion or conversion to other aircraft of A350XWB deliveries corresponding to the Cathay Pacific 2012, Singapore Airlines 2013 and United Airlines 2013 orders of the A350XWB.<sup>107</sup> The European Union maintains that the cancellation or completion of deliveries, or conversion to other aircraft brings to an end the adverse effects arising from those orders.

7.38. The United States addresses the European Union's arguments in the context of addressing the European Union's overall claim that it has taken appropriate steps to remove the adverse effects of the A380 and A350XWB LA/MSF subsidies, arguing that the alleged actions fail to bring the European Union into compliance with Article 7.8 of the SCM Agreement.<sup>108</sup>

#### **7.2.4 Observations regarding the European Union's measures or steps taken to achieve compliance**

7.39. These measures or steps alleged to achieve withdrawal or to constitute appropriate steps to remove adverse effects encompass: a series of amendments to the A380 and German A350XWB LA/MSF agreements; the alleged full repayment of outstanding principal and accrued interest under the UK A350XWB LA/MSF agreement; and the passive amortization of benefit of the Spanish A380 LA/MSF subsidy. The European Union refers to a broader array of steps that allegedly attenuate or dilute the causal link between the subsidy and alleged present adverse effects established in the original proceeding or the first compliance proceeding such that the challenged subsidies are no longer a "genuine and substantial" cause of adverse effects. We note that the European Union has not provided evidence indicating that the notified measures and steps were taken by the relevant member States for the specific purpose of achieving compliance with Article 7.8 of the SCM Agreement.

7.40. We now examine the merits of the European Union's compliance claims based on our understanding of the scope and nature of the obligations reflected in the adopted recommendations and rulings as well as prior interpretation of the applicable legal provisions, including Article 7.8.

### **7.3 The European Union's request for a preliminary ruling that the United States' claims against certain research and technological development measures are outside the Panel's terms of reference**

#### **7.3.1 Procedural background**

7.41. In its first written submission filed on 19 December 2018, the United States identified a series of research and technological development (R&TD) measures provided to Airbus, which it argues are subsidies the Panel is required to take into account in assessing the European Union's compliance with the DSB's recommendations and rulings.<sup>109</sup>

7.42. On 21 December 2018, the European Union submitted a request for a preliminary ruling that the United States' claims in relation to the R&TD measures referred to in the United States' first written submission are not properly within the Panel's terms of reference as defined by Articles 6.2 and 7.1 of the DSU. The United States submitted written comments on this request, and on 11 January 2019 the Panel sent a communication to the parties declining the European Union's request, indicating that the full reasoning supporting the Panel's decision would be set out in its final report.<sup>110</sup>

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<sup>106</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, para. 32.

<sup>107</sup> Communication from the European Union dated 17 May 2018, WT/DS316/34, para. 42. See also European Union's first written submission, para. 358.

<sup>108</sup> United States' first written submission, paras. 147-148; and response to Panel question No. 73, para. 165.

<sup>109</sup> United States' first written submission, paras. 9, 117-118, 126-128, and 243.

<sup>110</sup> Panel communication to the parties 11 January 2019.

7.43. In its communication of 11 January 2019, the Panel explained to the parties that the mere fact that the R&TD measures are not specifically identified in the European Union's panel request should not preclude the Panel from considering the United States' arguments related to the R&TD measures.<sup>111</sup> The Panel's decision was, therefore, without prejudice to any finding on the extent to which the United States is entitled to advance substantive claims regarding the consistency of the R&TD measures with the European Union's compliance obligations under Article 7.8 of the SCM Agreement. The parties advanced further arguments on this matter in their subsequent written submissions and at the Panel's substantive meeting with the parties.

### **7.3.2 The R&TD measures the United States challenges in this proceeding and relevant findings from previous stages of this dispute**

7.44. In its first written submission, the United States identified the following R&TD measures that existed at the time of the original proceeding, each of which were found to be specific subsidies:

- a. Grants for LCA-related R&TD projects in which Airbus participated pursuant to the:
  - i. Second Framework Programme for Community Activities in the Field of Research and Technological Development (1987-1991) ("Second Framework Programme");
  - ii. Third Framework Programme for Community Activities in the Field of Research and Technological Development (1990-1994) ("Third Framework Programme");
  - iii. Fourth Framework Programme of the European Community Activities in the Field of Research and Technological Development and Demonstration (1994-1998) ("Fourth Framework Programme");
  - iv. Fifth Framework Programme of the European Community for Research, Technological Development and Demonstration Activities (1998-2002) ("Fifth Framework Programme");
  - v. Sixth Framework Programme of the European Community for Research, Technological Development and Demonstration Activities, Contributing to the Creation of the European Research Area and to Innovation (2002-2006) ("Sixth Framework Programme");
- b. French government grants for LCA-related R&TD projects in which Airbus participated, between 1986 and 2005;
- c. German federal government grants for LCA-related R&TD projects in which Airbus participated (LUFO I, LUFO II, and LUFO III);
- d. Grants from three German sub-federal public entities for LCA-related R&TD projects in which Airbus participated;
- e. Spanish government loans for LCA-related R&TD projects in which Airbus participated under the PTA programme; and
- f. UK government grants for LCA-related R&TD projects in which Airbus participated under the CARAD programme.<sup>112</sup>

7.45. In addition to the R&TD measures that existed at the time of the original proceeding, the United States' claims in this proceeding cover the Seventh Framework Programme for Research and Technological Development (2007-2013) (Seventh Framework Programme) and the Horizon 2020

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<sup>111</sup> Panel communication to the parties 11 January 2019.

<sup>112</sup> United States' first written submission, para. 118; and second written submission, para. 299 and fn 396.

Programme (2014-2020) (Eighth Framework Programme).<sup>113</sup> These R&TD measures did not exist at the time of the original proceeding.

7.46. The original panel found that the majority of the R&TD measures challenged by the United States constituted specific subsidies to Airbus that caused serious prejudice to the United States' interests under Articles 5(c) and 6.3(a), (b), and (c) of the SCM Agreement.<sup>114</sup> Specifically, the panel found that the R&TD subsidies "enabled Airbus to develop features and aspects of its LCA on a schedule that it would otherwise have been unable to accomplish" and that "the impact of pre-competitive R&TD subsidies on Airbus' market presence was perhaps more attenuated, compared with the other subsidies at issue or with R&TD subsidies that funded research and technology actually used on LCA that were launched, {the panel} believe[d] that combined with the others, the R&TD subsidies complemented and supplemented the impact of LA/MSF".<sup>115</sup>

7.47. On appeal, the European Union argued that the original panel failed to establish that any of the "features and aspects" of its LCA developed with funding from R&TD subsidies impacted Airbus' product launch decisions.<sup>116</sup> The European Union further argued that the original panel failed to provide an evidentiary basis and a reasoned and adequate explanation for its causation finding, in violation of Article 11 of the DSU.<sup>117</sup> The United States argued, to the contrary, that the original panel correctly found that the R&TD subsidies "complemented and supplemented" the product effects of LA/MSF, because they enabled Airbus to "develop features and aspects of its LCA on a schedule that it would otherwise have been unable to accomplish".<sup>118</sup>

7.48. The Appellate Body considered that the original panel did not have a sufficient basis to find that the R&TD subsidies complemented and supplemented the effects of LA/MSF, finding as follows:

With respect to the other R&TD subsidies, we agree with the European Union that a general finding that they enabled Airbus to develop "features and aspects" of its LCA on a schedule that otherwise it would have been unable to accomplish does not provide a sufficient basis to determine that R&TD subsidies "complemented and supplemented" the "product effect" of LA/MSF in enabling Airbus to launch particular models of LCA. ... {A} competitive advantage, in our view, *must be reflected either in technologies incorporated in models of LCA actually launched by Airbus, or in technologies that make the production process of those LCA more efficient. Without specific findings that technology or production processes funded by R&TD subsidies contributed to Airbus' ability to launch and bring to the market particular models of LCA, the Panel did not have a sufficient basis to conclude that those subsidies "complemented and supplemented" the "product effect" of LA/MSF.*<sup>119</sup>

7.49. On this basis, the Appellate Body found that the original panel had erred under Articles 5(c) and 6.3(a), (b), and (c) of the SCM Agreement when it found that the R&TD subsidies "complemented and supplemented" the "product effect" of LA/MSF without establishing a genuine causal link between those R&TD subsidies and Airbus' ability to launch and bring to market its models of LCA. The Appellate Body, therefore, found that the original panel failed to conduct an objective assessment of the matter, including an objective assessment of the facts - as required by Article 11 of the DSU - and reversed the panel's finding that the effect of R&TD subsidies was the displacement

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<sup>113</sup> United States' first written submission, paras. 126-128.

<sup>114</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1608. The Panel found, however, that the United States failed to establish that the following R&TD measures constituted subsidies: (i) grants provided under the UK Technology Programme; and (ii) a portion of the funding committed to Airbus under the German government's "LuFo" programmes. (Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1502 and 7.1591). On appeal, the Appellate Body found that the United States' claims against the R&TD loans provided pursuant to the Spanish PROFIT programme were outside of the Panel's terms of reference. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 649).

<sup>115</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1959.

<sup>116</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1404.

<sup>117</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1404.

<sup>118</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1405 (referring to Panel Report, para. 7.1959).

<sup>119</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1407. (emphasis added)

of Boeing LCA from the EC and relevant third country markets, and significant lost sales, within the meaning of Article 6.3(a), (b), and (c) of the SCM Agreement.<sup>120</sup>

### 7.3.3 Whether the United States' claims against the R&TD measures are outside the Panel's terms of reference

#### 7.3.3.1 Introduction

7.50. The European Union argues that the United States' complaint against the R&TD measures is not properly within the Panel's terms of reference because the R&TD measures are not identified in the European Union's panel request.<sup>121</sup> In the absence of any reference to the specific R&TD measures in the European Union's panel request, the European Union argues that the proper course of action for the United States would have been to follow the guidance of the Appellate Body in *US – Continued Suspension/Canada – Continued Suspension*, and initiate its own Article 21.5 proceeding in which the United States could have raised its specific complaint against those measures.<sup>122</sup> According to the European Union, the United States' failure to do so means that its complaint against the R&TD measures cannot now form part of this Panel's terms of reference.<sup>123</sup>

7.51. The United States argues that the challenged R&TD measures are identified in the European Union's panel request as a matter of fact, because they fall within the scope of the "{n}on-subsidised investments in the A380 {and A350XWB} family aircraft" referred to on pages 5 and 6 of the European Union's panel request.<sup>124</sup> In any case, the United States argues that the R&TD measures fall within the Panel's terms of reference regardless of whether they are referred to in the European Union's panel request because they are part of the United States' rebuttal argument against the European Union's assertion of full, substantive, compliance.<sup>125</sup> In this respect, the United States maintains that the European Union's reliance on certain Appellate Body statements made in *US – Continued Suspension/Canada – Continued Suspension* is misplaced. On the contrary, according to the United States, the *US – Continued Suspension/Canada – Continued Suspension* disputes support its own position because in both proceedings the panels and the Appellate Body found that where substantive compliance is alleged by an original respondent, the matter to be examined by a panel is not limited to the measures explicitly listed in the original respondent's panel request.<sup>126</sup>

7.52. The parties' submissions concerning the extent to which the United States' complaint against the challenged R&TD measures is within the Panel's terms of reference raise two broad questions: (i) whether the challenged R&TD measures are referred to in the European Union's panel request as *a matter of fact*; and (ii) whether the United States' claims against those measures may nevertheless fall within the scope of this compliance proceeding even if the measures are not specifically referred to in the European Union's panel request. We address each of these questions in turn.

#### 7.3.3.2 Are the R&TD measures identified in the European Union's panel request?

7.53. The European Union's panel request provides a list of measures taken to comply with the recommendations and rulings of the DSB. Under the heading "Measures that Constitute Appropriate Steps to Remove Adverse Effects, under Articles 7.8, 5 and 6.3 of the SCM Agreement" the European Union lists "{n}on-subsidised investments in A380 family aircraft" and "{n}on-subsidised investments in A350XWB family aircraft". In explaining those measures, the European Union's panel request provides that:

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<sup>120</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1408 and 1409.

<sup>121</sup> European Union's request for a preliminary ruling, para. 16; and second written submission, para. 498.

<sup>122</sup> European Union's second written submission, para. 495.

<sup>123</sup> European Union's request for a preliminary ruling, paras. 7-9; and second written submission, paras. 468 and 495-517.

<sup>124</sup> United States' response to the European Union's preliminary ruling request, paras. 9-14.

<sup>125</sup> United States' response to the European Union's preliminary ruling request, paras. 15-22.

<sup>126</sup> United States' response to the European Union's preliminary ruling request, para. 20 (referring to Appellate Body Report, *US – Continued Suspension*, paras. 327-332).

Airbus has also undertaken significant non-subsidised investments in the A380, and in A380-related continuous support and development (Measure x, listed above). Currently, neither A380 MSF nor any other subsidy at issue is a genuine and substantial cause of sales or deliveries of A380 aircraft, or any associated adverse effects.

...

Additionally, Airbus has undertaken significant non-subsidised investments in the A350XWB, and in A350XWB-related continuous support and development (Measure xv, above). Neither A350XWB MSF nor any other subsidy at issue is currently a genuine and substantial cause of sales or deliveries of the A350XWB or any associated adverse effects.<sup>127</sup>

7.54. The United States submits that the reference in the European Union's panel request to "{n}on-subsidised investments in A380 family aircraft" and "{n}on-subsidised investments in A350XWB family aircraft" identifies investments related to the support and development of the A380 and the A350XWB, as measures taken to comply. In the United States' view, since the EU panel request does not limit the scope of such investments, either temporally or factually, the R&TD measures, which enable Airbus to develop technological improvements that the EU alleges are critical to Airbus's current competitiveness, are therefore covered by the EU panel request. In addition, the United States argues that while the European Union describes the investments as "non-subsidized", this is a rebuttable characterization. In sum, the United States argues that if the EU panel request includes investments in development of new technologies, including the development of successor aircraft, and the use of financial resources to enable production, it certainly includes the funding under the R&TD measures referenced in the United States' first written submission, which go directly to those purposes.<sup>128</sup>

7.55. The European Union argues that the United States' characterisation of the language in its panel request is incorrect because, according to the European Union, the relevant language must be understood to be limited to *non-subsidised* investments made *by Airbus*.<sup>129</sup> These investments are related to the *existing* A380 and A350XWB families and programmes, and cover Airbus initiatives affecting the "continuing development" of these aircraft<sup>130</sup>, and the continuing support "to maintain and improve production facilities".<sup>131</sup> The European Union also points out that in its first written submission the United States asserts that "{the EU's non-subsidized investment argument here} is a recycled version of the EU's failed 'non-subsidized investment' arguments from the first compliance proceeding and should be rejected once again". According to the European Union, this directly indicates that the United States understands that the non-subsidized investments do not relate to the R&TD measures, as was the case in the first compliance proceeding.<sup>132</sup>

7.56. On its face, the European Union's panel request refers to "non-subsidized" investments by Airbus related to "continuous support and development" of the A380 and A350XWB. This general language is broad and potentially covers any "investments" in the continuous support and development of the A350XWB and the A380, which the European Union maintains are not subsidized. To this extent, we agree with the United States when it argues that the description of the covered investments as "non-subsidized" does not preclude the possibility that the panel request might be able to cover the R&TD measures identified by the United States, because the fact that the European Union describes them as "non-subsidized" merely reflects the European Union's own legal characterization of the relevant measures. However, the content of the European Union's first written submission appears to confirm that the European Union's panel request does not cover the R&TD measures challenged by the United States.

7.57. Although a party's subsequent submissions during panel proceedings cannot be relied upon to cure a defect in a panel request, they may be consulted to confirm or clarify the meaning of the

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<sup>127</sup> European Union's panel request, paras. 31 and 41.

<sup>128</sup> United States' response to the European Union's preliminary ruling request, paras. 9-14.

<sup>129</sup> European Union's second written submission, para. 506.

<sup>130</sup> European Union's first written submission, para. 314.

<sup>131</sup> European Union's first written submission, para. 314; second written submission, para. 504.

<sup>132</sup> European Union's second written submission, para. 508 (referring to United States' first written submission, para. 199). See also United States' first written submission, para. 187.

words used in the panel request.<sup>133</sup> The European Union's first written submission does not mention R&TD measures in any form, and only refers specifically to targeted investments for the A380 and the A350XWB undertaken by Airbus.<sup>134</sup> In particular, the European Union refers to "substantial investments {by Airbus} ... in continuing development ... and continuing support for the A350XWB programme {which included} investments into ... the development of the ultra-long-range A350XWB-900ULR".<sup>135</sup> The European Union argues that these investments sustain and renew the aircrafts' competitiveness and that it is these investments, rather than the historical subsidies at the time of launch, that explain the current market presence and competitiveness of the aircraft.<sup>136</sup> Almost identical investments, and arguments, are made regarding the A380.<sup>137</sup> This is consistent with the European Union's description of similar Airbus actions in the first compliance proceeding, which the European Union argued severed the chain of causation between the LA/MSF subsidies and the relevant adverse effects. In particular, before the original compliance panel, the European Union argued that "the genuine and substantial cause of the ongoing market presence of the A320 and A330 families is not the LA/MSF subsidies, but rather the 'massive', allegedly, non-subsidized investments Airbus has made into the two families of LCA since they were launched".<sup>138</sup> These investments included "(a) 'Continuing Development'; (b) 'Continuing Support'; (c) the design and manufacture of three non-subsidized variants (the A321, A319 and A318) between 1988 and 1999"<sup>139</sup>, which are the same types of investments as those referenced at this stage of the dispute (*mutatis mutandis*).

7.58. In our view, the content of the European Union's first written submission clarifies that the reference in the European Union's panel request to the "non-subsidized investments ..." does not encompass the R&TD measures challenged by the United States. Indeed, nothing in the European Union's first written submission or any other submission in this dispute suggests that the European Union intended to include more than these initiatives in its panel request. Moreover, as already noted, reading the European Union's panel request in this way would be consistent with the arguments related to non-subsidised investments advanced in the original compliance dispute. Furthermore, we note that the United States, in responding to the European Union's "non-subsidized investments" arguments, equated those arguments with the European Union's unsuccessful "non-subsidized investment" arguments from the first compliance proceeding. The R&TD measures did not form part of that proceeding and we can thus infer that the United States, in equating the two sets of arguments, likely understood the allegedly non-subsidised investments to have been made by Airbus, and not to refer to the R&TD measures provided by the European Union, as was the case in the first compliance proceeding.

7.59. Thus, in our assessment, there is no factual basis to accept the United States' understanding of the reference to "non-subsidised investments" in the European Union's panel request as including the R&TD measures it seeks to challenge in this proceeding. Accordingly, we find that the European Union's panel request does not, as a factual matter, include a reference to the R&TD measures challenged by the United States.

### **7.3.3.3 Do the challenged R&TD measures fall within the Panel's terms of reference, even though they are not specifically identified in the European Union's panel request?**

7.60. The European Union argues that since the R&TD measures are not identified in the European Union's panel request, as a procedural matter, the proper recourse for an original complainant that considers the original respondent has excluded particular measures or claims from an Article 21.5 proceeding would be to file its own request for the establishment of a panel under Article 21.5. Thus, according to the European Union, "if the United States wished to challenge the WTO-consistency of the R&TD measures, it was *required ...*, as *specifically directed* by the Appellate Body" in the *US – Continued Suspension/Canada – Continued Suspension* disputes to file its own panel request.<sup>140</sup> Having not done so, the European Union submits that United States' claims

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<sup>133</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 786-787 and 790.

<sup>134</sup> European Union's first written submission, paras. 313 and 383.

<sup>135</sup> European Union's first written submission, paras. 314-323.

<sup>136</sup> European Union's first written submission, paras. 313 and 383.

<sup>137</sup> See European Union's first written submission, paras. 383-389.

<sup>138</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1516.

<sup>139</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1517.

<sup>140</sup> European Union's second written submission, paras. 473 and 495. (emphasis added)

against the R&TD measures are outside the Panel's terms of reference and thus cannot be examined by the Panel in this dispute.<sup>141</sup>

7.61. The United States argues that the R&TD measures are part of the Panel's terms of reference regardless of whether they are covered by the European Union's panel request, because they are part of the United States' rebuttal to the European Union's assertion of full, substantive, compliance. The United States argues that the Panel could only reach such a finding after considering the full scope of the relevant issues bearing on the European Union's allegation of substantive compliance. In this respect, the United States argues that the European Union cannot be found to have complied with its obligations under Article 7.8 of the SCM Agreement if the R&TD measures at issue (either alone or together with the LA/MSF subsidies) cause adverse effects to the US LCA industry.<sup>142</sup> Citing the panel and Appellate Body reports in *US – Continued Suspension/Canada – Continued Suspension* disputes, the United States argues that, where an original respondent asserts substantive compliance in an Article 21.5 proceeding, the matter to be examined by the Panel is not limited to what is explicitly listed in the original respondent's panel request. Furthermore, the United States emphasizes that an implementing Member should not be permitted to seek a finding that it has achieved full, substantive, compliance by submitting a panel request that identifies only a subset of the relevant measures taken to comply or otherwise artificially limits the scope of a compliance proceeding.<sup>143</sup>

7.62. We begin by observing that Article 7.1 of the DSU establishes that a panel's terms of reference are defined by the "matter" referred to in the request for its establishment; and the requirements for identifying the "matter" set out in the request for establishment are prescribed in Article 6.2 of the DSU, which in relevant part, provides that:

The request for the establishment of a panel shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.63. Both Articles 6.2 and 7.1 apply to panels established to examine compliance disputes within the meaning of Article 21.5 of the DSU, but their requirements must be adapted for that purpose.<sup>144</sup> Thus, it has been found that a panel request in an Article 21.5 proceeding must refer to the recommendations and rulings of the DSB made in the original proceeding, in addition to identifying the specific measures and the legal basis of the complaint.<sup>145</sup>

7.64. When a dispute is brought under Article 21.5 of the DSU by an original complainant, the compliance panel's terms of reference will be defined by the *complainant*, who will identify in its request for establishment, one or more of the respondent's declared or undeclared measures "taken to comply" as the focus of its complaint. However, in what are known as "reverse" compliance proceedings, it is the *respondent* from the original proceeding that requests the establishment of a panel to confirm that its alleged compliance actions bring it into conformity with its WTO obligations. In such compliance disputes, a strict reading and application of the requirements of Articles 6.2 and 7.1 of the DSU would mean that the panel's terms of reference would be set entirely by the original respondent. In our view, this would make it possible for an original respondent to confine the scope of the "reverse" compliance dispute to only those measures that *it* considers show compliance, leaving measures that the original complainant may consider to show non-compliance, outside of the scope of the proceeding. Thus, a strict interpretation of the requirements of Articles 6.2 and 7.1, as they apply in a "reverse" Article 21.5 proceeding, would mean that an implementing Member could be found to be in compliance simply because of the way it has defined the panel's terms of reference when, in fact, other measures (not included in the "reverse" compliance panel's terms of reference) could show non-compliance.

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<sup>141</sup> European Union's request for a preliminary ruling, para. 13 (citing *US – Continued Suspension*, para. 354); and second written submission, paras. 473, 482, and 495.

<sup>142</sup> United States' response to the European Union's preliminary ruling request, paras. 16-19.

<sup>143</sup> United States' response to the European Union's preliminary ruling request, para. 20.

<sup>144</sup> Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 109 (quoting Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 59).

<sup>145</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 62 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67).

7.65. According to the European Union, the Appellate Body specifically addressed this matter in the *US – Continued Suspension / Canada – Continued Suspension* disputes, where it allegedly found that the correct course of action for an original complainant to take, when it considers that an original respondent has excluded certain measures or claims from its request for the establishment of a panel in a "reverse" Article 21.5 proceeding, is to file its own separate request for the establishment of a panel under Article 21.5. The United States disagrees with the European Union's characterization of the Appellate Body's findings in the *Continued Suspension* disputes. For the United States, the Appellate Body statements the European Union relies upon constitute *obiter dictum* as they were made by the Appellate Body only after it had resolved the particular issue on appeal.<sup>146</sup> Moreover, the United States notes that the Appellate Body did not find the existence of a *requirement* on an original complainant to bring its own case, but only advised that an original complaining party "may" file its own request if it considers that the implementing measure is inconsistent with provisions of the WTO agreements not covered in the implementing Member's panel request.<sup>147</sup>

7.66. The *Continued Suspension* disputes arose out of a disagreement between the European Communities, on the one hand, and Canada and the United States, on the other, about whether the European Communities had complied with the recommendations and rulings of the DSB in the *EC – Hormones* dispute. In *EC – Hormones*, a European Communities' import ban on meat from cattle treated with certain hormones was found to be inconsistent with Article 5.1 of the SPS Agreement because it was not based on a proper risk assessment.<sup>148</sup> Following the adoption of the *EC – Hormones* panel and Appellate Body reports, Canada and the United States suspended concessions against imports of EC products as a result of the European Communities' failure to implement the recommendations and rulings within a reasonable period of time. Subsequently, the European Communities adopted Directive 2003/74/EC, which repealed and replaced the measure found to be WTO-inconsistent, claiming that it had thereby implemented the DSB's recommendations and rulings.<sup>149</sup> The United States and Canada considered that the new EC measure did not bring the European Communities into conformity with its WTO obligations, and continued to suspend concessions. The European Communities subsequently initiated the *Continued Suspension* original panel proceedings (not "reverse" Article 21.5 compliance proceedings), claiming that Canada and the United States were acting inconsistently with Article 22.8 of the DSU by continuing to suspend concessions after the measure found to be WTO-inconsistent had been removed.

7.67. Before the panels, the European Communities argued that once it had adopted Directive 2003/74/EC, Canada and the United States were not entitled to continue to suspend concessions but were required to initiate an Article 21.5 compliance panels to resolve any disagreement about whether the newly adopted measure brought the European Communities into compliance.<sup>150</sup> The panels rejected this argument, finding nothing in the text of Article 21.5 *requiring* Canada or the United States to bring such a case. The panels were not convinced that Article 21.5 was the "only avenue available to address a claim of compliance by a Member", noting that other possibilities were available, including resorting to a new original panel (as the European Communities had done in those disputes). Furthermore, the panels did not "believe that proceedings under Article 21.5 are open only to the original complainant"<sup>151</sup>, finding that a respondent could also initiate an Article 21.5 proceeding to establish that its alleged compliance measures brought it into conformity with its obligations.

7.68. Contrary to the panels, the Appellate Body found that the appropriate procedural avenue to resolve a disagreement as to whether an inconsistent measure has been removed is an Article 21.5 compliance panel. For the Appellate Body, the panels recognized this by stating that the task of each panel in the underlying dispute was to "perform functions similar to {those} of an Article 21.5 panel".<sup>152</sup> Thus, the Appellate Body concluded that:

... recourse to Article 21.5 panel proceedings is the proper course of action within the procedural structure of the DSU in cases where, as in this dispute, a Member subject to

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<sup>146</sup> United States' response to the European Union's preliminary ruling request, paras. 30, 32, and 33.

<sup>147</sup> United States' response to the European Union's preliminary ruling request, paras. 28-33.

<sup>148</sup> Appellate Body Report, *EC – Hormones*, para. 208.

<sup>149</sup> Appellate Body Reports, *US – Continued Suspension/Canada – Continued Suspension*, para. 326.

<sup>150</sup> Panel Reports, *US – Continued Suspension/Canada – Continued Suspension*, para. 4.104.

<sup>151</sup> Panel Reports, *US – Continued Suspension/Canada – Continued Suspension*, para. 7.353.

<sup>152</sup> Appellate Body Reports, *US – Continued Suspension/Canada – Continued Suspension*, para. 341 (quoting Panel Reports, *US – Continued Suspension/Canada – Continued Suspension*, para. 8.3).

the suspension of concessions has taken an implementing measure and a disagreement arises as to whether "the measure found to be inconsistent with a covered agreement has been removed" within the meaning of Article 22.8. Therefore, we share the European Communities' view that Article 21.5 panel proceedings are the procedures to be followed where there is disagreement as to whether Directive 2003/74/EC has achieved substantive compliance.<sup>153</sup>

7.69. The Appellate Body then went on to reject the European Communities' appeal against the panels' finding that a respondent is not precluded from initiating Article 21.5 proceedings. The Appellate Body agreed with the panels that such a course of action would be open to a respondent "to obtain confirmation of the consistency with the WTO agreements of its implementing measure". However, in making this finding, the Appellate Body recognized that where a respondent does request an Article 21.5 compliance panel, the panel request may be incomplete, as a respondent "cannot be expected to speculate as to the violations that could possibly be raised against its measure by other Members".<sup>154</sup> It was in this context that the Appellate Body made the statements the European Union relies upon in this dispute to argue that the R&TD measures identified by the United States do not fall within the scope of this proceeding. Specifically, the Appellate Body observed that where a respondent triggers an Article 21.5 proceeding, and the complainant considers the implementing measure does not achieve compliance, the complainant:

... may file its own {panel request} under Article 21.5 identifying those provisions that it considers should be examined by the Article 21.5 panel. ... The original complainant would be expected to do so as soon as possible after adoption of an implementation measure or after the filing of the original respondent's panel request, so that both Article 21.5 panel requests may be referred to the original panel wherever possible, allowing review of all the issues relating to substantive compliance in the same Article 21.5 proceedings.<sup>155</sup>

7.70. In our view, these Appellate Body statements firmly advocate the view that claims and measures not included in an original respondent's request for a "reverse" Article 21.5 compliance panel should be brought into the scope of the same Article 21.5 proceeding by having the complainant identify them in its own, separate, request for establishing an Article 21.5 panel.<sup>156</sup> Yet, we see nothing in the Appellate Body's statements pointing to the existence of any *requirement* on a complainant to take this course of action. The Appellate Body report does not identify any specific obligation in the DSU, stating only that a complainant "*may*" file its own request for establishment, adding that it would be "*expected*" to do so expeditiously. Moreover, we note that in the same disputes, both the panels and the Appellate Body ruled that Canadian and United States' claims against the European Communities' alleged compliance measure, that were *not* identified in the European Communities' request for establishment, *could be examined*.

7.71. In response to the European Communities' assertion of compliance, Canada and the United States argued that Directive 2003/74/EC was inconsistent with Articles 5.1 and 5.7 of the SPS Agreement. Neither of these two provisions was identified in the European Communities' panel request. Nevertheless, despite the lack of any reference to these provisions in the panel requests, the panels concluded that it was appropriate to consider the complainants' claims because understanding whether the European Communities was in substantive compliance with its obligations under the SPS Agreement was a prerequisite to determining whether the European Communities had made out its own claim under Article 22.8 of the DSU. Accordingly, the

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<sup>153</sup> Appellate Body Reports, *US – Continued Suspension/Canada – Continued Suspension*, para. 345.

<sup>154</sup> Appellate Body Reports, *US – Continued Suspension*, para. 329; *Canada – Continued Suspension*, para. 353.

<sup>155</sup> Appellate Body Reports, *US – Continued Suspension*, para. 329; *Canada – Continued Suspension*, para. 354.

<sup>156</sup> Since the *Continued Suspension* disputes, original complainants in two disputes, *US – Tuna II (Mexico) (Article 21.5 – US)* and *Colombia – Textiles (Article 21.5 – Colombia)*, have followed this approach and submitted their own respective panel requests following requests for "reverse" Article 21.5 proceedings by the respective respondents. In both cases, the panels addressed the measures and claims raised in *both* parties' panel requests thereby avoiding the terms of reference issues raised in the present proceeding. Appellate Body Reports, *US – Continued Suspension / Canada – Continued Suspension*, *US – Tuna II (Mexico) (Article 21.5 – US)* / *US – Tuna II (Mexico) (Article 21.5 – Mexico II)* and Panel Report, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*.

panels concluded that "nothing in the DSU prevents the Panel from considering the compatibility of the EC implementing measure with the SPS Agreement if this is necessary in order to make the findings required by {its} terms of reference".<sup>157</sup>

7.72. The Appellate Body upheld the panels' finding, concluding that it was necessary to evaluate whether the European Communities brought itself into conformity with the DSB's recommendations and rulings. The Appellate Body explained:

It is evident from the panel requests that the consistency of the United States' and Canada's continued suspension with Article 22.8 was linked to the European Communities' implementation of the DSB's recommendations and rulings in *EC – Hormones*. We fail to see how the claims explicitly listed in the panel requests by the European Communities could be resolved in isolation from the question of whether {the relevant measure} has brought the European Communities into compliance with these DSB's recommendations and rulings.<sup>158</sup>

7.73. Thus, the panels and the Appellate Body in the *Continued Suspension* disputes decided that it was appropriate to address claims under Articles 5.1 and 5.7 of the SPS Agreement *even though those legal provisions were not identified in the European Communities' panel request*. The panels and the Appellate Body concluded that it was necessary to determine the merits of the complainants' claims in order to assess whether the European Communities had achieved full substantive compliance with the DSB's recommendations and rulings, which was in turn relevant to address the European Communities' claim that the complaining parties were acting inconsistently with Article 22.8 of the DSU by continuing to suspend concessions.

7.74. Having carefully reviewed the reasoning and findings from the panel and Appellate Body reports in the *Continued Suspension* disputes the parties rely upon, we find they do not provide any clear guidance for determining whether the United States is entitled to have the merits of its claims against the R&TD measures examined in this "reverse" Article 21.5 dispute. Ultimately, however, we do not consider it is necessary to decide this legal question, because even assuming, *arguendo*, that the absence of any reference to the challenged R&TD measures in the European Union's panel request could not prevent the United States from raising claims, we believe we would be precluded from addressing them on other procedural grounds, which we identify and explain in the sections that follow.

#### **7.3.4 The United States' claims against R&TD measures that were subject to findings in the original proceedings or were in existence at the time of the first compliance proceeding**

7.75. The European Union claims that the United States is precluded in these second compliance proceedings from raising claims against the R&TD measures that were subject to findings in the original proceedings. The European Union argues that allowing the United States to challenge these measures again would provide the United States with an unfair second chance to make a case that it failed to make out in the original proceeding.<sup>159</sup> Specifically, the European Union argues that none of the R&TD measures were found to be WTO-inconsistent in the original proceeding, permitting the United States to raise claims against them now would disturb the finality of the DSB's recommendations and rulings.<sup>160</sup> In any event, the European Union argues that the United States could have challenged those measures in the *first* compliance proceeding but chose not to do so.<sup>161</sup> By declining to challenge any of the R&TD measures in the first compliance proceeding when it had the opportunity to do so, the European Union argues that the United States has essentially forfeited its right to make any further claim against these measures.<sup>162</sup>

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<sup>157</sup> Panel Reports, *US – Continued Suspension / Canada – Continued Suspension*, para. 7.367.

<sup>158</sup> Appellate Body Reports, *US – Continued Suspension / Canada – Continued Suspension*, para. 331.

<sup>159</sup> European Union's second written submission, para. 523 (citing Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210).

<sup>160</sup> European Union's second written submission, paras. 519-527.

<sup>161</sup> European Union's second written submission, para. 530.

<sup>162</sup> European Union's second written submission, para. 532.

7.76. The European Union also notes that it did not incur, upon the conclusion of the first compliance proceeding, any compliance obligations with respect to the R&TD measures<sup>163</sup> and that the United States' decision not to challenge the Seventh Framework Programme in the first compliance proceedings constitutes a final resolution of the matter.<sup>164</sup>

7.77. The United States argues that there is no basis to exclude from the Panel's consideration any of the R&TD measures that were subject to findings in the original proceeding or the Seventh Framework Programme. With respect to the measures raised in the original proceeding, the United States argues that the Appellate Body's findings were confined to the original panel's failure to make "specific findings"<sup>165</sup> and that the test applied by the original panel "was insufficiently demanding to justify its conclusion".<sup>166</sup> According to the United States, the Appellate Body did not evaluate whether the evidence before the original panel would support specific findings that the R&TD subsidies contributed to Airbus's ability to launch and bring to market any LCA model<sup>167</sup> and thus the matter was not resolved on the merits. Accordingly, the United States contends that it would not be getting an unfair second chance to make a case that it failed to make out in the original proceeding.<sup>168</sup>

7.78. The United States also argues that the European Union and member States have continued to provide funding to Airbus in the form of grants under the Seventh Framework Programme and that funding under this Framework Programme is "of the same nature" as the earlier funding.<sup>169</sup> The United States therefore argues that it should be permitted to challenge this Framework Programme on the grounds that it was not part of the original proceeding.<sup>170</sup>

7.79. Finally, the United States also argues that it should be permitted to raise a claim against the R&TD measures on systemic grounds. The United States contends that a finding that the measures cannot be challenged in a second compliance proceeding because they were not challenged in a first compliance proceeding would incentivize complaining parties to pursue claims that were not in themselves *necessary* to resolve the dispute in the interest of preserving the right to pursue potential claims against those measures in potential future proceedings. According to the United States, this would be inefficient and would be contrary to the objective of the prompt settlement of disputes enshrined in Article 3.3 of the DSU.<sup>171</sup> Additionally, the United States argues that preclusion on this ground "would impose a burden on the original complainant to identify *all* measures that are inconsistent with the original respondent's compliance obligations, no later than the original complainant's *first* request for the establishment of a compliance panel".<sup>172</sup> On the United States' understanding of the European Union's argument, this would mean that the original complainant's right to challenge such measures would be forever waived within the confines of the dispute. The United States suggests that this would infringe on the due process rights of original complainants, along with the objective of promoting prompt compliance with the recommendations or rulings of the DSB.<sup>173</sup>

7.80. Article 17.14 of the DSU provides that Appellate Body reports adopted by the DSB shall be "{...} unconditionally accepted by the parties to the dispute". Past panels and Appellate Body have interpreted this obligation to mean that adopted Appellate Body reports must be treated by the parties as a *final resolution* to their dispute.<sup>174</sup> Consequently, as explained in *US – Upland Cotton (Article 21.5 – Brazil)*, "allowing a party in an Article 21.5 proceeding to re-argue a claim that has been decided in adopted reports would ... provide an unfair 'second chance' to that party".<sup>175</sup> In

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<sup>163</sup> European Union's second written submission, para. 529.

<sup>164</sup> European Union's second written submission, para. 533.

<sup>165</sup> United States' first written submission, para. 248.

<sup>166</sup> United States' second written submission, para. 329.

<sup>167</sup> United States' second written submission, para. 329.

<sup>168</sup> United States' second written submission, para. 330 (referring to European Union's second written submission, para. 523).

<sup>169</sup> United States' first written submission, para. 126; and second written submission, para. 328.

<sup>170</sup> United States' second written submission, para. 328.

<sup>171</sup> United States' second written submission, para. 336.

<sup>172</sup> United States' second written submission, para. 337. (emphasis original)

<sup>173</sup> Article 21.1 of the DSU.

<sup>174</sup> See Appellate Body Reports, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 236; *EC – Bed Linen (Article 21.5 – India)*, para. 93; *US – Shrimp (Article 21.5 – Malaysia)*, para. 97; and Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 1145.

<sup>175</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210. (fn omitted)

contrast, where claims against a measure have not been decided on the merits in the original proceeding "they are not covered by the recommendations and rulings of the DSB" and, therefore, "a Member should not be entitled to assume that those aspects of the measure are consistent with the covered agreements."<sup>176</sup> Thus, although compliance proceedings cannot be used to "re-open" issues that were *decided on the merits* in the original proceeding<sup>177</sup>, claims that are *not* decided on the merits in the original proceeding can be reasserted in compliance proceedings.<sup>178</sup> Accordingly, in considering whether the United States is entitled to raise claims against the R&TD measures in this second compliance proceeding, a first threshold question we believe must be answered is whether the challenged R&TD measures were the subject of adopted findings and recommendations in the original proceeding.

7.81. As explained in paragraph 7.46, the original panel found that the majority of the R&TD measures challenged by the United States in this proceeding constituted specific subsidies that caused serious prejudice to the United States' interests under Articles 5(c) and 6.3(a), (b), and (c) of the SCM Agreement.<sup>179</sup> The panel found that the R&TD subsidies "enabled Airbus to develop features and aspects of its LCA on a schedule that it would otherwise have been unable to accomplish".<sup>180</sup> As a result, the original panel found that "{w}hile ... the impact of pre-competitive R&TD subsidies on Airbus' market presence was perhaps more attenuated, compared with the other subsidies at issue, ... we believe that combined with the others, the RT&D subsidies complemented and supplemented the impact of LA/MSF".<sup>181</sup>

7.82. On appeal, the Appellate Body found that the original panel did not have a sufficient basis to find that the R&TD subsidies complemented and supplemented the effects of LA/MSF. In particular, the Appellate Body observed that a general finding that the subsidies enabled Airbus to develop "features and aspects" of its LCA on a schedule that it otherwise would have been unable to accomplish does not provide a sufficient basis to determine that R&TD subsidies "complemented and supplemented" the product effect of LA/MSF in enabling Airbus to launch particular models of LCA.<sup>182</sup> In reaching this finding, the Appellate Body held that:

*Without specific findings that technology or production processes funded by R&TD subsidies contributed to Airbus' ability to launch and bring to the market particular models of LCA, the Panel did not have a sufficient basis to conclude that those subsidies "complemented and supplemented" the "product effect" of LA/MSF.*

...

*In failing to provide a sufficient evidentiary basis for its finding that the effect of non-LA/MSF subsidies was the displacement of Boeing LCA from the EC and relevant third country markets and significant lost sales ... the Panel failed to conduct an objective assessment of the matter, including an objective assessment of the facts, as required by Article 11 of the DSU.*<sup>183</sup>

7.83. We understand the Appellate Body to have rejected the original panel's *analytical approach*, finding that the application of the approach actually undertaken lead the panel to fail to conduct an objective assessment of the matter. However, the Appellate Body did not reject the merits of the United States' claims.

7.84. While the European Union disagrees with this characterization of the Appellate Body findings in the original proceeding, it argues that the United States is not entitled to advance any claims against the original R&TD measures in this second Article 21.5 compliance proceeding, because the United States failed to pursue such claims in the first Article 21.5 compliance proceeding. According

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<sup>176</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 424.

<sup>177</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.8 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 427).

<sup>178</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.8 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 424).

<sup>179</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1608.

<sup>180</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1959.

<sup>181</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1959.

<sup>182</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1407.

<sup>183</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1407-1408. (emphasis added)

to the European Union, the United States' failure to raise such claims during the first compliance proceeding when it had that opportunity means that the United States has essentially forfeited its right to raise these claims here. Importantly, in this regard, the European Union notes that because of the United States' decision not to renew its challenge against the Second through Sixth Framework Programmes, and other member State R&TD measures, at the time of the first compliance panel, the European Union did not incur any compliance obligations with respect to those measures upon the conclusion of the first compliance proceeding. The European Union maintains that the same logic applies in respect of the Seventh EU Framework Programme, which existed at the time of the first compliance proceeding – the United States' failure to raise claims against that measure at the time of the first compliance means that it has forfeited its right to do so in this second compliance proceeding.

7.85. In discussing the merits of their respective positions on this matter, both parties rely upon the Appellate Body's statement in *US – Upland Cotton (Article 21.5 – Brazil)* that "{a} complaining Member *ordinarily* would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not".<sup>184</sup> The European Union argues that the Appellate Body's statement supports the conclusion that the United States is not entitled to have its challenge against the original R&TD measures and the Seventh Framework Programme heard in this dispute. The United States argues that the specific reference does not support the European Union's argument, as that statement signifies only that the United States may not, in this proceeding, raise claims that it could have raised *in the first Article 21.5 compliance proceeding* and says nothing about the relationship between the first and second successive compliance proceedings, which the United States alleges should be treated differently.<sup>185</sup>

7.86. We note that since *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body has explained that its use of the word "ordinarily" was not intended to mean that such claims could never be brought, and that certain situations could exist which would allow an aspect of a previously challenged measure to be challenged in compliance proceedings to the extent that aspect was incorporated into the measure "taken to comply".<sup>186</sup> For example, in *US – Zeroing (EC) (Article 21.5 – EC)*, the European Communities sought to challenge an arithmetical error made to the determination of dumping challenged in the original dispute, which was subsequently incorporated into the United States' measure "taken to comply" (a revised anti-dumping determination). The European Communities had not challenged this aspect of the original determination during the first panel stage. Nevertheless, the Appellate Body found that the European Communities was entitled to challenge the arithmetical error because it was now an integral part of a *new* measure – the measure "taken to comply".

7.87. The circumstances surrounding this second compliance proceeding are different to those that arose in *US – Upland Cotton (Article 21.5 – Brazil)* and *US – Zeroing (EC) (Article 21.5 – EC)*. In this proceeding, the United States challenges the same measures that were challenged in the original proceeding. This compliance proceeding does not involve the question of whether an original complainant can challenge in a *first compliance* proceeding *new aspects* of an original measure *that did not exist* at the time of the original proceeding, as in *US – Upland Cotton (Article 21.5 – Brazil)*, or an *pre-existing feature* of a *new* measure, as in *US – Zeroing (EC) (Article 21.5 – EC)*. We recall that the United States' claims against the R&TD measures were not decided on the merits in the original proceeding. Accordingly, in our view, the United States would have been entitled to raise claims against the previously-challenged R&TD measures in the first compliance proceeding. Thus, the question that is now before us is whether, by failing to take that "second chance", the United States should be barred from making those claims in this second compliance dispute.

7.88. In considering this question, we begin by recalling that in the first compliance proceeding, the United States claimed that the A380 LA/MSF measures constituted prohibited import substitution subsidies under Article 3.1(b) of the SCM Agreement. The European Union argued that the United States' was not entitled to advance those claims because the United States "could have been pursued {them} in the original proceeding against the same A380 LA/MSF measures", but it instead

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<sup>184</sup> European Union's second written submission, para. 530 (citing Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211). See also Appellate Body Report, *US – Continued Suspension*, fn 771; and United States' second written submission, para. 335. (emphasis added)

<sup>185</sup> United States' second written submission, para. 335.

<sup>186</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 431-435.

chose to abandon them.<sup>187</sup> The United States argued that it should be permitted to pursue its Article 3.1(b) claims against the A380 LA/MSF subsidies in the compliance proceeding because at the time of the original proceeding, it was not aware of information (subsequently acquired by the time of the compliance proceeding), allegedly showing that French, German, Spanish and UK LA/MSF subsidies for the A380 were contingent on the use of domestic over imported goods.

7.89. The first compliance panel was not convinced that, as a matter of law, the United States was entitled to raise a claim under Article 3.1(b) against the unchanged A380 LA/MSF measures in that compliance proceeding on the basis that it did not have sufficient information at the time of the original panel request. The compliance panel found that it was difficult to see how the acquisition of new information alone could justify a complainant pursuing a new claim about an unchanged measure in a compliance proceeding.<sup>188</sup> In addition, the panel found that the evidence did not support the United States' contention that it was unaware of facts that could potentially be relevant to its fresh Article 3.1(b) claim.<sup>189</sup> Accordingly, the first compliance panel found that the United States was precluded from raising its Article 3.1(b) claims because it could have raised those claims, but didn't, in the original proceeding.

7.90. In this proceeding, the United States' challenges R&TD measures that were the subject of unresolved claims at the original stage of this dispute. The United States had the opportunity to raise claims against all of these measures, as well as the Seventh Framework Programme, in the first compliance proceeding. The United States did not take this "second chance". Moreover, in contrast to the situation in the first compliance proceeding as regards its Article 3.1(b) claims against the A380 LA/MSF subsidies, the United States has advanced little explanation of why it decided not to raise claims against the R&TD measures in the first compliance proceeding.

7.91. The United States argues that its claims should not be precluded simply because they were not raised in the first compliance proceeding because this "would impose a burden on the original complainant to identify *all* measures that are inconsistent with the original respondent's compliance obligations, no later than the original complainant's *first* request for the establishment of a compliance panel".<sup>190</sup> We note, however, that the United States was fully aware of the R&TD measures, having previously challenged them in the original proceeding. Thus, the present set of facts do not present a situation where an original complainant became aware of a new set of measures only after the first compliance proceeding. Furthermore, the United States' concern arises identically in the context of a first compliance proceeding following an original proceeding, in that parties are required to bring all relevant claims against a measure at the original panel stage, and cannot raise new claims in the compliance proceeding that could have been pursued in an original proceeding.<sup>191</sup>

7.92. Finally, the United States argues that its claims against the R&TD measures should be reviewed in this proceeding because the significance or relevance of the R&TD measures to the question of EU compliance has increased over time.<sup>192</sup> We note, however, that the R&TD work conducted under the majority of the challenged R&TD measures came to an end prior to the conclusion of the original proceeding. To the extent that the United States considered this R&TD work continued to bear on the question of compliance, it is therefore unclear why the United States could not have challenged them in the first compliance proceeding. Again, by not asserting any claim against the R&TD measures in the first compliance proceeding, the European Union had no basis to assume that it had compliance obligations in this dispute with respect to the R&TD measures.<sup>193</sup>

7.93. Thus, for all of the foregoing reasons, we find that the United States is not entitled to raise claims in this second compliance proceeding against the R&TD measures that were the subject of findings in the original proceeding, as well as the Seventh Framework Programme, which was not

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<sup>187</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.189.

<sup>188</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.199.

<sup>189</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.200.

<sup>190</sup> United States' second written submission, para. 337. (emphasis original)

<sup>191</sup> See, in this regard, Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.199; Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 642; and *EC – Bananas III*, para. 142.

<sup>192</sup> United States' comments on the European Union's response to Panel question No. 81, para. 322.

<sup>193</sup> See Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.75.

addressed in the original proceeding, but could have been challenged by the United States in the first compliance dispute.

### 7.3.5 The United States' claims against the Eighth Framework Programme

7.94. This section addresses whether the United States is entitled to raise claims against the Eighth Framework Programme, an alleged subsidy programme which did not exist at the time of establishment of the first compliance proceeding.<sup>194</sup>

7.95. The European Union argues that the United States may not raise any claims against the Eighth Framework Programme as it does not constitute a "measure taken to comply" within the meaning of Article 21.5 of the DSU.<sup>195</sup> The European Union argues that for a measure to be properly before a compliance panel, it must not only be specifically identified in a panel request, but must also constitute a "measure taken to comply" within the meaning of Article 21.5 of the DSU.<sup>196</sup> Accordingly, the European Union argues that by not including it in its panel request, the European Union did not declare the Eighth EU Framework Programme to be a measure taken to comply.<sup>197</sup> However, the European Union recognizes that the parties' characterization of a measure as one taken to comply is not dispositive and that it is up to the Panel to determine its jurisdiction, which may involve examining measures that the implementing Member has not declared to be measures taken to comply.<sup>198</sup> In this regard, the European Union argues that the Eighth Framework Programme cannot be characterized as an "*undeclared* measure taken to comply", because it does not have a "particularly close relationship" or a "close nexus" with the adopted DSB recommendations and rulings or the declared measures taken to comply in terms of their timing, nature and effect.<sup>199</sup>

7.96. The United States objects to the European Union's strict reliance on what is known as the "close nexus test", arguing that the European Union "does not engage with the first compliance panel's warning that 'there may be situations where the factual circumstances and legal provisions at issue in a particular compliance dispute call for a different approach to be taken'".<sup>200</sup> Even so, the United States argues that the Eighth Framework Programme bears a sufficiently close nexus to the European Union's declared measures taken to comply and the DSB's recommendations and rulings, and presents arguments related to each of the requisite elements.

7.97. Both parties accept that Article 21.5 proceedings concern measures "taken to comply" with the recommendations and rulings of the DSB.<sup>201</sup> Such measures may include measures *declared* by the implementing Member to bring it into compliance, but also include other measures that were not expressly declared as a "measure taken to comply" by the original respondent. Such *undeclared*

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<sup>194</sup> We note that in its responses to Panel questions, the United States has identified several other R&TD measures involving Airbus that did not exist at the time of establishment of the first compliance proceeding. These include the German civil aviation research programmes, LuFo V (2015-2019) and LuFo VI (2018-2022), as well as the UK's "Wing of the Future" programme. However, these measures were not cited by the United States as challenged measures, in direct response to a Panel question to this effect. The United States also did not present any arguments that these measures constituted specific subsidies which confer a benefit. Considering the late stage in the proceeding in which the United States raised these measures, and given the lack of substantive arguments the United States has advanced in their regard, we do not understand the United States to be challenging them. (See United States' first written submission, paras. 118 and 126; second written submission, para. 299 and fn 396; response to Panel question No. 79, paras. 196-197; and European Union's comments on the United States' response to Panel question No. 79, paras. 445 and 449).

<sup>195</sup> The European Union, in the alternative, also argues that the Second through Sixth Framework Programmes and the Seventh Framework Programme are not measures taken to comply within the meaning of Article 21.5 of the DSU. The preceding section recommends that the Panel find that the United States is precluded from challenging all of these programmes.

<sup>196</sup> European Union's second written submission, para. 538.

<sup>197</sup> European Union's second written submission, para. 539.

<sup>198</sup> European Union's second written submission, para. 540.

<sup>199</sup> European Union's second written submission, para. 542.

<sup>200</sup> United States' second written submission, para. 345 (referring to Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.84, fn 190).

<sup>201</sup> Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36. The Appellate Body reiterated in *EC – Bed Linen (Article 21.5 – India)* that "{i}f a claim challenges a measure which is not a 'measure taken to comply', that claim cannot properly be raised in Article 21.5 proceedings". (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78. (emphasis original))

measures taken to comply are measures that may "operate to undermine or effectively nullify the declared 'measures taken to comply' or otherwise circumvent that Member's compliance obligations".<sup>202</sup> As the Eighth Framework Programme is not a declared measure "taken to comply" by the European Union, the question arises as to whether it may be brought into the scope of this proceeding as an "undeclared" measure taken to comply by application of what is described as the "close nexus" test.

7.98. Panels and the Appellate Body have applied the "close nexus" test in order to assess whether an undeclared measure "taken to comply" may fall within a panel's terms of reference in the context of standard compliance proceedings.<sup>203</sup> Thus far, the "close nexus" test has been applied to allow *complainants* to initiate compliance proceedings to review measures that have not been specifically declared by an implementing member as measures "taken to comply". The test has not yet been applied in a "reverse" compliance proceeding to allow an original complainant to challenge an undeclared measure which is not identified in the original *respondent's* request for panel establishment. Although the United States objects to the European Union's strict reliance on the close nexus test, it fails to set out any reasons for not applying the test, merely relying on the *possibility* that another approach may be taken.

7.99. In considering whether the "close nexus" test should apply in this "reverse" compliance proceeding, we recall that our analysis in this section proceeds on the basis of the premise that an original complainant in a "reverse" compliance proceeding *is* entitled to raise claims against measures not specifically identified by the original respondent in its panel request.<sup>204</sup> Given this premise, we believe it makes sense to apply the "close nexus" test to determine whether a measure not identified by an original respondent in its panel request may fall within a "reverse" compliance panel's terms of reference. In our view, such an approach would effectively define the types of measures that an original complainant may bring into a "reverse" compliance dispute in the same way that measures that are not declared by an implementing Member to be "measures taken to comply" can be brought within the scope of a normal compliance dispute – namely, when they have a particularly close relationship with the measures taken to comply and/or the recommendations and rulings of the DSB.

7.100. Under the "close nexus" test, any measure with a "particularly close relationship" to the declared measure taken to comply, and to the recommendations and rulings of the DSB may be susceptible to review by a compliance panel.<sup>205</sup> As explained by the first compliance panel:

Determining whether {a measure is susceptible to review} requires panels to "scrutinize these relationships" in the context of the "factual and legal background" against which a declared measure taken to comply is adopted, which may, depending on the particular facts, call for an examination of the timing, nature and effects of the various measures. A compliance panel must on this basis determine whether there are "sufficiently close links" between the relevant measures and the DSB recommendations and rulings such that it would be appropriate to characterize the undeclared measure as a "measure taken to comply" and, consequently, to assess its consistency with the covered agreements in a proceeding initiated under Article 21.5 of the DSU.<sup>206</sup>

7.101. Thus, in order for the United States' claims against the Eighth Framework Programme to fall within our terms of reference, we must determine whether a particularly close relationship exists between that Programme and the recommendations and rulings of the DSB, and the declared measures taken to comply.

7.102. We recall that the DSB's recommendations and rulings from the first compliance proceeding concern the A380 and A350XWB LA/MSF measures.<sup>207</sup> The *declared* measures taken to comply in

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<sup>202</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.82.

<sup>203</sup> See Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

<sup>204</sup> See above para. 7.74.

<sup>205</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.83.

<sup>206</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.83 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77. (emphasis added)).

<sup>207</sup> In the original proceeding, the United States identified the Mühlenberger Loch and Bremen Airport measures but did not pursue these in the compliance proceeding. (Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, fns 1472 and 3330).

this dispute are the actions which the European Union alleges have withdrawn the LA/MSF subsidies and/or the alleged steps taken by the European Union and certain member States to remove their adverse effects. Application of the "close nexus" test requires us to assess the proximity of the Eighth Framework Programme with these declared measures taken to comply and the recommendations and rulings of the DSB in connection with LA/MSF. This involves examining the timing, nature and effects of each of these.

#### 7.3.5.1 Timing

7.103. The European Union argues that there is a temporal *disconnect* between the more recent Framework Programmes, including the Eighth Framework Programme, and the development of the A380 and A350XWB. In particular, as the A380 and A350XWB were launched in 2000 and 2006 respectively, the European Union argues that the A380 and A350XWB were launched, developed, tested, and certified before the Eighth Framework Programme even began<sup>208</sup>, and thus this Framework Programme cannot be a measure taken to comply.

7.104. The United States does not deny that there is a temporal disconnect between the R&TD activities funded through the Eighth Framework Programme and Airbus's original development of the A380 and A350XWB but contends that this disconnect is irrelevant.<sup>209</sup> However, the United States argues that the Eighth Framework Programme's funding overlaps the continuing investment that the European Union has cited as a measure taken to comply both in time and in the topic areas covered, and that thus, it complements and supplements the effects of the original LA/MSF for those aircraft by maintaining and enhancing the market presence of the aircraft that the older financing enabled.<sup>210</sup> Consequently, according to the United States, there is a close nexus in terms of timing between the Eighth Framework Programme and LA/MSF.

7.105. The European Union is correct that the funding provided under the Eighth Framework Programme was disbursed for activities taking place *after* the launch, development, testing and certification of the A380 and A350XWB. We note, however, that the funding provided under the Eighth Framework Programme overlaps with the continuing investment in post-launch support allegedly undertaken by Airbus in relation to both the A380 and the A350XWB, which the European Union has cited as a measure taken to comply. Accordingly, the R&TD work performed under the Eighth Framework Programme coincides with several of the European Union's compliance actions. To this extent, it cannot be excluded from the *timing* of the Eighth Framework Programme, that the R&TD work funded thereunder could undermine the European Union's alleged compliance actions, especially if the nature and effect of that work can be linked with the continued development and market presence of the A380 and the A350XWB.

#### 7.3.5.2 Nature

7.106. According to the European Union, unlike the LA/MSF subsidies for the A380 and the A350XWB, the funding available under the Eighth Framework Programme does not pertain to the financing of the development of a specific aircraft programme. Instead the European Union argues that the funding available under the Eighth Framework Programme is provided for conducting the early stages of research into new technologies that may or may not be applied on future aircraft development programmes.<sup>211</sup> The European Union's argument is that the *general* nature of the research funded by the Eighth Framework Programme simply cannot be equated with *particular* instances of LA/MSF that were found to enable the launch of specific types of aircraft "as and when" they were launched.<sup>212</sup>

7.107. The United States argues that the nature of the R&TD projects funded under the Eighth Framework Programme is not unlike the work funded through the LA/MSF provided for the A380 and A350XWB. Key to its arguments are the supposed overlaps between the work performed under the LA/MSF measures and the work performed in connection with the R&TD measures.<sup>213</sup> In this regard,

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<sup>208</sup> European Union's second written submission, para. 548.

<sup>209</sup> United States' second written submission, para. 358.

<sup>210</sup> United States' second written submission, para. 358.

<sup>211</sup> European Union's second written submission, para. 543.

<sup>212</sup> European Union's second written submission, para. 544.

<sup>213</sup> United States' second written submission, para. 348.

the United States refers to various projects and programmes linked to the development of the A380 and A350XWB (as well as the A320neo and A330neo), arguing that these projects and programmes directly impacted "several technology areas", though only certain of these arguments relate specifically to the Eighth Framework Programme.<sup>214</sup> The United States asserts that the LA/MSF contracts "authorized Airbus to use funds to conduct technical feasibility studies and validation work, including preliminary design, wind tunnel tests, costs of prototype and trial aircraft, structural tests, wing tests, [\*\*\*]".<sup>215</sup> Similarly, the United States submits that the Large Passenger Aircraft (LPA) element of the Clean Sky 2 project funded under the Eighth Framework Programme is aimed at developing flight-test vehicles and prototypes, developing manufacturing and assembly concepts, and performing flight tests.<sup>216</sup> According to the United States, the Clean Sky 2 project is aimed at taking technologies developed under the Seventh Framework Programme's Clean Sky project "to a higher level".<sup>217</sup> The United States disagrees with the European Union's assertion that the Eighth Framework Programme was limited to early-stage research, arguing that in fact "some activities under the Eighth Framework {are} explicitly aimed at 'R&TD with near-term applications'".<sup>218</sup> Moreover, the United States argues that, like LA/MSF, the Eighth Framework Programme funds both early- and late-stage R&TD.<sup>219</sup>

7.108. We recall that the adverse effects that are the subject of the DSB's recommendations and rulings were found to have been caused by LA/MSF subsidies related *specifically* to the A380 and the A350XWB. The factual situation with respect to the R&TD work funded under the Eighth Framework Programme is different, and can be contrasted with the circumstances faced by the panel in the first compliance dispute, when it found there was a "close nexus" between the A350XWB LA/MSF measures and the other LA/MSF measures at issue in that dispute.<sup>220</sup> There, the United States had argued that the A350XWB LA/MSF measures had essentially the same nature as the LA/MSF measures found to cause adverse effects in the original proceeding because both were "(a) loans; (b) concluded between the same parties; (c) with the same core success-dependent, levy-based, back-loaded and unsecured repayment terms; and (d) for the purpose of developing new models of LCA to compete against Boeing".<sup>221</sup> This is markedly different from the form of the R&TD funding provided under the Eighth Framework Programme, which consists of a large-scale, overarching scheme through which cash grants are awarded upon application to fund particular, discrete research and development projects aimed at developing various technologies, much of which is generic and does not refer to specific aircraft programmes.<sup>222</sup>

7.109. We agree with the United States, in principle, that the work done under the R&TD measures can overlap with LA/MSF in certain areas because the design and launch of an aircraft will involve research and technical development. Thus, where both are aimed at, for example, developing flight test vehicles and prototypes, we understand there to be an overlap in terms of scope. However, the essential point is that even to the extent that United States is correct about the overlaps between the two types of measures, the purpose and objective of each is different. On the one hand the projects funded under the Eighth Framework Programme are *relatively* early-stage research into various technologies and production methods which, while related specifically to aircraft and areas such as fuel efficiency and aerodynamics, are *not* tied to the launch and development of a specific type of aircraft or model of Airbus LCA. In other words, on the evidence presented by the United States, the R&TD projects funded under the Eighth Framework Programme are not product-specific. On the other hand, the government loans provided to Airbus under the LA/MSF measures were intended to finance the specific development and launch of the A380 and A350XWB.<sup>223</sup> The successful execution of the contracting parties' obligations under the LA/MSF agreements would

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<sup>214</sup> United States' first written submission, paras. 277-294; and second written submission, para. 349.

<sup>215</sup> United States' second written submission, para. 351 (referring to Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.227, 6.237, 6.250, and 6.258).

<sup>216</sup> *Clean Sky 2 Joint Undertaking: Work Plan 2018-2019*, (Exhibit USA-119), pp. 18-19.

<sup>217</sup> United States' second written submission, para. 357 (referring to *Clean Sky 2 Joint Undertaking: Work Plan 2014-2015*, (Exhibit USA-149), p. 66).

<sup>218</sup> United States' second written submission, para. 354.

<sup>219</sup> United States' second written submission, para. 355.

<sup>220</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.150-6.154.

<sup>221</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.58.

<sup>222</sup> European Union's second written submission, para. 543.

<sup>223</sup> Likewise, the European Union's alleged non-subsidized investments were not of a general nature, but specifically targeted to the A350XWB and the A380.

result in the launch, development and sale of a specific Airbus LCA. In contrast, the successful completion of the Airbus projects funded under the Eighth Framework Programme would allow Airbus to access a number of prototype technologies which may or may not be further developed and used on one or more of its existing or future LCA models.

7.110. Moreover, while it is possible to say that from a general perspective, certain aspects of the work funded under the LA/MSF agreements and the Eighth Framework Programme share some common features, both sets of measures also fund work that does *not* overlap. Under the aeronautics component of the Eighth Framework Programme, for example, a range of projects are funded, and only a part of these are related to LCA development in the same way as LA/MSF.<sup>224</sup> Furthermore, it appears that funding under the Eighth Framework Programme is not expressly earmarked for specific aircraft and the United States has not effectively demonstrated that the elements of the work that do overlap are *in fact* related to the development of specific aircraft. Accordingly, on the basis of the above considerations, we find that there is no particularly close relationship between the nature of the Eighth Framework Programme, the declared measures taken to comply, and the DSB's recommendations and rulings.

### 7.3.5.3 Effects

7.111. The European Union argues that the Eighth Framework Programme is of the same nature as the Second through Seventh Framework Programmes, "for which the European Union has, at no point during the 15-year history of this dispute, incurred any compliance obligations".<sup>225</sup> Referring to the Second through Sixth Framework Programmes, the European Union refers to the finding of the original panel, which stated that the "impact of pre-competitive R&TD subsidies on Airbus' market presence was perhaps more attenuated, compared with the other subsidies at issue".<sup>226</sup> According to the European Union, "pre-competitive" research of the type that has been found, in the original proceedings, *not* to complement and supplement the product effect of LA/MSF, is causally too far removed from the declared measures taken to comply to undermine their compliance with the DSB's recommendations and rulings. Thus, according to the European Union, the effects of the Eighth Framework Programme can be distinguished from those of the A380 and A350XWB LA/MSF subsidies on the basis of the more attenuated nature of the effects of the former, as well as the adopted findings that these subsidies did not complement and supplement the latter.<sup>227</sup>

7.112. To demonstrate a link between the funding provided under the Eighth Framework Programme and Airbus LCA development, the United States refers to three examples of projects funded under the Eighth Framework Programme that allegedly directly benefited Airbus: (i) the EFFICOMP project, which the United States' maintains has the objective of reducing manufacturing costs and lead time of composite structure manufacturing for aerospace applications<sup>228</sup>; (ii) the Clean Sky 2 Large Passenger Aircraft Programme, which the United States considers aims to "further mature and validate key technologies such as advanced wings and empennages design, making use of hybrid laminar airflow wing developments, as well as an all-new next generation fuselage cabin and cockpit-navigation"<sup>229</sup> and; (iii) the Graphene Flagship project, which the United States asserts is aimed at improving "existing and broadly used aeronautic products, especially those where high performance composites of epoxy resins and carbon fibres are implemented in airplane parts and fuselages".<sup>230</sup>

7.113. On their own, according to the United States, the R&TD under the Eighth Framework Programme generally accelerates the market entry of new and derivative Airbus LCA through the additive effects of generating learning that Airbus would not otherwise enjoy.<sup>231</sup> The United States cites examples in support of these assertions with respect to the A380, A350XWB, A320neo, and

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<sup>224</sup> See, for example, the CompInnova Project, which aims to develop a "revolutionary automated multipurpose and multifunctional Vortex robot ... for inspecting metallic and composite aircraft structures". See <<http://compinnova.eu/>>, accessed 21 August 2019.

<sup>225</sup> European Union's second written submission, para. 545.

<sup>226</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1959.

<sup>227</sup> European Union's second written submission, para. 546.

<sup>228</sup> EFFICOMP Project, CORDIS website, (Exhibit USA-36).

<sup>229</sup> LPA GAM 2018 Project, CORDIS website, (Exhibit USA-37).

<sup>230</sup> Aerostructures Manufacturer, Graphene Flagship website, (Exhibit USA-38).

<sup>231</sup> United States' first written submission, para. 276.

A330neo.<sup>232</sup> The United States argues that the European Union has thus provided no support for its assertion that the impact of Eighth Framework Programme's research on Airbus's technical capabilities is more attenuated than LA/MSF. The United States notes that one of the stated goals of the Clean Sky 2 project, for example, is the development of technology to Technology Readiness Level (TRL) 6, which overlaps in part with the types of R&TD funded by LA/MSF.<sup>233</sup>

7.114. As we have noted above, the Eighth Framework Programme does not involve product-specific financing, marking a crucial difference between that programme and LA/MSF for the A380 and A350XWB. The projects funded under the Eighth Framework Programme raised by the United States do not appear to be associated with the A380 or A350XWB, nor any apparent direct replacement model. Indeed, they do not appear to be specific to any particular model of Airbus LCA. It is thus difficult to see how, in practice, the effects of the Eighth Framework Programme would act specifically to undermine the European Union's compliance in this dispute.

7.115. Furthermore, we note that the majority of the work performed under the Eighth Framework Programme will only have effects in the future. Thus, even if the United States were correct in arguing that the subject matter of the Eighth Framework Programme and the LA/MSF measures overlaps in scope, it has not, in our view, presented sufficient evidence to demonstrate that the research funded under the Eighth Framework Programme could result in "matured technology that Airbus used on the A380 and the A350XWB either at the time of launch, or after those aircraft were launched"<sup>234</sup> because as the United States itself notes, flight testing of the technologies under the Clean Sky 2 Programme "is planned for late 2019 or early 2020, with production and delivery of a lower fuselage section in the 2020-2022 period".<sup>235</sup> Similarly, the EFFICOMP project aims to "develop efficient processes and efficient certification tools for the fast-track {of} cost-effective composite *aircraft of the future*".<sup>236</sup> The United States has not explained how a project that aims to begin flight tests in 2020 or the development of processes for "aircraft of the future" could be linked to: (i) Airbus' ability to launch the A380 and the A350XWB, as and when it did and, (ii) Airbus' completed post-launch investments in the A380 and the A350XWB that have resulted in technologies and production processes already in use.<sup>237</sup>

7.116. In the light of our review of the limited evidence and arguments presented by the United States with respect to the Eighth Framework Programme, and the distinct design and objectives of the R&TD measures which are not tied to particular aircraft models, we do not see a sufficient basis to find that the effects of the Eighth Framework Programme are likely to undermine the European Union's compliance with the adopted recommendations and rulings. Unlike LA/MSF and the allegedly non-subsidized investments Airbus made into the A350XWB and the A380, the work performed under the Eighth Framework Programme is not particularly closely related to enhancing Airbus' *present* competitiveness of the A350XWB and A380 in the marketplace.

### 7.3.6 Conclusions

7.117. In the light of the above analysis, we find that the United States' claims against the R&TD measures are outside of the scope of this second compliance proceeding. We reach this conclusion on the basis of the following considerations:

- a. The R&TD measures that the United States challenges are not identified, as a matter of fact, in the European Union's panel request; and
- b. Even assuming, *arguendo*, that the absence of any reference to the challenged R&TD measures in the European Union's panel request does not prevent the United States from raising its claims in this proceeding, the United States is nevertheless precluded from raising those claims because:

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<sup>232</sup> United States' first written submission, paras. 277-294.

<sup>233</sup> United States' second written submission, para. 354.

<sup>234</sup> European Union's response to Panel question No. 84, para. 480.

<sup>235</sup> United States' second written submission, paras. 350 and 357.

<sup>236</sup> "Objectives" EFFICOMP Website, <<https://efficomp.eu/objectives>>, accessed 29 July 2019.

(emphasis added)

<sup>237</sup> European Union's comments on the United States' response to Panel question No. 76, para. 402.

- i. As regards the United States' claims against the R&TD measures that were the subject of findings in the original proceeding, as well as the Seventh Framework Programme, the United States is precluded from raising those claims because it could have brought them in the first compliance proceeding but failed to do so.
- ii. As regards the United States' claims against the Eighth Framework Programme, the United States has failed to establish that the Eighth Framework Programme has "sufficiently close links" with the relevant measures taken to comply and the DSB's recommendations and rulings such that it would be appropriate to characterize the Eighth Framework Programme as a "measure taken to comply".

## **7.4 Whether the A350XWB and A380 LA/MSF subsidies have been withdrawn for the purpose of Article 7.8 of the SCM Agreement**

### **7.4.1 Introduction**

7.118. In this section, we address the European Union's claim that it has withdrawn the A350XWB and A380 LA/MSF subsidies, within the meaning of Article 7.8 of the SCM Agreement, thereby achieving full substantive compliance with the DSB recommendations and rulings.<sup>238</sup>

7.119. The European Union maintains that a Member achieves compliance through the withdrawal of the subsidy, within the meaning of Article 7.8, when that subsidy ceases to exist. In this regard, the European Union submits that Article 1.1 of the SCM Agreement identifies a financial contribution and a benefit as two distinct constituent elements of a subsidy, and a subsidy will no longer exist when either one of the two elements is removed. Under this understanding, a subsidy would no longer be "maintained" within the meaning of Article 7.8 when either the financial contribution or the benefit no longer exists.<sup>239</sup> The European Union finds support for its position in the ordinary meaning of the term "withdraw", as allegedly clarified by the Appellate Body in the first compliance proceeding.<sup>240</sup>

7.120. The European Union submits that there are different means through which a Member may achieve the withdrawal of a subsidy for the purpose of Article 7.8 of the SCM Agreement. In this proceeding, the European Union has identified the following three circumstances in which it argues the lives of the A350XWB and A380 LA/MSF subsidies have ceased to exist and, therefore, been withdrawn for the purpose of Article 7.8 of the SCM Agreement: (i) the actual repayment of all outstanding principal and accrued interest under the UK A350XWB and UK A380 LA/MSF loans; (ii) the replacement of the German A350XWB LA/MSF and French, German, Spanish and UK A380 LA/MSF agreements, with amended LA/MSF agreements conferred on terms consistent with the relevant market benchmark; (iii) the amortization of the benefit of the Spanish A380 LA/MSF subsidy through the passage of time.<sup>241</sup>

7.121. With this explanation of the European Union's claims, we first address the European Union's claims concerning the German and UK A350XWB LA/MSF subsidies before addressing the European Union's various claims concerning the A380 LA/MSF subsidies. Before doing so, we consider it helpful to first recall the guidance from the first compliance proceeding regarding the obligation to withdraw the subsidy contained in Article 7.8 of the SCM Agreement.

### **7.4.2 Guidance from the first compliance proceeding regarding the obligation to "withdraw" the subsidy contained in Article 7.8 of the SCM Agreement**

7.122. In the first compliance proceeding, the European Union argued before the panel that it had no obligation to adopt compliance measures with respect to subsidies that had ceased to exist prior

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<sup>238</sup> The European Union has not argued that the French and Spanish A350XWB LA/MSF subsidies have been withdrawn, instead arguing that it has taken appropriate steps to remove any adverse effects arising from those and any other non-withdrawn subsidies. We address the European Union's claim regarding the removal of adverse effects of any non-withdrawn subsidies in section 7.5 below.

<sup>239</sup> European Union's first written submission, para. 59 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.383).

<sup>240</sup> European Union's first written submission, paras. 60-62.

<sup>241</sup> European Union's first written submission, para. 63.

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.<sup>242</sup> The panel rejected this argument based on its finding that compliance under Article 7.8 can only be achieved if "an implementing Member no longer causes adverse effects through the use of subsidies within the meaning of Article 5 of the SCM Agreement".<sup>243</sup> The European Union requested the Appellate Body to reverse this finding.<sup>244</sup> In doing so, the Appellate Body addressed the interpretation of what is required to achieve compliance within the meaning of Article 7.8 of the SCM Agreement.

7.123. The Appellate Body began its analysis with an assessment of the text of Article 7.8 of the SCM Agreement, which provides:

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.

7.124. The Appellate Body observed that Article 7.8 consists of two clauses, the first of which refers to circumstances where a subsidy is found to have "resulted in adverse effects to the interests of another Member", and the second of which specifies two alternative ways that "the Member granting or maintaining such a subsidy" may come into compliance with its obligations under the SCM Agreement.<sup>245</sup> These options are to: (i) either "take appropriate steps to remove the adverse effects"; or (ii) "withdraw the subsidy".<sup>246</sup> In terms of the reference in Article 7.8 to "granting or maintaining" a subsidy found to have caused adverse effects, the Appellate Body considered "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".<sup>247</sup> Due to its view that Article 7.8 sets out an obligation "of a continuous nature, extending beyond subsidies granted in the past"<sup>248</sup>, the Appellate Body found it "difficult to see how a Member could be said to be 'granting or maintaining' a *subsidy* giving rise to a compliance obligations if that subsidy has expired and therefore no longer exists".<sup>249</sup>

7.125. In terms of achieving "withdrawal" of a subsidy, the Appellate Body noted that the relevant dictionary definitions of the 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".<sup>250</sup> The Appellate Body thus explained that "{t}his suggests that withdrawal of a subsidy, under Article 7.8 of the SCM Agreement, concerns the taking away of that subsidy, and thus that a Member 'granting or maintaining' a subsidy cease such conduct".<sup>251</sup> In order to withdraw a subsidy, the Appellate Body proceeded to note that "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".<sup>252</sup> In this vein, the Appellate Body additionally

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<sup>242</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.794.

<sup>243</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.822 and 6.1085.

<sup>244</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.353.

<sup>245</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.362.

<sup>246</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.362 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236).

<sup>247</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.364.

<sup>248</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 237.

<sup>249</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.364. (emphasis original)

<sup>250</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.366.

<sup>251</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.366.

<sup>252</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.366.

stated that it was "not clear ... how an implementing Member could modify the terms and conditions of subsidies that no longer exist".<sup>253</sup>

7.126. The Appellate Body also considered its understanding of withdrawal taking into account the context and object and purpose of Article 7.8. The Appellate Body emphasized that, while the focus of Article 5 of the SCM Agreement, as well as Article 7.8, is the causing of adverse effects through the use of a subsidy, Article 7.8 contemplates compliance action only in relation to the subsidy found to have caused adverse effects. For this reason, to the extent that the underlying subsidy has ceased to exist, the Appellate Body observed that there is no additional requirement under Article 7.8 to remove any lingering effects that may flow from that subsidy.<sup>254</sup> The Appellate Body further noted that its understanding of the term "withdrawal" was supported in the relevant provisions of the SCM Agreement governing prohibited subsidies. In particular, the Appellate Body noted that the remedy discussed in Article 4.7 "withdraw the subsidy without delay" does not require the removal of the effects of such subsidies.<sup>255</sup> Thus, the Appellate Body explained that "it would be incongruous, in our view, if elimination of the source of the inconsistency were sufficient to comply with an implementing Members' obligations in the context of Article 4.7, but not in the context of Article 7.8".<sup>256</sup> The Appellate Body also noted that Article 19.1 in Part V of the SCM Agreement, addressing the imposition of countervailing duties, stipulates that countervailing duties may be imposed on subsidised imports "unless the subsidy or subsidies are withdrawn".<sup>257</sup>

7.127. Thus, the Appellate Body emphasized that the obligation to "take appropriate steps to remove the adverse effects ... or withdraw the subsidy" in Article 7.8 pertains to subsidies that continue to be "granted" or "maintained" by the implementing Member after the conclusion of the implementation period. In turn, an implementing Member is not required to withdraw a subsidy that has ceased to exist.<sup>258</sup> Accordingly, based on this understanding, an implementing Member would have no compliance obligation with respect to subsidies that have expired or ceased to exist.

7.128. With this guidance in mind, we turn to evaluate the merits of the parties' submissions concerning the measures and steps the European Union maintains have resulted in the withdrawal of the A350XWB and A380 LA/MSF subsidies.

#### **7.4.3 The [\*\*\*] amendment to the German A350XWB LA/MSF agreement**

##### **7.4.3.1 Main arguments of the parties**

7.129. The European Union maintains that the subsidy provided to Airbus through the original German A350XWB LA/MSF agreement has been "withdrawn", within the meaning of Article 7.8 of the SCM Agreement, by means of replacement with a *new* non-subsidized German A350XWB LA/MSF agreement. According to the European Union, where an implementing Member granting a financial contribution on subsidized terms varies those terms, such that there is a "substantial" modification in what the Member provides the recipient, the Member provides a *new* financial contribution, the benefit of which must be determined by comparing the terms of the new instrument to a contemporaneous market benchmark.<sup>259</sup>

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<sup>253</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.366.

<sup>254</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.371.

<sup>255</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.376.

<sup>256</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.376.

<sup>257</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.378.

<sup>258</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.383.

<sup>259</sup> European Union's first written submission, paras. 70-80 and 100-102. Canada appears to share the European Union's view that the amended terms and conditions should be assessed against the terms and conditions available on the market at the time when full substantive compliance is asserted, in the case of respondent-initiated compliance proceedings. (Canada's response to Panel question No. 1 to third parties, paras. 1 and 5).

7.130. The European Union argues that the [\*\*\*] amendment to the original German A350XWB LA/MSF agreement brought about a "substantial modification"<sup>260</sup> to its terms as a result of the changes made to the [\*\*\*], the [\*\*\*], the [\*\*\*], and [\*\*\*].<sup>261</sup> For the European Union, these changes resulted in a *new* financial contribution, the "benefit" of which must be assessed by comparing the newly agreed terms with a benchmark that reflects the relevant market conditions and positions of Airbus and the German government in 2018.<sup>262</sup>

7.131. In assessing whether the newly amended German A350XWB LA/MSF agreement was provided on such market terms, the European Union relies on a report produced by its consultant, TradeRx, which compares the terms of the amended German A350XWB LA/MSF agreement with an alleged contemporaneous market benchmark, following the approach adopted in the first compliance proceeding to determine the internal rate of return (IRR) and applicable market benchmark for the original German A350XWB LA/MSF loan.<sup>263</sup> The European Union points out that, according to the calculations in the TradeRx A350XWB Report, the expected IRR of the amended German A350XWB LA/MSF agreement exceeds the relevant contemporaneous market benchmark.<sup>264</sup> The European Union thus concludes that the German A350XWB LA/MSF agreement resulting from the [\*\*\*] amendment replaces the subsidized financial contribution under the original German A350XWB LA/MSF agreement with a financial contribution that does not confer a benefit, and is, therefore, not subsidized.<sup>265</sup>

7.132. Finally, the European Union also argues, *in the alternative*, that it would be appropriate to view the [\*\*\*] amendment to the German A350XWB LA/MSF loan agreement as an intervening event that brings the life of the German A350XWB LA/MSF loan to an end, achieving withdrawal of the subsidy for the purpose of Article 7.8 of the SCM Agreement.<sup>266</sup>

7.133. The United States maintains that the European Union has chosen the wrong analytical framework to assess the question of withdrawal, arguing that there is no support for the European Union's submission that the [\*\*\*] amendment achieved compliance with respect to the original German A350XWB LA/MSF subsidy. The United States submits that the benchmark analysis set out in TradeRx A350XWB Report might be appropriate to determine whether a *new* loan confers a subsidy, but it does not properly address the question of whether *an amendment to a pre-existing loan provided on subsidized terms* has been withdrawn. The United States argues that, in order to answer that question, it is necessary to assess the effect of the amendment on the pre-existing loan, which in the United States' view, TradeRx A350XWB Report has ignored.<sup>267</sup>

7.134. According to the United States, the [\*\*\*] amendment to the German A350 XWB LA/MSF agreement is correctly viewed as an "intervening event", or "an unplanned adjustment to the terms of the pre-existing German LA/MSF for the A350XWB", that "increased the benefit conferred by the pre-existing German LA/MSF subsidy for the A350XWB" and prolonged its "life" until at least [\*\*\*].<sup>268</sup> To assess the effect of the amendment, the United States submits a report produced by its consultant, NERA Economic Consulting, that compares the IRR of the original unamended German A350XWB LA/MSF agreement, as of [\*\*\*], to the IRR of the amended German A350XWB LA/MSF agreement, as of [\*\*\*].<sup>269</sup> The NERA German A350XWB Report concludes that the IRR of the original unamended arrangement is *higher* than the IRR of the amended loan agreement, which the United States submits means that the amendment increased the subsidy to Airbus and that the German lender, KfW, would have been in a better financial position if it had simply left the terms of

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<sup>260</sup> European Union's first written submission, para. 101; German A350XWB [\*\*\*] amendment, (Exhibit EU-9 (BCI) (English translation)), Clause 2(d) and Annex 2. See also TradeRx A350XWB LA/MSF Report, (Exhibit EU-11 (HSBI/BCI)), paras. 37-39.

<sup>261</sup> European Union's first written submission, para. 101.

<sup>262</sup> European Union's first written submission, para. 103.

<sup>263</sup> TradeRx A350XWB LA/MSF Report, (Exhibit EU-11 (HSBI/BCI)).

<sup>264</sup> European Union's first written submission, paras. 105-107 (referring to TradeRx A350XWB LA/MSF Report, (Exhibit EU-11 (HSBI/BCI))).

<sup>265</sup> European Union's first written submission, paras. 115-116.

<sup>266</sup> European Union's first written submission, fn 142.

<sup>267</sup> United States' first written submission, para. 96.

<sup>268</sup> United States' first written submission, paras. 93 and 100.

<sup>269</sup> NERA German A350XWB LA/MSF Report, (Exhibit USA-26 (HSBI/BCI)).

the original A350XWB LA/MSF unamended.<sup>270</sup> Accordingly, the United States concludes that "no reasonable commercial lender in the position of the Government of Germany would have agreed to enter into the [\*\*\*] Amendment".<sup>271</sup> In addition, the United States argues that the [\*\*\*] amendment "prolonged the life of the pre-existing German LA/MSF subsidy for the A350XWB to well after [\*\*\*]", because the amendment was based on an expectation that A350XWB deliveries would continue [\*\*\*].<sup>272</sup>

7.135. Finally, the United States argues that even if the Panel were to accept the European Union's analytical framework as the correct one, a comparison of the IRR of the [\*\*\*] amendment to the market benchmark used by TradeRx shows that no reasonable commercial lender would have agreed to the amendment's terms. The United States relies upon a second analysis of the [\*\*\*] amendment performed by NERA, in which NERA calculated a revised IRR for the amended German A350XWB LA/MSF loan agreement. NERA based this calculation on a revised delivery schedule that NERA constructed after concluding that the delivery schedule used by TradeRx "is at odds with the anticipated number of deliveries in the Ascend data, the statement of Airbus executives, and the [\*\*\*] anticipated in the business case for the A350XWB".<sup>273</sup> Based on this assessment NERA concluded that, assuming that the market benchmark used by TradeRx was correct, then the IRR is actually lower than what a market lender in 2018 would have required for a similar transaction.<sup>274</sup> In connection with NERA's updated analysis, the United States has also argued that TradeRx's market benchmark is also "likely too low", because TradeRx "appear{s} to have improperly ignored that, even under an early repayment scenario, KfW would have been entitled to [\*\*\*] provided for under the terms of the original German A350 XWB LA/MSF contract".<sup>275</sup> For these reasons, the United States argues that, even if the Panel were to agree that the European Union's analytical framework was the correct one, the European Union has failed to demonstrate that the IRR of the German A350XWB LA/MSF as modified by the [\*\*\*] amendment is not lower than the market benchmark.<sup>276</sup>

#### 7.4.3.2 Evaluation by the Panel

##### 7.4.3.2.1 Features of the amended German A350XWB LA/MSF loan agreement

7.136. As explained in section 7.2.2.2 above, the original German A350XWB LA/MSF agreement entitled Airbus to draw a total of [\*\*\*] under a scheduled series of disbursements. Repayments were to be made through per-aircraft levies based on an estimated delivery forecast submitted in connection with the original loan agreement.<sup>277</sup> Full repayment of the drawn-down loan principal was expected to occur by [\*\*\*].<sup>278</sup> The original agreement also required Airbus to [\*\*\*].<sup>279</sup>

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<sup>270</sup> NERA German A350XWB LA/MSF Report, (Exhibit USA-26 (HSBI/BCI)), paras. 7-8; United States' first written submission, para. 93.

<sup>271</sup> United States' first written submission, para. 93.

<sup>272</sup> United States' first written submission, paras. 87 and 100.

<sup>273</sup> Third NERA German A350XWB LA/MSF Report, (Exhibit USA-173 (HSBI/BCI)), para. 18. To construct a delivery schedule for the A350XWB, NERA considered it reasonable to rely on actual deliveries through the end of 2017 with projected deliveries as reported by Flight Ascend Consultancy for 2018 to 2019. Beginning in 2020, NERA then estimated deliveries based on the A350 XWB business case schedule and a maximum annual delivery level of 120 aircraft. (Third NERA German A350XWB LA/MSF Report, (Exhibit USA-173 (HSBI/BCI)), para. 16).

<sup>274</sup> Third NERA German A350XWB LA/MSF Report, (Exhibit USA-173 (HSBI/BCI)), para. 23.

<sup>275</sup> United States' comments on the European Union's response to Panel question No. 7, paras. 44-47; and Third NERA German A350XWB LA/MSF Report, (Exhibit USA-173 (HSBI/BCI)), section VII.

<sup>276</sup> United States' comments on the European Union's response to Panel question No. 7, paras. 44-47; and Third NERA German A350XWB LA/MSF Report, (Exhibit USA-173 (HSBI/BCI)), section V.

<sup>277</sup> German A350XWB LA/MSF Agreement, (Exhibit EU-10 (BCI) (English translation)), Clause 3.2; and Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.237.

<sup>278</sup> German A350XWB LA/MSF Agreement, (Exhibit EU-10 (BCI) (English translation)), Clause 6; and Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.238.

<sup>279</sup> German A350XWB LA/MSF Agreement, (Exhibit EU-10 (BCI) (English translation)), Clause 10; and Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.242.

7.137. The original loan agreement was [\*\*\*].<sup>280</sup> The agreement was amended [\*\*\*].<sup>281</sup> On the latter occasion, the German government lender, KfW, agreed to [\*\*\*].<sup>282</sup> Expected repayments of outstanding principal were calculated on the basis of [\*\*\*].<sup>283</sup> Under the amended [\*\*\*], full repayment of principal and interest is expected to be achieved by [\*\*\*]. The [\*\*\*] amendment also modified [\*\*\*], with [\*\*\*].<sup>284</sup>

7.138. Thus, while the [\*\*\*] amendment modified certain terms of the original German A350XWB LA/MSF loan agreement, Airbus continues to be under an obligation to repay the outstanding principal and accrued interest under that loan. The German A350XWB LA/MSF agreement therefore continues to exist as an outstanding loan, albeit on modified terms. The question that arises is whether the amended terms modified the arrangement such that it no longer qualifies as a subsidy, within the meaning of the SCM Agreement.

#### 7.4.3.2.2 The relevant analytical framework

7.139. The European Union characterizes the [\*\*\*] amendment to the German A350XWB LA/MSF loan as an act, *and alternatively*, an "intervening event", that achieves the withdrawal of the German A350XWB LA/MSF subsidy, within the meaning of Article 7.8 of the SCM Agreement. We note, however, that notwithstanding the European Union's alternative characterization, the fundamental reason advanced by the European Union to support its assertion of compliance on this basis is the same regardless of how the [\*\*\*] amendment is described.<sup>285</sup> Thus, irrespective of whether the amendment is properly characterized as an act, or as an "intervening event", the European Union maintains that it achieves compliance with its obligation to "withdraw the subsidy" because it has replaced the pre-existing subsidized A350XWB LA/MSF agreement with a LA/MSF agreement on terms that would have been offered to Airbus by a market lender. Accordingly, the key question we must address in order to determine the merits of the European Union's assertion of compliance is whether the [\*\*\*] amendment to the German A350XWB LA/MSF agreement has resulted in the replacement or modification of the subsidized loan that was the subject of the original compliance proceeding with a market-based loan instrument.

7.140. In considering their positions, we begin by recalling the Appellate Body's observations from the first compliance proceeding regarding the obligation to "withdraw" the subsidy in accordance with Article 7.8 of the SCM Agreement, as discussed in section 7.4.2 above. The Appellate Body emphasized that the obligation to either "take appropriate steps to remove the adverse effects ... or withdraw the subsidy" in Article 7.8 pertains to subsidies that *continue to be* "granted" or "maintained" by the implementing Member *after* the conclusion of the implementation period.<sup>286</sup> The Appellate Body also provided guidance with respect to how an implementing Member may withdraw a subsidy that is being "granted" or "maintained" for purposes of Article 7.8, agreeing with the compliance panel that "withdrawal" may be achieved when an implementing Member takes "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".<sup>287</sup> As discussed above, there is no question

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<sup>280</sup> Email from [\*\*\*], 20 March 2015, (Exhibit EU-106 (BCI) (English translation)). See also TradeRx A350XWB LA/MSF Report, (Exhibit EU-11 (HSBI/BCI)), para. 35.

<sup>281</sup> See section 7.2.2.2 above.

<sup>282</sup> German A350XWB [\*\*\*] amendment, (Exhibit EU-9 (BCI) (English translation)), Clause 2(d) and Annex 2. See also TradeRx A350XWB LA/MSF Report, (Exhibit EU-11 (HSBI/BCI)), paras. 37-39. [\*\*\*] The [\*\*\*] amendment does not appear to have [\*\*\*]. (See [\*\*\*] German A350XWB LA/MSF Agreement, (Exhibit EU-10 (BCI) (English translation)), Clauses 5.4(d) and Annex 1.4(f); and KPMG Assessment of [\*\*\*], (Exhibit EU-105 (BCI)), pp. 3-5).

<sup>283</sup> German A350XWB [\*\*\*] amendment, (Exhibit EU-9 (BCI) (English translation)), Clause 2(d) and Annex 2. See also TradeRx A350XWB LA/MSF Report, (Exhibit EU-11 (HSBI/BCI)), paras. 37-39.

<sup>284</sup> German A350XWB [\*\*\*] amendment, (Exhibit EU-9 (BCI) (English translation)), Clause 4; and TradeRx A350XWB LA/MSF Report, (Exhibit EU-11 (HSBI/BCI)), paras. 39-40.

<sup>285</sup> The European Union's claim that the [\*\*\*] amendment to the German UK A350XWB LA/MSF loan may be, *in the alternative*, characterized as an "intervening event" that brings the life of the subsidy to an end, is presented in a footnote to its first written submission. The European Union does not advance any specific arguments to support this claim that are different to those advanced in relation to its main, non-alternative, claim. (See European Union's first written submission, fn 142).

<sup>286</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.383.

<sup>287</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.366.

that the amended German A350XWB LA/MSF loan agreement is a measure *currently being maintained* by the German government. Thus, the question that remains to be resolved, in the light of the European Union's submissions, is whether the [\*\*\*] amendment has aligned the terms of the A350XWB LA/MSF loan agreement with a market benchmark. In the light of the prospective nature of WTO remedies<sup>288</sup>, we understand that the alignment of an existing subsidized loan with a market benchmark need not result in the repayment of past subsidies provided under that loan, but rather, it must achieve non-subsidization with respect to the future operation of the loan.

7.141. The European Union argues that the making of "substantial" modifications to the terms of a pre-existing subsidised loan necessarily means that the pre-existing loan has been "replaced" by a *new and different* loan, which must be assessed against a *contemporaneous* benchmark in order to determine whether the subsidy provided under the original loan has been withdrawn. In advancing this line of argument, the European Union refers to certain statements and findings made by the panel in *Japan – DRAMS (Korea)*. Specifically, the European Union relies on the panel's statement that "the modification of an existing loan may properly be treated as the transfer of new rights to the recipient of the modified loan", in support of its view that an existing financial contribution is replaced by a "new" one whenever it is "substantially" modified.<sup>289</sup>

7.142. In our view, the European Union's reliance on *Japan – DRAMS (Korea)* is misplaced. The panel in *Japan – DRAMS (Korea)* was called upon to *inter alia* determine whether Japan's investigating authority (JIA) had acted inconsistently with its WTO obligations when it determined that a series of restructuring transactions, which included modifications to the terms of pre-existing loan agreements in the form of extensions to loan maturities, reductions of interest rates, and the conversion of interest to principal, involved "direct transfers of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. Korea argued that "transactions that merely change the terms of existing claims, and do not involve the provision of money to the alleged subsidy recipient, cannot be characterized as transactions involving a 'direct transfer of funds' within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement".<sup>290</sup> In rejecting Korea's submission and finding that the JIA had not acted inconsistently with its obligations, the panel expressed the following views (parts of which the European Union relies upon):

We do not accept that the relinquishment or modification of claims may not, in certain circumstances, be treated as the transfer of new claims, giving rise to new rights and obligations. For example, once one analyses what actually occurs in the transaction, the modification of an existing loan may properly be treated as the transfer of new rights to the recipient of the modified loan. The borrower's old rights no longer exist. They have been replaced by new rights. In this sense, the modified loan may properly be treated as a new loan. Thus, the modification of a loan through debt forgiveness involves the transfer of new rights to the borrower, who is now liberated of the obligation to repay the debt, and instead has the right to use the money for free. Similarly, the modification of a loan through an extension of the loan maturity involves the transfer of new rights to the borrower, who is now entitled to borrow the money for a longer period of time. Since the new rights that are transferred in such transactions have monetary value, and may be counted in a (legal or natural) person's capital, we consider that such transactions may properly be treated as "direct transfers of funds" in the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*. ...<sup>291</sup>

7.143. We note that the legal question that is the focus of the above analysis is whether a modification to the terms of an existing loan may be characterized as a "direct transfer of funds" for the purpose of Article 1.1(a)(1)(i) of the SCM Agreement. This legal question arose in the context of a fact pattern where none of the modified loans at issue had been previously found to constitute subsidies. In contrast, the legal question at the centre of the European Union's submission in this dispute is whether the [\*\*\*] amendment should be understood to have created a *new* German A350XWB loan contract that must be considered *separately and independently* from the pre-existing *subsidized* A350XWB loan, when it comes to determining whether the subsidy provided under the

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<sup>288</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 494; and Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 6.38-6.42.

<sup>289</sup> European Union's first written submission, para. 75 (referring to Panel Report, *Japan – DRAMS (Korea)*, para. 7.442).

<sup>290</sup> Panel Report, *Japan – DRAMS (Korea)*, para. 7.426.

<sup>291</sup> Panel Report, *Japan – DRAMS (Korea)*, para. 7.442.

pre-existing A350XWB loan contract has been withdrawn for the purpose of Article 7.8 of the SCM Agreement. On the basis of these legal and factual differences alone, we do not find the panel's statements in *Japan – DRAMS (Korea)* to be instructive for the resolution of the matter before us. In any case, we do not understand those statements to have the same meaning and implications as the European Union.

7.144. We understand the panel in the above passages to have said that a "modified loan may properly be treated as a new loan" to the extent that a "borrower's old rights no longer exist" and "have been replaced by new rights". In our view, in advancing this line of thinking, the panel merely meant to explain that when the terms of an existing loan are amended, a "new" loan exists, "in the sense that" the rights and obligations under the pre-existing loan have been modified. The panel did not say that the pre-existing loan no longer exists, but only that the "borrower's old rights" (those that are modified) "no longer exist" and "have been replaced by new rights". This does not mean that the pre-existing loan has been terminated and replaced. Rather, it simply means that the pre-existing loan continues to exist in a modified form. In this regard, we note that Japan had argued that "changes to the terms of loans amount to a *re-issuance of the loan* as the terms of the original loan are extinguished and replaced with new terms".<sup>292</sup> However, the panel did not go as far as Japan in its finding, concluding only that the transactions involving the modification of loans at issue could be characterized as "direct transfers of funds" within the meaning of Article 1.1(a)(1)(i) because they involved the transfer of new rights of monetary value.

7.145. Moreover, to the extent that we should understand the European Union submissions to suggest that the panel's finding stands for the proposition that the *benefit* of a new financial contribution, resulting from modifications made to an existing, subsidized, financial contribution, must be evaluated at the time of the modifications, we recall that the loans at issue in *Japan – DRAMS (Korea)* had not been previously found to confer a benefit. In contrast, in this dispute the German A350XWB LA/MSF agreement was previously found to constitute a subsidy within the meaning of Article 1.1 of the SCM Agreement. Thus, in our assessment, there is no basis from which to draw the implication the European Union appears to rely upon, given the different factual situation in this proceeding compared with that in *Japan – DRAMS (Korea)*.

7.146. Thus, for all of the above reasons, we do not consider the panel statements in *Japan – DRAMS (Korea)* the European Union relies upon to support its position in this dispute.

7.147. In the light of our understanding of the panel's approach in *Japan – DRAMS (Korea)*, we consider that the [\*\*\*] amendment to the German A350XWB LA/MSF agreement altered the rights of the German government and Airbus, but it did not bring into existence a *new* loan agreement. There is no evidence before us, and, indeed, the European Union does not argue, that the original A350XWB LA/MSF is legally distinct from the loan agreement resulting from the [\*\*\*] amendment. We note, moreover, that by the time of the [\*\*\*] amendment, all required disbursements had been made and Airbus was continuing to make payments of principal and interest in accordance with the terms of the original contract, which was not terminated. Thus, we find that the original German A350XWB LA/MSF agreement continues to exist in a modified form, reflecting the revised repayment terms agreed through the [\*\*\*] amendment. In our view, this implies that, contrary to the European Union's contention, the appropriate benchmark against which to measure whether the [\*\*\*] amendment aligned the terms of the German A350XWB LA/MSF agreement with the market, is *not* a loan on the same or similar terms issued by a market lender *for the first time at the same moment as the amendment*. We disagree with the European Union on this point because the analytical approach it advances would treat the amended A350XWB LA/MSF agreement in the same way as a new loan under which all terms and conditions (disbursements, interest payments, repayments) have been agreed *at the time of the amendment*<sup>293</sup> when in fact, for the reasons we have explained, this is not the case.

7.148. We recall that in all previous proceedings of this dispute, the panels and the Appellate Body explained that in order to determine whether LA/MSF confers a "benefit" on Airbus, within the meaning of Article 1.1(a)(2) of the SCM Agreement, the terms of each LA/MSF loan agreement must

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<sup>292</sup> Panel Report, *Japan – DRAMS (Korea)*, para. 7.437. (emphasis added)

<sup>293</sup> As explained further below, the European Union's approach treats all outstanding principal under the original [\*\*\*] German A350XWB LA/MSF Agreement as funding disbursed to Airbus for the first time in [\*\*\*].

be compared with the terms of a comparable loan available from the market.<sup>294</sup> In the original and first compliance proceedings, the challenged LA/MSF agreements were examined to determine whether they each conferred a benefit on Airbus by comparing the cost of the LA/MSF financing to Airbus on the agreed terms (calculated as a separate "internal rate of return" for each LA/MSF contract) to the cost that Airbus would have incurred (calculated as a "rate of return") to obtain the same or similar financing from the market *at the time Airbus and the relevant Airbus government entered into the LA/MSF agreement*.<sup>295</sup> For the German A350XWB LA/MSF contract, the IRR was determined by identifying the interest rate that set the Net Present Value of the cash flows anticipated under the terms of the loan agreement to zero.<sup>296</sup> The IRR of the German A350XWB LA/MSF agreement was compared with a constructed interest rate considered to represent the rate of return that a market lender would have achieved on a loan to Airbus on the same or similar terms, *and at the same time*, as the A350XWB loan agreement.

7.149. Consistent with this approach, we believe that where funding under a subsidized loan agreement has already been disbursed and remains outstanding, an amendment to that loan to bring it into alignment with a market benchmark on a prospective basis would need to ensure that, all other things being equal, the revised repayment terms capture the overall cash-flow the market lender would have expected to achieve, *at the time the recipient originally entered into the government loan contract*, for the remaining duration of the particular loan.<sup>297</sup> In this way, the recipient would be placed in the same position it would have been in at the time of the amendment, had the loan been agreed on market terms from the very beginning.

7.150. Explained by way of example, this line of reasoning implies that a subsidized loan provided for a 10-year period at an average cost of 5% interest per annum (instead of the market rate of 7%), could be aligned with a market benchmark in year five by increasing the rate of interest to apply over the remaining five years to 7%, even if the market rate for a comparable five-year loan at the same time was higher or lower than 7%. In our view, it is only by raising the interest rate to what the market lender would have originally requested the recipient to pay over the remaining five years of the loan contract that it could be concluded that, all other things being equal, the recipient is no longer receiving a subsidized loan.

7.151. Such an approach to determining whether a subsidized loan has been aligned to a market benchmark would ensure that the "withdrawal" of a subsidy will depend upon a Member's own actions and decisions, as opposed to exogenous factors such as the general cost of finance in an economy.<sup>298</sup> Thus, where, for example, the general cost of money increased between the time a subsidized loan was agreed and the date of an amendment intended to align the terms of that loan with a market benchmark, an approach that requires the amended terms to reflect the *contemporaneous cost of money* would require the subsidizing government to charge, on a prospective basis, more for the loan than a market lender would have originally requested from the recipient over the same period of the loan. Conversely, where the general cost of money decreased between the time a subsidized loan was agreed and the date of an amendment intended to align the terms of that loan with a market benchmark, an approach that requires the amended terms to reflect the *contemporaneous cost of money* would require the subsidizing government to charge, on a prospective basis, less for the loan than a market lender would have originally requested from the recipient. In both situations, the determining factor for the alignment of the subsidized loan to a market benchmark would not be the government's decision to have the recipient pay what a market lender would have required at the time the loan was originally agreed, but rather movements in the

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<sup>294</sup> Panel Reports, *EC and certain member States – Large Civil Aircraft*, para. 7.382; *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.293; Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 706; and *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 5.109-5.112.

<sup>295</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.401.

<sup>296</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.306-6.348.

<sup>297</sup> Depending upon the terms of the loan contract, this analysis may need to account for any penalties paid by the borrower to the market lender for renegotiating the terms of the loan.

<sup>298</sup> Third parties Brazil and Japan share the view that changes in exogenous commercial condition cannot on their own be the determining factor in analysing whether a subsidy has been withdrawn. (Brazil's response to Panel question No. 1 to third parties, para. 3; Japan's response to Panel question No. 1 to third parties). Canada submits that exogenous commercial circumstances are "highly relevant" to an assessment of withdrawal. (Canada's response to Panel question No. 1 to third parties, para. 1).

cost of money. Given the characteristics of LA/MSF, other exogenous factors we believe could have the same or similar impact include the credit worthiness of Airbus and the development status of the funded LCA.

7.152. The European Union maintains that comparing the IRR of the amended German A350XWB LA/MSF agreement with a contemporaneous market benchmark for a new loan to Airbus issued on the same or similar terms as the amended agreement is an appropriate way to test whether the German A350XWB LA/MSF agreement has been aligned with a market benchmark. The European Union justifies this approach by arguing that the German government lender, KfW, did not have the option to leave the German A350XWB LA/MSF agreement unamended because, under [\*\*\*] of the unamended agreement, Airbus was entitled to force KfW to accept early repayment. The European Union maintains that such a clause is a standard term in comparable loan agreements<sup>299</sup>, which in the case of Airbus, left it with an incentive to repay the loan in [\*\*\*] because market interest rates had decreased substantially since the time Airbus and KfW agreed on the original terms of the German A350XWB LA/MSF agreement, making it possible for Airbus to refinance at lower interest rates.<sup>300</sup>

7.153. We understand the logic of the European Union's argument to be as follows: If Airbus chose to prepay the loan in accordance with [\*\*\*], KfW (or a market lender in its place) would not have been in a position to realize the expected future cash-flows and IRR under the original agreement. The European Union submits that where a loan agreement entitles the borrower to prepay the loan, the borrower's choice to exercise that right makes the originally-anticipated IRR impossible for the lender to attain. In those circumstances, the European Union argues that it would be erroneous to consider that, in agreeing to amend the loan to reflect current market circumstances, the lender exchanged its allegedly "superior" IRR under the original terms of the subsidy for an allegedly "inferior" one under the amended terms. Thus, the European Union submits that the only way to determine whether the [\*\*\*] amendment is on market terms is to compare the IRR of the amended German A350XWB LA/MSF agreement with a loan on the same or similar terms that could have been offered by a market lender to Airbus at the same time.<sup>301</sup>

7.154. We agree with the European Union that, in the face of having to accept the full repayment of the outstanding principal disbursed under an existing loan concluded at a time of relatively high interest rates, a market lender would not expect to achieve the same returns anticipated under the original loan contract from an amendment that avoids full repayment and continues the loan arrangement on different terms at a time of relatively low interest rates. This situation is different from the one described in our above example, which underlies the starting point of our analytical framework, because the situation discussed in the example comes about in a context where the commercial lender is left with a choice between the continuation of an existing loan or the acceptance of revised terms. In other words, the situation described in the above example is not one where, apart from the desire of the contractual parties to amend the loan arrangement to align its terms with a market benchmark, all other things have remained the same. In contrast, in the situation posited by the European Union, the market lender is faced with a choice between accepting the *early repayment* of outstanding principal and accrued interest under an existing arrangement *or* the new repayment terms negotiated under revised terms.

7.155. The United States argues that the European Union has provided no evidence to support its assertion that had Airbus and KfW not agreed to enter into the [\*\*\*] amendment, Airbus would have opted to prepay the outstanding LA/MSF and other accrued charges.<sup>302</sup> In other words, the United States argues that there is no factual basis to support the premise underlying the analytical framework applied by the European Union to determine whether the German A350XWB LA/MSF subsidies have been withdrawn.

7.156. We agree with the United States that the European Union has provided no evidence showing that Airbus actually invoked, or even attempted to trigger, [\*\*\*] of the German A350XWB LA/MSF agreement. Although the European Union argues that in the "negotiations leading up to the amendment, both Airbus and KfW knew that Airbus' Best Alternative to a Negotiated Agreement, or

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<sup>299</sup> European Union's second written submission, para. 108.

<sup>300</sup> European Union's second written submission, para. 109.

<sup>301</sup> European Union's second written submission, para. 105.

<sup>302</sup> United States' second written submission, paras. 106-111.

'BATNA', was to effect prepayment"<sup>303</sup>, the European Union has presented no evidence of the discussions between the German government and Airbus about the potential early repayment of the outstanding principal under the terms of [\*\*\*]. Neither is there any evidence before us showing that Airbus considered alternative market-based finance options around the time of those negotiations. Moreover, in explaining the background and motivations of the [\*\*\*] amendment, its preamble makes no reference to any possible early repayment, mentioning only that KfW was asked to enter into the amendment "in order to [\*\*\*] on the loan tranches, and to provide the Borrower with new [\*\*\*] for these [\*\*\*]".<sup>304</sup> In the absence of any evidence showing that Airbus was, in fact, seriously considering exercising its rights under [\*\*\*] in order to refinance the German A350XWB LA/MSF using market-based instruments (which the European Union maintains was a credible possibility),<sup>305</sup> there is no sufficient basis to accept the premise underlying the European Union's submissions. In this light, we believe that the European Union's assertion of compliance with respect to the German A350XWB LA/MSF subsidies cannot be sustained.

7.157. Consistent with the starting point of the analytical framework we have set out above, in considering whether to enter into the [\*\*\*] amendment, we believe that a market lender that *did not* face the potential repayment of the outstanding principal and accrued interest *as a credible possibility* would have compared the returns available under the unamended *market-based* arrangement with those available under the proposed amendment. Although the parties have not undertaken this analysis, the United States' expert, NERA Consulting, conducted an assessment of the expected IRR of the *unamended* loan contract and compared that to the expected IRR under the [\*\*\*] amendments, taking into account the revised 2018 forecast delivery schedule used in the TradeRx Report.<sup>306</sup> The European Union has not disputed the accuracy of the NERA calculation, arguing only that it addresses the wrong question.<sup>307</sup> For present purposes, we note that NERA concludes that the IRR for the unamended German A350XWB LA/MSF agreement (which, we recall was provided on subsidized terms) is greater than the IRR of the amended agreement.<sup>308</sup> This confirms that a market lender that *did not* face the potential repayment of outstanding principal and accrued interest *as a credible possibility* would have preferred its own *market-based* A350XWB LA/MSF agreement (offering greater returns than the unamended German A350XWB LA/MSF agreement) to the [\*\*\*] amended version of the German A350XWB LA/MSF agreement.

7.158. Finally, even if we were to accept that there was a credible possibility that Airbus could have invoked [\*\*\*] to repay and refinance the German A350XWB LA/MSF, we are not convinced that the test for determining whether that amendment was market-based should be focused, as the European Union argues, on comparing the IRR of the amended contract with the IRR that a market lender would expect to achieve (and, therefore, request Airbus to pay) for the same or similar loan entered into at the time of the amendment. As already discussed<sup>309</sup>, such an approach would erroneously treat the [\*\*\*] amended German A350XWB LA/MSF agreement in the same way as a new loan issued for the first time at the time of the amendment. In order to determine whether the terms of the amended German A350XWB LA/MSF agreement are market-based, the question that we believe must be answered is whether a *market lender* (not KfW) would have preferred to receive the returns associated with the amended German A350XWB LA/MSF agreement over the returns it could have expected to achieve as a result of a decision on the part of Airbus to invoke its right under [\*\*\*] of the LA/MSF agreement to repay the outstanding principal and accrued interest. In this way, we believe it would be possible to determine whether the [\*\*\*] amendment to the German A350XWB LA/MSF agreement left Airbus in the same position it would have been in at the time of the amendment, had the German A350XWB LA/MSF agreement been agreed with a commercial lender on market terms from the very beginning. We now turn to apply this standard to the facts

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<sup>303</sup> European Union's opening statement at the meeting of the panel, para. 65.

<sup>304</sup> German A350XWB [\*\*\*] amendment, preamble. (Exhibit EU-9 (BCI) (English translation)).

<sup>305</sup> The European Union has not argued that Airbus would have made the repayment on the basis of its own funds, without using any form of market financing.

<sup>306</sup> NERA German A350XWB LA/MSF Report, (Exhibit USA-26 (HSBI/BCI)), para. 4 and Appendices 1 and 2.

<sup>307</sup> European Union's second written submission, para. 102.

<sup>308</sup> NERA German A350XWB LA/MSF Report, (Exhibit USA-26 (HSBI/BCI)), paras. 2, 8, and 10-15. NERA calculated two different IRRs for the original German A350XWB LA/MSF agreement based on different assumptions concerning the interest charged on the [\*\*\*]. NERA determined that the IRR under the unamended arrangement is either [\*\*\*] or [\*\*\*]. NERA then compared these IRR calculations to the expected IRR of [\*\*\*] that TradeRx calculated for the amended original German A350XWB LA/MSF agreement. (See NERA German A350XWB LA/MSF Report, (Exhibit USA-26 (HSBI/BCI)), para. 4 and Appendices 1 and 2).

<sup>309</sup> See paragraphs 7.144–7.147 above.

surrounding the [\*\*\*] amendment to the German A350XWB LA/MSF contract, as a means to make *alternative findings*, having already concluded that the European Union has failed to establish the factual basis underpinning its claims of compliance with respect to the German A350XWB LA/MSF subsidies.

#### **7.4.3.2.3 Whether the [\*\*\*] amendment has aligned the terms of the German A350XWB LA/MSF agreement with a market benchmark**

7.159. The European Union argues that the returns that would have been available to KfW had it decided to invest the outstanding principal and accrued interest that Airbus would have been required to repay in the event that Airbus triggered [\*\*\*] of the German A350XWB LA/MSF agreement can be represented by the IRR that a market lender would have requested Airbus to pay for a loan on the same or similar terms as the [\*\*\*] amendment. According to the European Union, that "return is also what KfW could have expected to receive if it accepted the prepayment and re-invested it in a venture of similar risk profile".<sup>310</sup> Thus, relying upon the calculations in the TradeRx A350XWB LA/MSF Report, the European Union argues that the IRR of KfW's re-investment of the funds repaid by Airbus would have been less than the IRR of the [\*\*\*] amendment.<sup>311</sup> In our view, however, it is not entirely clear whether the IRR calculated in the TradeRx Report for the alleged market benchmark represents the return that a *market lender* would have expected to receive from re-investing the *significant* amount of outstanding principal and accrued interest that Airbus would have repaid. The IRR determined by TradeRx is based on an estimate of the risk profile of the amended A350XWB LA/MSF contract, which captures Airbus' credit worthiness and the risk profile of the A350XWB project. Opportunities to invest in projects having different risk profiles with potentially overall greater returns would have no doubt been available to a market lender, particularly given what the *significant* value of the early repayment would have been.

7.160. The United States argues that the European Union is wrong when it argues that KfW would have preferred the [\*\*\*] amendment over the receipt of early repayment under the unamended German A350XWB LA/MSF agreement. According to the United States, the European Union's submission is flawed because if Airbus effected [\*\*\*], Airbus would have retained the obligation to make [\*\*\*] under the original agreement.<sup>312</sup> Thus, the United States argues that the choice that KfW faced with was whether to: (i) receive [\*\*\*] and *also* [\*\*\*] as dictated by the original agreement; or (ii) agree to the [\*\*\*] amendment.<sup>313</sup> Given these choices, the United States' expert, NERA Consulting, calculated an IRR of investing the [\*\*\*] at the alleged market-based IRR determined in the TradeRx Report and receipt of the [\*\*\*], and compares that to the IRR of the amended German A350XWB LA/MSF agreement. The NERA Report concludes that the expected IRR of re-investing the early repayment and receiving [\*\*\*] ([\*\*\*]) is greater than the expected IRR of the amended German A350XWB LA/MSF loan agreements ([\*\*\*]).<sup>314</sup> On this basis, the United States concludes that a market lender in the German government's position as of [\*\*\*] would not have agreed to enter into the [\*\*\*] amendment because it would have been more beneficial to accept and re-invest the early repayment and accept the future royalty payments.<sup>315</sup>

7.161. The European Union does not dispute the United States' assertion that [\*\*\*] would be available under an early repayment scenario, nor does the European Union specifically dispute the accuracy of NERA's IRR calculations. Nevertheless, the European Union maintains that the United States and NERA err in arguing that the European Union's submissions "ignore KfW's entitlement to [\*\*\*] in the case of early repayment". After confirming that [\*\*\*] would have been available under both the early repayment and amendment scenarios, the European Union points out that the [\*\*\*] available under the amended LA/MSF agreement provided for marginally

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<sup>310</sup> European Union's response to Panel question No. 11, paras. 113-114.

<sup>311</sup> European Union's response to Panel question No. 7, para. 62.

<sup>312</sup> United States' comments on the European Union's response to Panel question No. 7, para. 47.

<sup>313</sup> United States' comments on the European Union's response to Panel question No. 7, para. 47; Third NERA German A350XWB LA/MSF Report, (Exhibit USA-173 (HSBI/BCI)), para. 28.

<sup>314</sup> United States' comments on the European Union's response to Panel question No. 7, para. 47; Third NERA German A350XWB LA/MSF Report, (Exhibit USA-173 (HSBI/BCI)), paras. 27-29. NERA submits that the TradeRx IRR calculation of [\*\*\*] for the amended German A350XWB LA/MSF agreement is [\*\*\*] of [\*\*\*]", and that the annual IRR can be alternatively calculated as [\*\*\*] which is the compounded annual return of [\*\*\*] quarterly growth. (Third NERA German A350XWB LA/MSF Report, (Exhibit USA-173 (HSBI/BCI)), fn 5).

<sup>315</sup> United States' comments on the European Union's response to Panel question No. 7.

better returns than those prescribed under the unamended A350XWB arrangement. The European Union concludes that this means that "with respect to [\*\*\*], the 2018 amendment enhances KfW's position".<sup>316</sup> Likewise, the European Union argues that the [\*\*\*] terms brought about by the [\*\*\*] amendment had a [\*\*\*], concluding that the financial terms of the amended agreement did not alter KfW's financial position.<sup>317</sup>

7.162. We find the European Union's response to the United States' arguments to be misplaced because it does not address the comparison between the returns available to a market lender under the [\*\*\*] amendment and the returns that would have resulted if a market lender decided to re-invest the repaid principal and receive the planned [\*\*\*] under the unamended A350XWB LA/MSF agreement. Although the European Union explains that its response provides a "comparison of the expected returns under the early repayment and the 2018 amendment scenarios", in substance, the European Union compares the terms of the [\*\*\*] amendment with the terms of the unamended agreement. To this extent, the European Union's submissions answer the wrong question because they proceed on the basis that the early repayment *would not have occurred*, leaving the market lender with a choice between the unamended or amended A350XWB LA/MSF agreements.

7.163. As already explained, in order to determine whether the terms of the amended German A350XWB LA/MSF agreement are market-based, the question that must be answered is whether a *market lender* (not KfW) would have preferred the returns associated with the amended German A350XWB LA/MSF agreement over the returns it could have expected to achieve as a result of Airbus' decision to invoke its right under [\*\*\*] of the LA/MSF agreement to repay the outstanding principal and accrued interest. The analysis the United States presents in the NERA Report attempts to perform this comparison. However, we are not convinced that NERA's calculation is entirely accurate. First, the IRR calculated in the repayment scenario relies upon the market benchmark IRR determined by TradeRx, which, as already noted, we believe may not necessarily reflect the alternative investment options available to a market lender.<sup>318</sup> Second, in the absence of any further explanation, we are not convinced that the way the NERA Report has relied upon the TradeRx IRR in its calculation is appropriate, as it seems to have been used to generate the re-invested cash flows as a compound interest rate instead of in the form of an IRR. Finally, we note that in accounting for the cash flows expected from future [\*\*\*] payments, the NERA Report uses the values prescribed in the unamended German A350XWB LA/MSF agreement. We recall, however, that the returns available under the unamended German A350XWB LA/MSF agreement are subsidized and, therefore, by definition less than what a market lender would have requested Airbus to pay for the same or a similar loan. In our view, this suggests that the [\*\*\*] payments envisaged under the unamended German A350XWB LA/MSF agreement were less than what a market lender would have accepted. To this extent, NERA's calculation of the returns achieved from future [\*\*\*] may well under-estimate the returns available to a market lender.

7.164. Thus, in the light of the above considerations, we find that the European Union has failed to demonstrate that the [\*\*\*] amendment to the German A350XWB LA/MSF agreement resulted in the "withdrawal" of the subsidy, by aligning its terms with a market benchmark. We are not convinced by the European Union's submissions under this alternative analysis, because they fail to properly address and establish that a *market lender* would have preferred to receive the returns anticipated under the [\*\*\*] amendment over the returns that would have been available from re-investing Airbus' early repayment of the significant amount of outstanding principal and accrued interest, taking into account the value of future [\*\*\*] under the unamended A350XWB LA/MSF contract. The European Union has, therefore, failed to show that the [\*\*\*] amendment left Airbus

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<sup>316</sup> European Union's comments on certain arguments and evidence that the United States filed with its 25 June 2019 Comments on EU Responses to Panel questions, paras. 20 and 22.

<sup>317</sup> European Union's comments on certain arguments and evidence that the United States filed with its 25 June 2019 Comments on EU Responses to Panel questions, para. 23.

<sup>318</sup> We note that the United States has questioned the European Union's calculation of the [\*\*\*] under the German A350XWB LA/MSF agreement, suggesting *inter alia* that the European Union's analysis may have undervalued it as a potential return to the German government. The United States maintains that it was unable to verify the calculation performed by the European Union's expert, KPMG, because it alleges that various specific pieces of information needed to understand it was not provided with the analysis. (United States' comments on the European Union's response to Panel question No. 4, paras. 29-30). In the light of our findings concerning the European Union's claim, we do not believe it is necessary to explore this issue further with the parties.

in the same position it would have been in at the time of the amendment, had the German A350XWB LA/MSF agreement been originally agreed with a commercial lender that would have been faced with a real possibility that Airbus could have forced it to accept early [\*\*\*] in [\*\*\*].

#### 7.4.4 Repayment of the UK A350XWB LA/MSF loan on subsidized terms

##### 7.4.4.1 Main arguments of the parties

7.165. The European Union argues that, on [\*\*\*], Airbus fully repaid the UK A350XWB LA/MSF loan by making a payment of [\*\*\*] to the UK Department of Business, Energy & Industrial Strategy (BEIS). The European Union argues that this sum reflects the total amount of outstanding principal drawn-down by Airbus as of [\*\*\*], plus interest accrued since [\*\*\*], less [\*\*\*].<sup>319</sup>

7.166. According to the European Union, the full repayment of a loan on its subsidized terms achieves the withdrawal of that subsidy, for the purpose of Article 7.8 of the SCM Agreement, because the repayment of the financial contribution removes one of the constituent elements of a subsidy, resulting in the life of that subsidy coming to end. The European Union submits that this is precisely what was achieved when Airbus fully repaid the UK A350XWB LA/MSF loan on [\*\*\*], thereby bringing the European Union into compliance under Article 7.8 in respect of the UK A350XWB LA/MSF subsidy.<sup>320</sup> Alternatively, the European Union argues that it would be appropriate to view the repayment of the UK A350XWB LA/MSF loan as an "intervening event" that brings the life of the UK A350XWB LA/MSF loan to an end, thereby achieving the withdrawal of the subsidy.<sup>321</sup>

7.167. The United States acknowledges that Airbus made a payment of [\*\*\*] to the UK Government on [\*\*\*].<sup>322</sup> However, according to the United States, this fact alone does not establish that Airbus repaid "the full amount of outstanding principal" or that Airbus will not draw down the principal again.<sup>323</sup> In any case, the United States argues that the European Union has failed to withdraw the UK A350XWB LA/MSF subsidy because repaying a loan on its subsidized terms does not result in the withdrawal of the subsidy for purposes of Article 7.8 of the SCM Agreement.<sup>324</sup> The United States submits that the first compliance panel agreed with this assessment when it criticized the same theory advanced by the European Union in that proceeding.<sup>325</sup>

7.168. Moreover, the United States rejects the European Union's argument that the repayment of the UK A350XWB LA/MSF loan may be viewed as an intervening event that brings the life of the loan to an end. The United States argues that the full repayment to which the European Union refers, and the possibility that early repayment would occur, is "part of the spectrum of facts that informed the parties' *ex ante* expectation as to the life of the subsidy, and it was also an element of the contract that the first compliance panel had before it when it found that the contract transmitted a subsidy".<sup>326</sup> The United States argues that the fact that the contract operated as it was originally envisioned cannot logically serve as an intervening event that changes the life of the benefit of the subsidy.<sup>327</sup>

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<sup>319</sup> European Union's first written submission, para. 88.

<sup>320</sup> European Union's first written submission, paras. 64-69 and 89.

<sup>321</sup> European Union's first written submission, fn 139.

<sup>322</sup> United States' first written submission, para. 105.

<sup>323</sup> United States' first written submission, paras. 101 and 110-114.

<sup>324</sup> United States' first written submission, paras. 101 and 106-109; and second written submission, paras. 41-45.

<sup>325</sup> United States' first written submission, paras. 106-107 (referring to Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1070-6.1073); and second written submission, para. 44.

<sup>326</sup> United States' first written submission, para. 109.

<sup>327</sup> United States' first written submission, para. 109; and response to Panel question No. 22, para. 61.

#### 7.4.4.2 Evaluation by the Panel

##### 7.4.4.2.1 Has the UK A350XWB LA/MSF loan been fully repaid?

7.169. The European Union asserts that Airbus repaid all outstanding principal and interest accrued less [\*\*\*] totalling [\*\*\*] under the UK A350XWB LA/MSF contract on [\*\*\*] as part of a [\*\*\*].<sup>328</sup> In particular, on [\*\*\*], Airbus informed the United Kingdom of its intention to effect [\*\*\*].<sup>329</sup> On [\*\*\*], BEIS confirmed to Airbus that the payment had been received, and that the sum reflected "the Principal amount drawn down", "plus Interest accrued from [\*\*\*]", "less [\*\*\*]".<sup>330</sup> BEIS confirmed that "{t}his means that the Repayable Investment has been repaid in full".<sup>331</sup>

7.170. In explaining the amount repaid by Airbus, the European Union submits that during the [\*\*\*], Airbus drew down only [\*\*\*], which is less than the [\*\*\*] maximum amount of funding available under the UK A350XWB LA/MSF loan agreement.<sup>332</sup> As evidence of the amounts of receipts and repayments made, the European Union submitted Airbus accounting entries in Exhibit EU-81.<sup>333</sup> Those entries reveal a difference of [\*\*\*], which the European Union explains as the difference between: (i) interest accrued between [\*\*\*] and [\*\*\*]; and (ii) [\*\*\*].<sup>334</sup> Finally, the European Union explained how Airbus determined the final levy payments that were due on [\*\*\*] eligible A350XWB deliveries that were made during the first quarter of 2018.<sup>335</sup>

7.171. Our review of Airbus' accounting entries in Exhibit EU-81 and the European Union's explanations confirms that Airbus' [\*\*\*] payment reflects the full amount of outstanding principal due under the UK A350XWB LA/MSF agreement, plus interest accrued since the date of the last periodic interest payment on 26 March 2018, less [\*\*\*].

7.172. We note that the European Union has further indicated that, under the terms of the UK A350XWB LA/MSF Agreement, Airbus is not permitted to re-draw funds under the loan [\*\*\*].<sup>336</sup> Specifically, Clause 4.4 of the agreement provides that [\*\*\*].<sup>337</sup> Clause 1 defines the [\*\*\*].<sup>338</sup> The

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<sup>328</sup> European Union's first written submission, paras. 86-89; and second written submission, paras. 59-72. See also [\*\*\*] UK A350XWB LA/MSF Agreement, (Exhibit EU-28 (BCI)), Clause 6.6.

<sup>329</sup> BEIS Letter to Airbus, [\*\*\*], (Exhibit EU-7 (BCI)).

<sup>330</sup> BEIS Letter to Airbus, [\*\*\*], (Exhibit EU-7 (BCI)).

<sup>331</sup> BEIS Letter to Airbus, [\*\*\*], (Exhibit EU-7 (BCI)).

<sup>332</sup> European Union's second written submission, fns 93 and 104.

<sup>333</sup> Excerpts from Airbus' accounting system in relation to the A350XWB LA/MSF loan, (Exhibit EU-81 (BCI)). The European Union points out that, in scrutinizing Airbus' accounting excerpts, the United States erroneously identified cash flows of [\*\*\*] as repayments instead of disbursements of loan principal, and that the United States further erroneously transposed the disbursement amount on [\*\*\*] as an amount that was [\*\*\*] short of the actual disbursement. We have confirmed the accuracy of the amounts of receipts and repayments reflected in Exhibit EU-81 (BCI), consistent with the European Union's observations. (European Union's comments on the United States' response to Panel question No. 18, paras. 67-70. See also United States' response to Panel question No. 18, paras. 46-47).

<sup>334</sup> The European Union submits that a principal balance of [\*\*\*]. The European Union also explained that Clauses 1.1 and 7.1 of the UK A350XWB LA/MSF loan agreement [\*\*\*]. (European Union's comments on the United States' response to Panel question No. 18, para. 71 and fns 111 and 113; [\*\*\*] UK A350XWB LA/MSF Agreement, (Exhibit EU-28 (BCI)), Clauses 1.1 and 7.1).

<sup>335</sup> The European Union explains that, in reviewing Airbus' levy payments in the first quarter of 2018, the United States incorrectly determined that Airbus should have made levy payments on [\*\*\*] A350XWB deliveries made by 30 April 2018. The European Union explains that, under the UK A350XWB LA/MSF loan agreement, Airbus is required to pay [\*\*\*]. Of the [\*\*\*], the European Union explains that [\*\*\*] were free of levies because [\*\*\*]. (European Union's comments on the United States' response to Panel question No. 18, paras. 72-73 (referring to [\*\*\*] UK A350XWB LA/MSF Agreement, (Exhibit EU-28 (BCI)), Clauses 1.1, 5.3 and 5.4); and Airbus Orders & Deliveries Data, (Exhibit USA-49). See also United States' response to Panel question No. 18, para. 48).

<sup>336</sup> European Union's second written submission, para. 75.

<sup>337</sup> [\*\*\*] UK A350XWB LA/MSF Agreement, (Exhibit EU-28 (BCI)), Clause 4.4.

<sup>338</sup> [\*\*\*] UK A350XWB LA/MSF Agreement, (Exhibit EU-28 (BCI)), Clause 1.1.

United States asserts that it is not clear that Airbus will not draw down the principal again<sup>339</sup>, recalling that Airbus and the UK Government previously [\*\*\*].<sup>340</sup>

7.173. Although it is true that [\*\*\*], there has been no further amendment to suggest that this will happen again. Moreover, and significantly, it is clear from [\*\*\*] of the loan agreement that Airbus [\*\*\*] prior to the date on which Airbus made its final payment of outstanding principal and interest. These facts suggest that Airbus is not seeking, and indeed, is not entitled to seek, further funding from the UK Government under the UK A350XWB LA/MSF contract. Similarly, we do not see a factual basis to conclude that Airbus is even considering the possibility of asking the UK government to amend the A350XWB LA/MSF agreement to allow it to draw down additional funds. The mere *possibility* that this may happen is, in our view, insufficient to support a finding that the full amount of funding originally contemplated under the UK A350XWB LA/MSF loan continues to be available.

7.174. Accordingly, we agree with the European Union that the full amount of [\*\*\*] was not drawn down, and that the full amount of funds available to Airbus under the UK A350XWB LA/MSF contract was not outstanding at the time of the final payment.<sup>341</sup> We also agree with the European Union that Airbus has repaid the entirety of the principal that it actually drew down and received. In our view, this follows from the contractual terms of the UK A350XWB LA/MSF agreement, which establishes a repayment obligation with respect to the [\*\*\*]<sup>342</sup> and defines the [\*\*\*].<sup>343</sup>

7.175. We therefore find that Airbus repaid all outstanding principal and interest accrued under the UK A350XWB LA/MSF contract on [\*\*\*] with a final payment totalling [\*\*\*]. This represents repayment of the full amount of principal that Airbus actually drew down and received, which we consider is the amount relevant to our assessment.

#### **7.4.4.2 Whether the full repayment of outstanding principal and interest under the UK A350XWB LA/MSF agreement on subsidized terms has achieved the withdrawal of the subsidy**

7.176. As it did with respect to the amendment of the German A350XWB LA/MSF agreement, the European Union characterizes Airbus' repayment of the UK A350XWB LA/MSF loan as an act, *and alternatively*, an "intervening event", that achieves the withdrawal of the UK A350XWB LA/MSF subsidy, within the meaning of Article 7.8 of the SCM Agreement. We note, however, that notwithstanding the European Union's alternative characterization, the fundamental reason advanced by the European Union to support its assertion of compliance on this basis is the same regardless of how the repayment is described.<sup>344</sup> Thus, irrespective of whether the repayment is properly characterized as an act, or as an "intervening event", the European Union maintains that it achieves compliance with its obligation to "withdraw the subsidy" because, by "removing" the financial contribution, it has brought the life of the UK A350XWB LA/MSF subsidy to an end. Accordingly, the key question we must address in order to determine the merits of the European Union's assertion of compliance is whether the repayment of the UK A350XWB LA/MSF loan on subsidized terms brings the life of the UK A350XWB LA/MSF subsidy to an end.

7.177. The European Union relied upon essentially the same line of argument in the first compliance proceeding, when it argued that the lives of most of the pre-A380 LA/MSF subsidies had come to an

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<sup>339</sup> United States' first written submission, paras. 101 and 110-114.

<sup>340</sup> United States' first written submission, paras. 103 and 113 (referring to Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.258 and fn 462). The relevant information contained in para. 6.258 and fn 462 are BCI.

<sup>341</sup> European Union's first written submission, paras. 87-89; and second written submission, paras. 63-64. See also Excerpts from Airbus accounting system in relation to the A350XWB UK loan, (Exhibit EU-81 (BCI)).

<sup>342</sup> [\*\*\*] UK A350XWB LA/MSF Agreement, (Exhibit EU-28 (BCI)), Clause 5.1.

<sup>343</sup> [\*\*\*] UK A350XWB LA/MSF Agreement, (Exhibit EU-28 (BCI)), Clause 1.1.

<sup>344</sup> The European Union's claim that the repayment of the UK A350XWB LA/MSF loan may be, *in the alternative*, characterized as an "intervening event" that brings the life of the subsidy to an end, is presented in a footnote to its first written submission. The European Union does not advance any specific arguments to support this claim that are different to those advanced in relation to its main, non-alternative, claim. (See European Union's first written submission, fn 139).

end because they had already been fully repaid.<sup>345</sup> In this compliance proceeding, the European Union reiterates that position, arguing that it "is supported by, and fully consistent with the Appellate Body's finding, in the original proceedings, that 'the removal of the financial contribution', as one of the constituent elements of a subsidy, results in the 'life' of a subsidy coming 'to an end'".<sup>346</sup>

7.178. In the first compliance proceeding, the panel expressed concerns about the European Union's understanding of the Appellate Body's statement, explaining as follows:

The European Union finds support for its submission that the repayment of the LA/MSF agreements has brought the subsidy to an end in the following statement made by the Appellate Body in the original proceeding:

We understand the participants to agree with the basic proposition that a subsidy has a life, which may come to an end, either through *the removal of the financial contribution and/or the expiration of benefit.*<sup>347</sup> (emphasis added)

For the European Union, the full repayment of the LA/MSF agreements implies that the financial contributions provided to Airbus have been "returned"<sup>348</sup> and, therefore, consistent with the Appellate Body's statement, no subsidies continue to exist. In our view, the European Union has misunderstood the totality of the Appellate Body's guidance on this point.

First, we note that the Appellate Body statement relied upon by the European Union refers to the "removal" of a financial contribution. However, it is less than clear to us that the repayment of a loan on its subsidized terms amounts to the same thing. Rather, it could be argued that the full repayment of a subsidized loan implies that a subsidized financial contribution has been provided to the recipient in its entirety, not removed or "returned", as the European Union argues.

Second, while it is true that the repayment of a loan on its subsidized terms would bring about the end of the financial contribution, in the sense that there would be no longer any financial contribution in existence, the Appellate Body explicitly recognized in the original proceeding that this, alone, will not necessarily mean that the relevant subsidy has ceased to exist. Specifically, in the paragraph immediately preceding the statement the European Union relies upon, the Appellate Body explained that:

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.*<sup>347</sup> (emphasis added).

7.179. After raising these doubts about the European Union's understanding of the Appellate Body's statement, the compliance panel ultimately refrained from making specific findings on whether the repayment of a loan on subsidized terms achieves the withdrawal of the subsidy for the purpose of Article 7.8 of the SCM Agreement, having already found that the "lives" of the relevant subsidies had expired before the end of the implementation period on other grounds.<sup>348</sup> The

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<sup>345</sup> Specifically, the European Union argued that the lives of 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, came to an end. (Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.109 and Table 13).

<sup>346</sup> European Union's second written submission, para. 20 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 709).

<sup>347</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1070-6.1073 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 708-709). (fns omitted)

<sup>348</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1074 ("We believe it is unnecessary to make any definitive findings in relation to the merits of the European Union's submissions concerning the extent to which the actual repayment of the relevant LA/MSF

European Union appealed this aspect of the first compliance panel's findings. However, the Appellate Body found it unnecessary to address that appeal, having upheld the Panel's separate findings that the pre-A380 LA/MSF subsidies expired before the beginning of the implementation period, leaving the European Union with no further compliance obligation under Article 7.8 with respect to those subsidies.<sup>349</sup>

7.180. Fundamentally, the European Union's reliance on the same line of argument in this dispute is based on the view that the compliance panel was wrong to suggest that the repayment of a loan on subsidized terms may not amount to the "removal" of a financial contribution. The European Union advances several lines of argument in support of its submission.

7.181. First, the European Union argues that its position "is consistent with, and flows from, the very definition of a subsidy"<sup>350</sup>, which the European Union submits requires the co-existence of two elements – a financial contribution *and* a benefit conferred on the recipient. Thus, according to the European Union, "it follows that, when one of the two constituent elements is removed, a subsidy cannot be held to exist".<sup>351</sup> For the European Union, this understanding is confirmed by the term "thereby" in Article 1.1(b) of the SCM Agreement, which the European Union argues indicates that a benefit can only be conferred, and can only exist, based on a financial contribution that a recipient "continues to enjoy".<sup>352</sup>

7.182. Second, the European Union maintains that the compliance panel's analysis should be disregarded because it was based on a misreading of what the Appellate Body had in mind when it said 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".<sup>353</sup> According to the European Union, the compliance panel was wrong to interpret this statement to mean that the Appellate Body explicitly recognized that the repayment of a loan on its subsidized terms does not, alone, bring the life of a subsidy to an end.<sup>354</sup> For the European Union, the Appellate Body's statement "does not speak to the (non-)existence of a subsidy after *the act of removing the financial contribution in full*", which is the question before the panel in this proceeding. Rather, it is focused on the "life of the subsidy continuing after *the act of granting the financial contribution*".<sup>355</sup>

7.183. Third, the European Union submits that the compliance panel's observations about the repayment of a loan on subsidized terms were driven by its interpretation of the phrase "withdraw the subsidy", which was overturned by the Appellate Body. In this light, the European Union argues

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measures on subsidized terms has brought about the end of the "lives" of the challenged subsidies"). See also Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, fn 1847.

<sup>349</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.406 ("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").

<sup>350</sup> European Union's second written submission, para. 21.

<sup>351</sup> European Union's second written submission, paras. 21, 28-35 and 83-85. Canada in its third-party submission expressed a similar view to that of the European Union that "actions or events affecting the financial contribution or the benefit elements of a subsidy can result in withdrawal", including by repayment of the principal amount of the loan. For Canada, "as the recipient of a subsidized loan benefits from having access to the principal amount of the loan on better-than-market terms, once the principal is repaid it no longer enjoys such benefit". (Canada's third-party submission, paras. 10 and 12). Brazil and Japan share the view that withdrawal can only be achieved through addressing the benefit provided by the subsidy. Brazil submits, for instance, that, repayment of a loan "does not affect in any way the manner in which a subsidy 'was projected to materialize over a certain period at the time of the grant'". (Brazil's response to Panel question No. 1, para. 17). Japan submits that a finding that the life of a subsidy has expired "would always require the benefit to no longer exist". (Japan's third-party submission, para. 6. See also Japan's third-party submission, paras. 4 and 5 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 5.387, 5.391, and 6.12)).

<sup>352</sup> European Union's second written submission, para. 22.

<sup>353</sup> European Union's second written submission, paras. 28-29; and response to Panel question No. 19, para. 22.

<sup>354</sup> European Union's response to Panel question No. 19.

<sup>355</sup> European Union's response to Panel question No. 19, para. 25. (emphasis original)

that the compliance panel's views on what might or might not be argued regarding the effectiveness of the repayment of a loan on subsidized terms in achieving "withdrawal" are not instructive.<sup>356</sup>

7.184. The United States argues that the European Union's arguments are at odds with the correct understanding of Article 7.8 of the SCM Agreement as well as Article 1 of the SCM Agreement<sup>357</sup>, and are not supported by the Appellate Body's findings in the first compliance proceeding concerning the "life" of a subsidy.<sup>358</sup> While noting that the text of Article 7.8 permits Members to comply by withdrawing the subsidy, the United States submits that, based on its ordinary meaning, the text of Article 7.8 refers to the withdrawal of the subsidy itself, and not an element or component of the subsidy.<sup>359</sup> The United States submits that Article 1 of the SCM Agreement defines the existence of a subsidy in terms of a financial contribution by which a benefit is conferred. According to the United States, "the Appellate Body found that the evaluation of benefit requires a collective analysis of the financial contribution, the terms under which the Member conferred it, and the terms available in the market".<sup>360</sup> Thus, the United States submits that a conclusion as to the withdrawal of a subsidy requires consideration of all of these factors.<sup>361</sup>

7.185. The United States further contends that the Appellate Body's statement "that a subsidy has a life, which may come to an end, either through the removal of the financial contribution and/or the expiration of the benefit", was made in the context of an analysis of Articles 5 and 6 of the SCM Agreement. The United States argues that considerations relevant for Article 5 are different from those relevant to Article 7.8, in that Article 5 "concerns the use of subsidies in a way that causes adverse effects - not the continued existence of such subsidies".<sup>362</sup> In addition, the United States argues that the use of "and/or" in the Appellate Body's statement the European Union relies upon merely "signals an understanding that the parties agreed that the two options are not necessarily disjunctive".<sup>363</sup> For the United States, this language leaves open the possibility that removal of a financial contribution would only bring the life of a subsidy to an end if it also entails termination of the benefit. The United States argues that the European Union now "seeks to distort the appellate report's 'and/or' into an either/or theory that would artificially cut short the lives of subsidies while the *ex ante* benefit remains untouched".<sup>364</sup>

7.186. The United States submits that there may be occasions when the repayment -and removal- of the financial contribution may achieve withdrawal of a subsidy but considers that this will depend on the particular circumstances. In the case of a subsidised loan, the United States submits that the withdrawal would necessitate prospective annual interest rates that brought the loan into conformity with the loan the recipient could have obtained in the market at the time it received the subsidy.<sup>365</sup>

7.187. Finally, the United States argues that there is no support for the European Union's argument that the compliance panel's views on whether the repayment of a loan on subsidized terms may withdraw a subsidy are somehow invalid because the compliance panel's interpretation of the phrase "withdraw the subsidy" was overturned by the Appellate Body. The United States submits that the

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<sup>356</sup> European Union's second written submission, para. 27; and response to Panel question No. 19, paras. 20-21.

<sup>357</sup> United States' second written submission, paras. 42-45.

<sup>358</sup> United States' second written submission, para. 45.

<sup>359</sup> United States' second written submission, para. 42.

<sup>360</sup> United States' second written submission, para. 42.

<sup>361</sup> United States' second written submission, para. 42. The United States argues that, "just as the governments' payment of principal to Airbus under the LA/MSF contracts was not enough for past panel and appellate reports to conclude that it conferred a subsidy, the alleged disgorgement of the principal by Airbus is not enough by itself to conclude that the subsidy no longer exists". (United States' second written submission, para. 43).

<sup>362</sup> United States' second written submission, para. 45 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.373) ("Article 5 is concerned with the causing of adverse effects through the 'use' of subsidies. ... In contrast, Article 7.8 is concerned with the continued existence of 'such subsid{ies}'".)

<sup>363</sup> United States' second written submission, para. 45.

<sup>364</sup> United States' second written submission, para. 45. See also United States' comments on the European Union's response to Panel question No. 19, para. 73.

<sup>365</sup> United States' comments on the European Union's response to Panel question No. 21, para. 84. Alternatively, the United States submits that the subsidizing government would need to extract an amount equal to the difference between the original benchmark and the loan. (United States' comments on the European Union's response to Panel question No. 20, para. 76).

compliance panel's analysis of whether repayment could withdraw a subsidy was not founded on its separate analysis of whether a subsidy properly found to have ended was withdrawn for purposes of Article 7.8.<sup>366</sup>

7.188. We do not see a contradiction between the compliance panel's suggestion that the repayment of a loan on subsidized terms may not constitute the "removal" of a financial contribution and the definition of a subsidy contained in Article 1.1 of the SCM Agreement. The compliance panel's statement was focused on whether the *repayment of a loan on subsidized terms* amounts to the "removal" of a financial contribution, not whether the "removal" of a financial contribution brings the life of a subsidy to an end. Thus, the compliance panel's statement is not directed at understanding whether the removal of one of the constituent elements of a subsidy (the financial contribution) means that the subsidy no longer exists. It is instead focused on whether the repayment of a loan on subsidized terms means that a financial contribution has been "removed". On this particular point, the compliance panel suggests that the repayment of a loan on subsidized terms might *not* amount to the "removal" of the financial contribution, but rather, the full provision of a subsidized financial contribution.

7.189. Likewise, although we agree with the European Union that the second Appellate Body statement quoted in the above passage was not directed at understanding whether the "removal" of a financial contribution automatically brings the life of a subsidy to an end, the compliance panel did not rely upon it to make that point. As already noted, the compliance panel's suggestion that the repayment of a loan on subsidized terms may not constitute the "removal" of a financial contribution does not address this question. The second Appellate Body statement quoted by the compliance panel envisages that a subsidy may "continue to exist after the act of granting the financial contribution". When considered in the light of the compliance panel's view that the full repayment of a loan on subsidized terms arguably "implies that a subsidized financial contribution has been provided to the recipient in its entirety", the compliance panel's reliance on the second Appellate Body statement suggests that it believed that the repayment of a loan on subsidized terms could be characterized as the completion of the "act of granting of a financial contribution". Thus, correctly understood, the compliance panel's position is consistent with the Appellate Body's view that a subsidy may "continue to exist after the act of granting the financial contribution".

7.190. Turning to the third reason the European Union has advanced to support its position that the above passage from the compliance panel report should be disregarded, we note that there is no mention of, or reference to, the compliance panel's interpretation of the phrase "withdraw the subsidy". Moreover, there is no suggestion that the compliance panel's views were based on its previously articulated position that the "withdrawal" of a subsidy for the purpose of Article 7.8 of the SCM Agreement must bring an implementing Member into conformity with its obligations under Article 5 of the SCM Agreement. Indeed, the fact that this consideration was not mentioned at all (when it was the most obvious way of dismissing the European Union's submission concerning the repayment of the LA/MSF loans) suggests that the compliance panel's interpretation of what it means to "withdraw the subsidy" for the purpose of Article 7.8 did not form part of its reasoning in this part of its report. Accordingly, we find no basis to agree with the European Union's contention that the compliance panel's statements were driven by its interpretation of the phrase "withdraw the subsidy", which was overturned by the Appellate Body.

7.191. We note that in arguing that the repayment of a loan on subsidized terms constitutes the "withdrawal" of a subsidy, the European Union elaborates a theoretical example involving the provision of a one-off cash grant of EUR 10 million that was first advanced by the United States during the substantive meeting with the Panel. The European Union compares the repayment of a one-off cash grant of EUR 10 million that is used to purchase assets of the same value with a useful life of 10 years, with the repayment of a 10-year subsidized loan of EUR 10 million used for the same purpose.<sup>367</sup> We understand the European Union to rely upon its presentation of the outcomes of the two examples to support the logic of its submissions.

7.192. The European Union begins its discussion of the one-off cash grant by explaining that both the financial contribution and the benefit amount to EUR 10 million. The European Union asserts that one way to determine the life of the subsidy would be to amortise the benefit of the EUR 10 million over the anticipated useful life of the purchased assets (10 years). According to the European Union,

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<sup>366</sup> United States' comments on the European Union's response to Panel question No. 19, para. 70.

<sup>367</sup> European Union's responses to Panel question Nos. 19 and 21.

the subsidy would be considered "withdrawn" for the purpose of Article 7.8 of the SCM Agreement at the end of the 10-year period by virtue of the expiry of its benefit. To this extent, the European Union agrees with the notion that the life of a subsidy may continue even after a financial contribution has been fully provided – or, in the words of the Appellate Body, 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".<sup>368</sup>

7.193. The European Union then goes on to consider how the subsidy could be withdrawn after five years, positing two possibilities. The first option would involve removing the *benefit* on a prospective basis, which the European Union maintains would be achieved if the recipient repaid the unamortised benefit of the one-off cash grant amounting to EUR 5 million. With this payment, the European Union submits that the original one-off cash grant could no longer be found to confer a benefit on a prospective basis, and the subsidy would be withdrawn. The second option posited by the European Union would involve the removal of the *financial contribution*, which the European Union submits would be achieved if the recipient repaid the entirety of the one-off cash grant of EUR 10 million. The European Union argues that, once that payment is made, there would be no longer any financial contribution, and the subsidy would thereby be withdrawn.

7.194. Turning to the subsidized loan of EUR 10 million, the European Union first explains that in the light of the 10-year repayment period and the 10-year useful life of the assets purchased with that loan, the subsidy would come to an end after 10 years. For the European Union, the subsidy would no longer exist after 10 years because by then the financial contribution would have been repaid in full and the benefit fully amortized. As with the one-off cash grant, the European Union goes on to explain how the subsidy could be withdrawn after five years, identifying two possible scenarios. Under the first scenario, the *benefit* would be removed on a prospective basis, which the European Union maintains would be achieved by aligning the prospective annual interest payments with a market benchmark. The second scenario would see the recipient repay the entirety of the loan principal – i.e. the EUR 10 million. With this payment, the European Union argues that there would be no longer any *financial contribution*, and the subsidy would thereby be withdrawn.

7.195. In our view, the European Union's presentation of the above two examples overlooks important differences in the characteristics of the two types of subsidies, which when properly considered, suggest that the repayment of a loan on subsidized terms should *not* be understood on its own to necessarily bring the life of a subsidy to an end.

7.196. As the European Union notes, a financial contribution in the form of a one-off cash grant involves the transfer of funds to a recipient, with those funds also immediately representing the benefit to the recipient. In contrast, the benefit of a subsidized loan accrues from the savings achieved by the recipient as a result of the below-market interest rates charged by the government. The total value of those savings (i.e. the full benefit) is not transferred immediately as in the case of a one-off cash grant. It is achieved gradually over the course of the repayment period, which will generally define the duration of the loan. Thus, the full benefit of a subsidized loan will be conferred only *when the loan is repaid in full*. To this extent, and contrary to the European Union's submissions, the full repayment of the *principal* disbursed under a subsidized loan can be best equated with the *provision* of a financial contribution in the form of a one-off cash grant (equivalent to the total savings resulting from below-market interest rates), *not the "removal" of a subsidy*. In our view, to argue otherwise would mean that Members would have different compliance obligations under Article 7.8 of the SCM Agreement in relation to the withdrawal of subsidies affording recipients *the same amount of benefit*, simply because of the form of the financial contribution chosen to confer that benefit. This, we believe, can be seen from the examples posited by the European Union.

7.197. The European Union argues that the repayment after five years of the one-off cash grant of EUR 10 million and the principal of EUR 10 million disbursed under the subsidized loan, would bring the lives of the two subsidies to an end because, according to the European Union, in both cases the financial contributions would have been fully repaid, making it impossible to conclude there is ongoing subsidization.<sup>369</sup> We note, however, that under this line of reasoning, none of the value of

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<sup>368</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 708.

<sup>369</sup> The United States considers that the "benefit" conferred by a grant is equivalent to the face value of the grant plus the interest that the recipient avoided paying because of the grant. Hence, a grant may be seen

the benefit afforded to the recipient under the subsidized loan would have been returned to the government, whereas the entirety of the benefit conferred via the cash grant would have been repaid. The recipient of the subsidized loan would be free to keep the savings that helped or enabled it to finance the purchase of assets, while the recipient of the one-off cash grant would not be entitled to keep the government funding assistance. In the example presented by the European Union, it is not possible to determine the amount of the benefit of the subsidized loan because the interest rate savings were not specified. Assuming that the subsidized loan provided its recipient with exactly the same total value of savings as the cash grant – i.e. EUR 10 million<sup>370</sup> – it is apparent that the Member having provided the one-off cash grant would be in a different compliance position than the Member that provided exactly the same amount of benefit to the recipient by means of a subsidized loan. We do not see any legal basis to conclude that a Member's decision to provide a recipient with a specific amount of funding assistance, by using *either* a loan *or* a grant, should determine the extent to which the recipient is required to repay the totality of that funding assistance in order to bring the subsidizing Member into compliance with its obligation to withdraw the subsidy under the terms of Article 7.8 of the SCM Agreement. In our view, these considerations suggest that the repayment of a loan on subsidized terms should *not* be understood to bring the life of a subsidy to an end.

7.198. We note, furthermore, that the European Union recognizes that the repayment of principal and interest is a defining feature of a financial contribution in the form of a loan.<sup>371</sup> Indeed, the requirement to repay principal and interest under a subsidized loan is an essential term of the agreement between the subsidizing government and loan recipient pursuant to which that form of financial contribution is transferred. In contrast, the repayment of a one-off cash grant is *not* an inherent feature of this type of financial contribution. The repayment of a one-off cash grant is extraneous to a subsidizing government's direct transfer of funds to a recipient. By overlooking this important difference, the parallel the European Union draws between the repayment of the two types of financial contributions used in its examples is misplaced. In order to agree with the European Union, we would need to accept that the performance of the very terms through which a subsidized loan is provided (i.e. the repayment of principal at below-market interest rates) would be, alone, enough to "remove" or "take away" the subsidy that is defined by the very existence of those terms. While we accept that the life of any subsidy will come to an end with the passage of time, we do not believe that a subsidy can be withdrawn for the purpose of Article 7.8 of the SCM Agreement simply through the execution of a condition whose performance is the very means by which the same subsidy is bestowed. In other words, we do not see how the same act – the performance of a requirement to make subsidized repayments under a government loan – can define both the provision *and* the withdrawal of a subsidy.

7.199. Both parties find support for their different positions in the terms of Articles 1 and 7.8 of the SCM Agreement. According to the European Union, the very definition of a subsidy under Article 1 requires the co-existence of a "financial contribution" and a corresponding "benefit". Thus, relying upon the Appellate Body's statement that the life of a subsidy may come to an end "either through the removal of the financial contribution and/or the expiration of benefit", the European Union argues that the *full repayment of a loan* on its subsidized terms brings the life of that subsidy to an end. The United States, however, argues that it follows from Article 7.8 that a subsidy *in its entirety* must be withdrawn in order to achieve compliance, not just one of its elements. In this regard, the United States maintains that the Appellate Body's use of the words "and/or" in the statement the European Union relies upon means that the Appellate Body recognized that the two options identified were not necessarily disjunctive, confirming that the removal of a financial contribution may bring the life of a subsidy to an end only if it also entails the termination of the benefit.

7.200. As noted by the first compliance panel, the statement the European Union relies upon was not made in isolation but preceded by the Appellate Body's explanation of how the terms of Article 1 of the SCM Agreement operate to define the existence of a subsidy. After recalling, as the

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as functionally equivalent to an interest-free loan for which the recipient need not pay the principal, according to the United States. (United States' response to Panel question No. 21, para. 59; and comments on the European Union's response to Panel question No. 21, para. 79).

<sup>370</sup> This could be possible, for example, if the government loan was interest free, and a similar loan from the market lender would have required the recipient to pay 10% interest per annum on the full amount of loan principal.

<sup>371</sup> European Union's response to Panel question No. 21, para. 11.

European Union does in this proceeding, that Article 1 stipulates that a subsidy shall be deemed to exist if there is a financial contribution that confers a benefit, the Appellate Body stated:

... 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. This is confirmed, for example, by the text of Articles 4.7 and 7.8 of the SCM Agreement. The reference in those provisions to "withdrawing" the subsidy would be rendered meaningless if a subsidy did not continue to exist after its conferral on a recipient.<sup>372</sup>

7.201. In a footnote attached to the last sentence of this statement the Appellate Body explained its thinking further, recalling that it had previously found in the context of Part V of the SCM Agreement, that the benefit of an "untied, non-recurring, 'financial contribution'" may continue to flow after it has been provided.<sup>373</sup> The statement the European Union relies upon – that the life of a subsidy may come to an end "either through the removal of the financial contribution and/or the expiration of benefit" – was made by the Appellate Body at the beginning of the very next paragraph. In our view, the European Union's understanding of that statement is mistaken because it fails to account for the specific context in which it was made.

7.202. Having twice explained that a subsidy may continue to exist after the act of granting a financial contribution is complete, we believe that it would be incongruous to understand the Appellate Body to have accepted in the very next sentence that the repayment of a loan on its subsidized terms can bring the life of a subsidy to an end. This is because, for the reasons already explained, the repayment of a loan on subsidized terms merely confirms that a subsidy has been fully provided (in the same way that the transfer of a one-off cash grant confirms the recipient has received the full subsidy). Thus, when considered in its proper context, we do not understand the Appellate Body statement the European Union relies upon to support its position. On the contrary, in the light of the Appellate Body's explanation of how the terms of Article 1 of the SCM Agreement operate to define the existence of a subsidy in the preceding paragraph of its report, the Appellate Body statement the European Union relies upon is best understood to express the view that the life of a subsidized loan may come to an end in either of two situations: when the financial contribution *and* the benefit have been removed; or when only the benefit is removed. This reflects our view that the repayment of a loan on its subsidized terms does not, alone, bring the life of the subsidy to an end.

7.203. Finally, we do not see any inconsistency between the view that the repayment of a loan on subsidized terms does *not*, alone, bring the life of a subsidy to an end, and the Appellate Body's interpretation of a Member's compliance obligations under Article 7.8 of the SCM Agreement. We recall that in the first compliance dispute, the Appellate Body found that a Member has no compliance obligation under Article 7.8 with respect to expired subsidies. However, for the reasons explained above, we do not consider that the repayment of a loan on subsidized terms necessarily means that the subsidy has expired. The repayment of a loan on subsidized terms does not "remove", "return" or "withdraw" the subsidized loan. Rather, it merely confirms that the subsidized financial contribution has been fully provided, in the same way that the act of transferring the funding associated with a one-off cash grant confirms that the cash grant has been fully provided. Thus, just as the provision of a financial contribution in the form of a one-off cash grant *does not* bring the life of a subsidy to an end immediately after that grant is made, so too may the life of a subsidized loan continue to exist after it has been fully repaid on subsidized terms. In both situations, the life of the subsidy will depend upon the extent to which the recipient is continuing to use the subsidy for its originally intended purposes (in the European Union's example, the useful life of the purchased

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<sup>372</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 708. (fn omitted)

<sup>373</sup> The full text of the relevant footnote provides: "{w}e also note that, in a Part V context, the Appellate Body has found that an investigating authority may presume, for purposes of an administrative review under Article 21.2 of the SCM Agreement, "that a 'benefit' continues to flow from an untied, non-recurring 'financial contribution'", although this presumption is rebuttable. (Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, fn 1643 (citing Appellate Body Report, *US – Lead and Bismuth II*, para. 62); and *US – Countervailing Measures on Certain EC Products*, para. 84).

assets) without having repaid at least the remaining value of the benefit associated with the original financial contribution on a prospective basis.<sup>374</sup>

7.204. With the above considerations in mind, we now turn to review whether the repayment of UK A350XWB LA/MSF brought the life of the subsidy provided under that loan to an end. We have found<sup>375</sup> that Airbus made a final payment to the UK government in [\*\*\*] totalling [\*\*\*], which represents repayment of the full amount of outstanding principal that Airbus actually drew down and received, plus accrued interest under the *subsidized* UK A350XWB LA/MSF agreement. Accordingly, and in the light of our conclusions with respect to the implications of the full repayment of a subsidized loan *on its subsidized terms* for the expiry of a subsidy, we find that the European Union has failed to establish that Airbus' repayment of the sums outstanding under the subsidized UK A350XWB LA/MSF agreement withdrew the subsidy provided under that arrangement for the purpose of Article 7.8 of the SCM Agreement.

#### **7.4.5 The European Union's claim that the French, German, Spanish and UK A380 LA/MSF subsidies have been withdrawn**

7.205. In this section, we address the European Union's claim that the French, German, Spanish and UK A380 LA/MSF subsidies have been withdrawn, thereby achieving compliance for purposes of Article 7.8 with respect to these subsidies. In section 7.4.5.1, we address the European Union's contention that it has achieved the withdrawal of all the A380 LA/MSF subsidies through a series of [\*\*\*] amendments to the French, German, Spanish and UK A380 LA/MSF loan agreements. In section 7.4.5.2, we address the European Union's separate claim that the Spanish A380 LA/MSF subsidy has been withdrawn by means of the full amortization of the *ex ante* benefit over time. Finally, in section 7.4.5.3, we address the European Union's submission that an announcement made by Airbus during the course of this proceeding to "wind down" and terminate the A380 programme provides "further confirmation" and "an independent basis" to find that the European Union has withdrawn the French, German, Spanish and UK A380 LA/MSF subsidies.

##### **7.4.5.1 The [\*\*\*] amendments to the French, German, Spanish and UK A380 LA/MSF loan agreements**

###### **7.4.5.1.1 Main arguments of the parties**

7.206. The European Union argues, on similar terms to its claim concerning the [\*\*\*] amendment to German A350XWB LA/MSF, that the [\*\*\*] amendments to the French, German, Spanish and UK A380 LA/MSF loan agreements have achieved the withdrawal of the subsidies conferred under those arrangements. The European Union argues that all four member States concluded amendments to their respective A380 LA/MSF agreements with Airbus, such that the previous financial contributions, which were found to have been provided on subsidised terms, have now been replaced by new financial contributions that are consistent with a market benchmark, thereby bringing the member State lenders into compliance with their obligations under Article 7.8 of the SCM Agreement.<sup>376</sup>

7.207. Relying upon the panel and Appellate Body reports in *Japan – DRAMS (Korea)*, the European Union argues that the substantial modification of an existing loan, including the extension of the repayment period of a government loan, may be properly treated as the transfer of *new rights* to the recipient of the modified loan and thus, give rise to a *new financial contribution*.<sup>377</sup> The European Union argues that the modifications made to the terms of the four amended A380 LA/MSF agreements can be characterized as such because they [\*\*\*], and [\*\*\*], allowing Airbus [\*\*\*].<sup>378</sup> Accordingly, the European Union maintains that the amended A380 LA/MSF contracts constitute new

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<sup>374</sup> In this regard, we recall that the "nature, amount, and projected use of the challenged subsidy may be relevant factors to consider in an assessment of the period over which the benefit from a financial contribution *might be expected* to flow. A panel may consider, for example, as part of its *ex ante* analysis of benefit, whether the subsidy is allocated to purchase inputs or fixed assets; the useful life of 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". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 707).

<sup>375</sup> See section 7.4.4.2.1 above.

<sup>376</sup> European Union's first written submission, paras. 70-80 and 100-102, 150, 158-159, and 160-170.

<sup>377</sup> European Union's first written submission, para. 152 (referring to Panel Report, *Japan – DRAMS (Korea)*), para. 7.442 and Appellate Body Report, *Japan – DRAMS (Korea)*, para. 251).

<sup>378</sup> European Union's first written submission, paras. 155-156.

financial contributions which must be assessed against the terms of a contemporaneous market benchmark in order to determine whether they confer a benefit within the meaning of Article 1.1(a)(2) of the SCM Agreement.

7.208. The European Union argues that the terms of the amended A380 LA/MSF agreements are consistent with those that a commercial lender, facing the possibility of the termination of the A380 programme, would have offered Airbus at the relevant time. In support of this argument, the European Union relies upon a report prepared by its consultant PwC, which analyses the transactions at issue and concludes that the behaviour of the member State governments in agreeing to the amendments was consistent with the behaviour of a market-based lender facing the possibility of the termination of the A380 programme. In particular, PwC considered the various aspects of the four restructured arrangements to assess the "net effect" of the amendments on each government lender's future returns. PwC concluded that the amendments had "net advantages" due to their impact on expected repayments which thus put the lenders in a better position than they would have been in under a programme termination scenario.<sup>379</sup> The European Union contends that the member State lenders thus acted as rational commercial actors by agreeing to a restructuring that entailed a [\*\*\*] in the face of the certainty of such losses.<sup>380</sup>

7.209. The United States argues that there is no support for the European Union's argument that the amendments "replaced" the pre-existing A380 LA/MSF subsidies. Rather than terminate the original A380 LA/MSF contracts, the United States argues that the amendments kept the A380 LA/MSF contracts in place, under terms that were modified specifically to [\*\*\*]. The United States argues that this does not conform with the requirement in Article 7.8 to "withdraw" or "take away" a pre-existing subsidy found to have caused adverse effects.<sup>381</sup>

7.210. The United States argues that the [\*\*\*] amendments are properly understood to be "intervening events" – an "unplanned adjustment to the terms of a pre-existing subsidy" – that *increased* the amount of the pre-existing A380 LA/MSF subsidies to Airbus and prolonged their lives.<sup>382</sup> To assess the effect of the amendment, the United States has submitted a report by NERA Consulting, which compares the IRR of the original A380 LA/MSF loan agreements, considering only cash flows from 2018 onward, to the IRR of the amended A380 LA/MSF agreements, from 2018 onward. The NERA analysis finds that the IRRs of the original German, Spanish, and UK A380 LA/MSF are higher than the corresponding IRRs of the LA/MSF as amended, concluding that the amendments made Airbus better off – and the governments of Germany, Spain, and the UK worse off – than they would have been, absent the amendments.<sup>383</sup> For French A380 LA/MSF, NERA concludes that the IRR of the original French A380 LA/MSF is slightly lower than the IRR of French A380 LA/MSF as amended, but finds that the results are highly sensitive to the credibility of [\*\*\*].<sup>384</sup> In this respect, the United States submits that if Airbus opts to terminate the A380 programme somewhat earlier than forecasted under the revised delivery schedule, then the IRR of the original French A380 LA/MSF contract would be higher than the IRR of French A380 LA/MSF as amended.<sup>385</sup> NERA also assessed the IRR of the original A380 LA/MSF packages considered together, and the IRR of the amended LA/MSF packages considered together, concluding that the IRR of the original package is higher than the amended arrangements. The United States submits that this provides additional confirmation that the amendments increased the pre-existing A380 LA/MSF subsidies to Airbus.<sup>386</sup>

7.211. In any case, even on the basis of the European Union's own argument, the United States submits that the European Union is incorrect in arguing that the [\*\*\*] amendments aligned the A380 LA/MSF subsidies with a contemporaneous market benchmark. According to the United States, the European Union and the PwC report improperly assume that, absent the [\*\*\*] amendments, Airbus would have terminated the A380 programme by [\*\*\*], thus preventing the Airbus governments from recovering the outstanding A380 LA/MSF principal, making any alternative

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<sup>379</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)).

<sup>380</sup> European Union's second written submission, para. 137.

<sup>381</sup> United States' first written submission, paras. 52 and 55-56

<sup>382</sup> United States' first written submission, paras. 37-41.

<sup>383</sup> United States' first written submission, para. 45 (referring to NERA A380 LA/MSF Report (Exhibit USA-8 (HSBI/BCI)), para. 17).

<sup>384</sup> NERA A380 LA/MSF Report, (Exhibit USA-8 (HSBI/BCI)), para. 19.

<sup>385</sup> United States' first written submission, para. 46.

<sup>386</sup> United States' first written submission, para. 47 (referring to NERA A380 LA/MSF Report, (Exhibit USA-8 (HSBI/BCI)), paras. 17 and 20).

allowing for the potential recovery of principal attractive.<sup>387</sup> The United States considers the European Union's argument to be flawed because it fails to recognize that a private creditor "would have had good reasons to believe that Airbus ... would have sought to capture the 2018 Emirates order or a similar volume of orders from another airline customer, even in the absence of the [\*\*\*] amendments".<sup>388</sup> The United States additionally argues that the European Union and PwC analysis incorrectly ignored the risk that forecast customer demand for the A380 would not materialize, [\*\*\*] which "led PwC to overstate the 'net advantages,' rendering its financial analysis unreliable".<sup>389</sup> Finally, the United States argues that the European Union's argument and the conclusions in the PwC report are flawed because there is no evidence that the Airbus governments performed an adequate level of due diligence in considering whether to enter into the [\*\*\*] amendments to the A380 LA/MSF agreements, which is inconsistent with the behaviour of a commercial lender.<sup>390</sup> On the whole, the United States argues that a reasonable commercial lender could have sought better terms, such as repayment on a fixed schedule, rather than through future A380 deliveries, which "would have drastically reduced the risk of the amendments to the lenders".<sup>391</sup>

#### 7.4.5.1.2 Evaluation by the Panel

##### 7.4.5.1.2.1 Features of the amended A380 LA/MSF loan agreements

7.212. The [\*\*\*] amendments modify the terms of each of the original LA/MSF agreements that were concluded by France, Germany, Spain and the United Kingdom with Airbus between [\*\*\*] and [\*\*\*].<sup>392</sup> The European Union asserts that Airbus and the four member States concluded the four amendments to ensure that Airbus would receive [\*\*\*] at a point in time when Airbus faced faltering demand for the A380 and needed to make a critical decision as to whether to continue the programme or [\*\*\*].<sup>393</sup> The German A380 LA/MSF amendment was concluded on [\*\*\*], the French A380 LA/MSF amendment on [\*\*\*], the UK A380 LA/MSF amendment on [\*\*\*], and the Spanish A380 LA/MSF amendment on [\*\*\*].<sup>394</sup>

7.213. While the specific amendments differ in certain respects, the four amendments share common features. As a core modification, each of the amendments [\*\*\*]. The French amendment [\*\*\*].<sup>395</sup> The German amendment [\*\*\*].<sup>396</sup> The Spanish amendment [\*\*\*].<sup>397</sup> The [\*\*\*] UK amendment [\*\*\*].<sup>398</sup> In addition, the LA/MSF contracts contained the following country-specific modifications:

- a. In the case of the French amendment, [\*\*\*]<sup>399</sup> Airbus also agreed [\*\*\*].<sup>400</sup> The French amendment also extends the expiration date of the original French A380 LA/MSF agreement from [\*\*\*].<sup>401</sup>

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<sup>387</sup> United States' first written submission, para. 60.

<sup>388</sup> United States' first written submission, para. 62.

<sup>389</sup> United States' first written submission, para. 74.

<sup>390</sup> United States' first written submission, paras. 77-78.

<sup>391</sup> United States' first written submission, para. 79.

<sup>392</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, fn 1933, para. 7.326;

French A380 LA/MSF Agreement, (Exhibit EU-12 (BCI)); Convention No. [\*\*\*]81035002277545, [\*\*\*], (Exhibit EU-13 (BCI)); German A380 LA/MSF Agreement, (Exhibit EU-14 (BCI) (English Translation)); and Spanish A380 LA/MSF Agreement, (Exhibit EU-15 (BCI)); UK A380 LA/MSF Agreement, (Exhibit EU-16 (BCI)).

<sup>393</sup> European Union's first written submission, paras. 140-145; PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI)), paras. 39-42; and Minutes of a meeting of the board of directors of Airbus SE, [\*\*\*], (Exhibit EU-18 (HSBI)), pp. 2-4.

<sup>394</sup> European Union's first written submission, para. 144.

<sup>395</sup> [\*\*\*] French A380 LA/MSF Amendment, (Exhibit EU-21 (BCI)), Art. 3.

<sup>396</sup> [\*\*\*] German A380 LA/MSF Amendment, (Exhibit EU-20 (HSBI/BCI) (English Translation)),

Section 3.1(a).

<sup>397</sup> [\*\*\*] Spanish A380 LA/MSF Amendment, (Exhibit EU-23 (BCI)), p. 3.

<sup>398</sup> [\*\*\*] UK A380 LA/MSF Amendment, (Exhibit EU-22 (BCI)), Art. 4.1.

<sup>399</sup> Specifically, under the amendment, [\*\*\*]. ([\*\*\*] French A380 LA/MSF Amendment, (Exhibit EU-21 (BCI)), Art. 2).

<sup>400</sup> [\*\*\*] French A380 LA/MSF Amendment, (Exhibit EU-21 (BCI)), Art. 5.

<sup>401</sup> [\*\*\*] French A380 LA/MSF Amendment, (Exhibit EU-21 (BCI)), Art. 1; and PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 163.

- b. In the case of the German amendment, [\*\*\*].<sup>402</sup> Airbus was also required to [\*\*\*].<sup>403</sup> The German amendment also [\*\*\*].<sup>404</sup>
- c. In the case of the Spanish amendment, [\*\*\*].<sup>405</sup> The amendment also creates a new obligation for Airbus to [\*\*\*].<sup>406</sup>
- d. In the case of the UK amendment, Airbus also agreed to make [\*\*\*].<sup>407</sup>

7.214. Finally, in the event of the A380 programme termination, the [\*\*\*] A380 LA/MSF amendment affirmed the obligation contained in the original [\*\*\*] A380 LA/MSF agreement for Airbus to [\*\*\*].<sup>408</sup> [\*\*\*] in the event of A380 programme termination.<sup>409</sup>

#### 7.4.5.1.2.2 The relevant analytical framework

7.215. The analytical framework the European Union relies upon to support its submission that the [\*\*\*] amendments to the French, German, Spanish and UK A380 LA/MSF agreements achieved the withdrawal of the subsidies conferred under those arrangements is similar to the analytical approach the European Union presented in relation to the [\*\*\*] amendment to the German A350XWB LA/MSF agreement discussed in section 7.4.3.2.2. As with the [\*\*\*] amendment to the German A350XWB LA/MSF contract, the European Union maintains that the [\*\*\*] A380 LA/MSF amendments created four new financial contributions, the terms of which should be compared with a contemporaneous market benchmark in order to determine whether they confer a benefit and, therefore, continue to subsidize Airbus.<sup>410</sup> However, unlike the approach adopted by the European Union with respect to the German A350XWB amendment, the European Union has not attempted to substantiate its assertion of compliance by presenting a calculation of the IRRs of the amended A380 LA/MSF contracts and comparing these to the rate of return that a market-based lender would have wanted to achieve on a loan to Airbus on similar terms to the amended A380 LA/MSF contracts at the time they were concluded. Rather, for the amended A380 LA/MSF contracts, the European Union argues that the appropriate benchmark against which to measure whether the revised terms are market-based is the behaviour of a commercial lender faced with the likelihood of the early termination of the A380 programme by [\*\*\*].<sup>411</sup> Thus, in order to determine whether the [\*\*\*] amendments to the A380 LA/MSF agreements achieve compliance, the key question that must be answered following the European Union's suggested analytical framework is whether a commercial lender, faced with the likely termination of the A380 programme, would have entered into the A380 LA/MSF amendments on the terms agreed between Airbus and the Airbus governments.<sup>412</sup>

7.216. In essence, we understand the European Union's submissions to be based on the following two premises: first, that the [\*\*\*] amendments created *new* loans that *replaced* the original A380 LA/MSF agreements; and second, that the appropriate way to determine whether the amended A380 LA/MSF agreements continue to confer a subsidy on Airbus is to determine whether a *commercial*

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<sup>402</sup> Specifically, [\*\*\*]. ([\*\*\*] German A380 LA/MSF Amendment, (Exhibit EU-20 (HSBI/BCI) (English translation)), sec. 3.1(b)).

<sup>403</sup> [\*\*\*] German A380 LA/MSF Amendment, (Exhibit EU-20 (HSBI/BCI) (English translation)), sec. 2.1.

<sup>404</sup> [\*\*\*] German A380 LA/MSF Amendment, (Exhibit EU-20 (HSBI/BCI) (English translation)), sec. 3.2.

<sup>405</sup> Under the original Spanish A380 LA/MSF agreement, Airbus agreed to pay a per-aircraft levy of [\*\*\*]. These per-aircraft levies were [\*\*\*]. ([\*\*\*] Spanish A380 LA/MSF Amendment, (Exhibit EU-23 (BCI)), p. 4).

<sup>406</sup> [\*\*\*] Spanish A380 LA/MSF Amendment, (Exhibit EU-23 (BCI)), p. 5.

<sup>407</sup> [\*\*\*] UK A380 LA/MSF Amendment, (Exhibit EU-22 (BCI)), Art. 4.2.

<sup>408</sup> [\*\*\*] [\*\*\*] A380 LA/MSF Amendment, [\*\*\*]; Clause 2.4 and schedule 3, Clause 4.2. See also PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), paras. 123-124.

<sup>409</sup> The [\*\*\*] amendment uniquely provides that Airbus should [\*\*\*], specifying that the legal consequences provided for in Section 9 of the 2002 Loan Agreement shall not take effect if Airbus breaches this obligation. We understand that this means that Airbus is not precluded from terminating the programme prior to 2028. ([\*\*\*] A380 LA/MSF Amendment, [\*\*\*], sec. 4; and PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), paras. 84-85).

<sup>410</sup> European Union's first written submission, paras. 70-80 and 152-176.

<sup>411</sup> European Union's first written submission, paras. 124-141; Minutes of a meeting of the board of directors of Airbus SE, [\*\*\*] (Exhibit EU-18 (HSBI)), p. 2; and PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), Section C.

<sup>412</sup> European Union's first written submission, paras. 160-175.

*lender* would have agreed to the A380 LA/MSF amendments, given the likely termination of the A380 programme.

7.217. We recall that in our analysis of the [\*\*\*] amendment to the German A350XWB LA/MSF agreement, we dismissed the European Union's reliance on the panel and Appellate Body reports in *Japan – DRAMS (Korea)* as a basis to support its view that a "substantial modification" to an existing loan necessarily creates a *new* loan (financial contribution) for the purpose of performing a benefit analysis. We found that the European Union's reliance on *Japan – DRAMS (Korea)* was misplaced because that dispute addressed a different legal question arising from a different set of facts compared with the legal and factual issues arising in relation to the [\*\*\*] amendment to the German A350XWB LA/MSF agreement. In our view, the same conclusion can be reached *mutatis mutandis* in relation to the European Union's reliance on *Japan – DRAMS (Korea)* to support its submissions concerning the [\*\*\*] amendments to the A380 LA/MSF agreements.

7.218. As with the [\*\*\*] amendment to the German A350XWB LA/MSF agreement, there is nothing in the evidence before us to suggest that the [\*\*\*] A380 LA/MSF amendments brought into existence a *new* financial contribution. Although the amendments altered the contracting parties' rights, they did not establish new and separate loan arrangements. The [\*\*\*] amendments did not terminate the original A380 LA/MSF agreements. All required disbursements under the loan agreements had been made before the [\*\*\*] amendments, no new disbursements were made as a result of those amendments, and the outstanding principal and interest had not yet been fully repaid. Thus, in our view, the original A380 LA/MSF agreements continue to exist but in a restructured form, reflecting the revised repayment terms agreed between Airbus and the Airbus governments.

7.219. For the reasons already explained in the context of our analysis of the [\*\*\*] amendment to the German A350XWB LA/MSF contract, we consider that where funding under a subsidized loan agreement has been fully disbursed and remains outstanding, an amendment to that loan to bring it into alignment with a market benchmark on a prospective basis would need to ensure that the recipient is placed in the same position it would have been in at the time of the amendment, had the loan been agreed on market terms from the beginning.<sup>413</sup> Thus, in our view, the correct approach for determining whether the revised terms of the A380 LA/MSF agreements align those contracts with a market benchmark, requires us to determine whether they leave Airbus in the same position it would have been in at the time of the amendments, *had the loan contract been agreed on market terms from the beginning*. We now turn to apply this standard to the facts surrounding the [\*\*\*] amendments to the A380 LA/MSF agreements.

#### **7.4.5.1.2.3 Have the [\*\*\*] amendments aligned the terms of the A380 LA/MSF agreements with a market benchmark?**

7.220. We begin by noting that the amount of outstanding principal under the A380 LA/MSF agreements at the time of the [\*\*\*] amendments was significant.<sup>414</sup> As already noted, the [\*\*\*] amendments release Airbus of the obligation to make levy payments on certain deliveries made during the [\*\*\*] period with a view to *inter alia* facilitating Airbus' planned sales to an important customer that, it appears, would not otherwise have been made. However, at the same time, all

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<sup>413</sup> See section 7.4.3.2.2 above.

<sup>414</sup> Under the original A380 LA/MSF agreements, France committed to provide up to [\*\*\*] in LA/MSF; Germany committed to provide up to [\*\*\*] in LA/MSF; Spain committed to provide up to [\*\*\*] in LA/MSF; and the United Kingdom committed to provide up to [\*\*\*] in LA/MSF. (French A380 LA/MSF Agreement, (Exhibit EU-12 (BCI)), Arts. 3.1 and 6.2; German A380 LA/MSF Agreement, (Exhibit EU-14 (BCI)), Clause 4; Spanish A380 LA/MSF Agreement, (Exhibit EU-15 (BCI)), Art. 2; and UK A380 LA/MSF Agreement, (Exhibit EU-16 (BCI)), Clause 5). The United States submits that, at the end of 2017, only the outstanding [\*\*\*] were [\*\*\*] for France; [\*\*\*] for Germany, [\*\*\*] for Spain and [\*\*\*] for the United Kingdom. (United States' second written submission, para. 63 (referring to NERA A380 LA/MSF Report, (Exhibit USA-8 (HSBI/BCI)), Appendices 1-8)). We additionally note that the European Union has estimated that losses for the member States would have been [\*\*\*], if the programme had terminated in [\*\*\*]. The European Union submits that [\*\*\*] because Airbus is obliged to [\*\*\*]. (European Union's first written submission, para. 127; PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), paras. 150-158 and [\*\*\*]; and [\*\*\*] A380 LA/MSF Agreement (Exhibit [\*\*\*]), Schedule 3, Clauses 4.3, 4.8 and 4.9).

four amendments [\*\*\*].<sup>415</sup> The French and German amendments also require Airbus to [\*\*\*]<sup>416</sup>, and additional [\*\*\*] on future deliveries are provided for in the case of the Spanish amendment.<sup>417</sup> Thus, in broad terms, it can be said that the four amendments restructure the repayment terms of the outstanding principal and future interest payable under the pre-existing LA/MSF agreements, in a way that decreases the financial burden on Airbus in the short- to medium-term, while increasing that burden in the long-term, when Airbus and the members State governments apparently expected the market for the A380 to improve.

7.221. The PwC report the European Union relies upon defines its objective as the assessment of "whether the negotiated restructurings of the respective A380 MSF loan agreements between Airbus (or its affiliates) and {the French, German, Spanish and UK governments} are consistent with what private creditors in a similar position would have demanded for comparable transactions at the same time, i.e. whether each restructuring measure is provided on terms consistent with the relevant and contemporaneous market benchmark".<sup>418</sup> The PwC report undertakes this assessment in essentially four steps.

7.222. In the first two steps, the PwC report reviews the likelihood of programme termination and the prospects of a successful turnaround at the time of the [\*\*\*] amendments. After explaining that "a precondition for private creditors to support a ... project restructuring" is the "likelihood of a successful turnaround" in the prospects of the financed project<sup>419</sup>, the PwC report examines the risk of A380 programme termination, finding that "there was a high risk of programme termination and therefore a high probability for the member states to lose a substantial portion of their MSF investment".<sup>420</sup> The PwC report then goes on to explore the "turnaround prospects" of the A380 programme in the light of available demand forecasts for LCA sold into the market for Very Large LCA over the next 20 years, and the modifications Airbus anticipated would be made to the A380 to improve its competitiveness. PwC concludes that this information "suggest{s} the existence of prospects for a successful turnaround for the A380 programme".<sup>421</sup>

7.223. In the final two steps of its analysis, PwC determines the potential losses to the Airbus governments in the event of A380 programme termination. PwC next assesses the advantages and disadvantages of the amendments from the perspective of each government lender. PwC explains that where this assessment results in a "net-advantage", the member State lenders improve their positions relative to the programme termination scenario. However, where the assessment of the amendment shows a "net-disadvantage", the degree of the disadvantage resulting from the restructured terms would need to be compared to the expected losses of the programme termination scenario because "a smaller net-negative effect in the restructuring scenario ... would still lead to the conclusion that supporting the restructuring process would be the preferred behaviour of a private lender".<sup>422</sup> This is because, according to PwC, the "main goal for a private creditor when faced with restructuring is to avoid (partly or entirely) potential losses".<sup>423</sup> In other words, a creditor may decide to proceed with the restructuring of a loan even if the full amount of outstanding principal and future interest payments expected under the pre-existing loan could not be recovered.

7.224. PwC concludes that the effect of the [\*\*\*] amendments is a net-advantage for [\*\*\*] of [\*\*\*]<sup>424</sup> and a net-advantage for [\*\*\*] of [\*\*\*].<sup>425</sup> In the case of [\*\*\*], PwC determines that the net effect of the [\*\*\*] amendment is "neutral", with a possibility to [\*\*\*] and concludes that a private creditor would have behaved in the same manner as the Spanish government.<sup>426</sup> Finally,

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<sup>415</sup> [\*\*\*] French A380 LA/MSF Amendment, (Exhibit EU-21 (BCI)), Art. 2; [\*\*\*] German A380 LA/MSF Amendment, (Exhibit EU-20 (HSBI/BCI) (English translation)), sec. 3.1(b); [\*\*\*] Spanish A380 LA/MSF Amendment, (Exhibit EU-23 (BCI)), p. 4; and [\*\*\*] UK A380 LA/MSF Amendment, (Exhibit EU-22 (BCI)), Art. 4.2.

<sup>416</sup> [\*\*\*] French A380 LA/MSF Amendment, (Exhibit EU-21 (BCI)), Art. 5; and [\*\*\*] German A380 LA/MSF Amendment, (Exhibit EU-20 (HSBI/BCI) (English translation)), sec. 2.1.

<sup>417</sup> [\*\*\*] Spanish A380 LA/MSF Amendment, (Exhibit EU-23 (BCI)), p. 5.

<sup>418</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), paras. 3 and 20.

<sup>419</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 8.

<sup>420</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 33.

<sup>421</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 59.

<sup>422</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 13.

<sup>423</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 9.

<sup>424</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 168.

<sup>425</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. [\*\*\*].

<sup>426</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. [\*\*\*].

in the case of the [\*\*\*], PwC concludes that the [\*\*\*] amendment [\*\*\*] even in the event of programme termination. Nevertheless, PwC ultimately assesses that the [\*\*\*] amendment is market-based, because a private investor would have accepted the amendment.<sup>427</sup>

7.225. In our view, PwC's analysis cannot be relied upon to show that the [\*\*\*] amendments have brought the terms of the A380 LA/MSF agreements into line with a market benchmark.

7.226. The PwC report finds that the market prospects were positive in 2018 for a new and allegedly more competitive version of the A380 that Airbus intended to develop. PwC arrived at this conclusion after reviewing: (i) the Airbus 2017 Global Market Forecast (predicting 1,410 new deliveries in the "Very Large Aircraft" segment between 2017 and 2037); (ii) Boeing's 2017 Current Market Outlook (predicting 3,160 deliveries in the "Medium/Large Passenger Widebody" segment over the same period); (iii) the Flight Global Fleet Forecast (predicting 405 deliveries in the "Large aircraft" segment from 2016 to 2036, and specifically 394 for the A380); (iv) two Airbus PowerPoint slides describing various planned "improvements" to the A380; and (v) certain Airbus HSBI concerning then current and future sales campaigns.<sup>428</sup>

7.227. We note, however, that as explained by PwC, the recent history of the A380 revealed a different story, suggesting that its short to medium-term prospects were not good. As of February 2018, Airbus had not received any new A380 orders for nearly four years.<sup>429</sup> On the contrary, several airlines had cancelled or reduced existing contractual arrangements, resulting in an order volume of 311 aircraft by the end of 2017. With 226 A380s delivered through May 2018, only 85 deliveries remained outstanding, and a substantial portion of these were apparently at risk of cancellation.<sup>430</sup> In our view, the very fact that Airbus was close to terminating the programme suggests that a market lender would have closely scrutinized Airbus' future business plans for the A380, including the delivery forecasts for a new improved "A380plus".<sup>431</sup> In this regard, we recall that in considering the reliability of Airbus' business case delivery forecasts, the original panel made the following statement:

In our view, the further in time the events that are the subject of a forecast are anticipated to take place, the more likely it is that one or more intervening events may impede their fulfilment. In the specific context of the LCA industry, where, as the European Communities notes, the business environment is shaped by factors "whose very foreseeability is impossible by definition",<sup>432</sup> the element of uncertainty that is attached to aircraft delivery forecasts that sometimes projected events over multiple decades<sup>433</sup> cannot be ignored.<sup>432</sup>

7.228. Moreover, in the light of the fact that the repayment terms of the amended A380 LA/MSF contracts continue to be substantially levy-based and success-dependent, we believe that the following considerations, identified by the panel in the original proceeding, would have also informed a market lender's assessment of Airbus' business forecast for the A380:

Because of the graduated levy-based and success-dependent nature of LA/MSF repayments, Airbus has an economic incentive to be optimistic in its forecasts of, *inter alia*, the number of aircraft likely to be sold and the pace of those sales {...} The greater the number of sales over which principal repayments and royalties must be

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<sup>427</sup> PwC submits that "a private investor would be interested in supporting [\*\*\*]. (PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. [\*\*\*]).

<sup>428</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 59.

<sup>429</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 31 (noting that, "{a}lthough Airbus officially announced an A380 order for three aircraft from Japanese carrier All Nippon Airways (ANA) in January 2016, these orders were in fact previously considered as 'undisclosed' customers within Airbus' official order book".)

<sup>430</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 31.

<sup>431</sup> The United States and NERA submit that a private creditor would have had access to information characterizing Airbus' A380 demand forecasts as optimistic, and therefore would be unlikely to accept Airbus' demand forecasts uncritically. (United States' second written submission, paras. 67-79; and NERA A380 LA/MSF Report, (Exhibit USA-8 (HSBI/BCI)), paras. 3, 23-25, and 33-36).

<sup>432</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.414. (fns omitted)

paid, the less likely it is that Airbus will have to make those payments if the business plan estimates prove too optimistic.<sup>433</sup>

7.229. In our assessment, the above factors suggest that a market lender would have taken a conservative approach to determining whether the business prospects of the A380 were enough to justify amending the loans, instead of accepting the losses that would have resulted from programme termination. We are not convinced that a market lender faced with the possibility of termination of the A380 programme would have concluded that the "precondition"<sup>434</sup> for supporting the restructuring of the A380 LA/MSF loans (i.e. the "likelihood of a successful turnaround" of the A380)<sup>435</sup> was as easily satisfied as PwC found to be the case. Thus, in our view, PwC's analysis is an insufficient basis to conclude that a market lender would have found "the existence of prospects for a successful turnaround for the A380 programme".<sup>436</sup>

7.230. The United States appears to argue that the PwC analysis cannot be relied upon to show that the A380 LA/MSF amendments were market-based, because the European Union has failed to demonstrate the fundamental premise upon which it is based – namely, that a market lender would have believed that the 2018 amendments were necessary in order to continue the A380 programme. The United States discusses evidence which it considers demonstrates that a private creditor would have doubted that Airbus would have terminated the A380 programme by [\*\*\*] absent the amendments. This evidence includes a statement by Emirates CEO that Emirates "remain{ed} committed to the {A380} programme".<sup>437</sup> The United States submits that Airbus was also confident about market demand for the A380 and expected it to revive in the mid-2020s, that Airbus already had enough non-at-risk orders to sustain the A380 programme until [\*\*\*]<sup>438</sup>, and that Airbus also had identified [\*\*\*] when pitching the amendments to member State lenders.<sup>439</sup> The United States furthermore maintains that a reasonable creditor would also have known that Airbus had the ability to continue operating the A380 programme at a loss if necessary, as it had done in the past, in order to capture future anticipated demand.<sup>440</sup> In the light of our assessment of what a market lender's likely outlook would have been regarding future prospects for the A380 programme—and even NERA and the United States' own assessment of Airbus' A380 delivery forecasts<sup>441</sup>—we are not persuaded by the United States' assertions concerning the likely expectations surrounding the risk of A380 programme termination.

7.231. In addition, we note that the United States points to the lack of evidence in this proceeding showing that the Airbus governments performed any due diligence in respect of the A380 amendments to support its submission that the PwC report fails to demonstrate that the [\*\*\*] amendments are market-based.<sup>442</sup> The United States contrasts this situation with the circumstances surrounding the original A380 LA/MSF agreements, where specific project appraisals were performed and the Airbus business case, which included an analysis of multiple scenarios, was reviewed.<sup>443</sup> The European Union argues that the presence or absence of due diligence is not determinative of whether

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<sup>433</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1926. (fns omitted)

<sup>434</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 8.

<sup>435</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 8.

<sup>436</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), para. 59.

<sup>437</sup> Emirates press release, "Emirates welcomes 100<sup>th</sup> A380 to its fleet", (2 November 2017), (Exhibit USA-5).

<sup>438</sup> United States' second written submission, para. 67 (referring to Airbus SE Special Earnings Call February 2018, (Exhibit USA-3)). See also United States' second written submission, paras. 71-72.

<sup>439</sup> United States' second written submission, para. 67 (referring to [\*\*\*] German A380 LA/MSF Amendment, (Exhibit EU-20 (HSBI/BCI)), Attachment 3).

<sup>440</sup> United States' first written submission, paras. 64-65.

<sup>441</sup> NERA A380 LA/MSF Report, (Exhibit USA-8 (HSBI/BCI)), para. 16 (referring to Airbus SE Special Earnings Call January 2018, (Exhibit USA-1)) ("It is important to be clear, however, that {the expected delivery schedule for the A380} is optimistic and inaccurate. The forecasts for [\*\*\*] are much higher than Airbus had already told investors it would meet. Moreover, the delivery schedule assumes that Airbus would succeed in capturing {} orders beyond the 2018 Emirates order.")

<sup>442</sup> United States' second written submission, para. 76 (referring to Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.651); NERA A380 LA/MSF Report, (Exhibit USA-8 (HSBI/BCI)), paras. 37-39. The United States additionally argues that evidence on record confirms that the member State lenders decided to enter the [\*\*\*] amendments on the basis of non-commercial considerations related to [\*\*\*]. (United States' second written submission, paras. 62 and 64 (citing Letter from [\*\*\*], (Exhibit EU-89 (HSBI)), "{T}he [\*\*\*]").

<sup>443</sup> NERA A380 LA/MSF Report, (Exhibit USA-8 (HSBI/BCI)), para. 39.

the amendments aligned the A380 LA/MSF contracts to a market benchmark, and in any event, the member States did in fact negotiate the terms of the agreement and perform due diligence, as is evident from the fact that the four amendments differ from each other, demonstrating that member States sought to optimise the outcomes.<sup>444</sup> In our view, a market lender faced with the possible termination of the A380 programme and the recognized uncertainty in LCA delivery forecasts (particularly, given the recent history, as regards the A380) would have undertaken its own due diligence on the prospects of the A380. We recall in this regard that the first compliance panel found that:

... a commercial investor would be normally expected to perform a certain degree of due diligence in relation to the current and future "economic conditions" of a particular project before agreeing to enter into a loan contract.<sup>445</sup>

7.232. The evidence of discussions between Airbus and the Airbus governments the European Union relies upon does not reveal the extent to which France, Germany, Spain and the UK relied upon their own independent appraisals of the prospects for the A380 in agreeing to the amendments. The European Union's evidence confirms only that negotiations were held over a period of months to discuss the terms of the amendments.<sup>446</sup> There is, therefore, no evidence before us showing that the Airbus governments performed any independent assessment of Airbus' business plan for the A380, including its marketing prospects, or the economic value of the terms of the amendments. While we do not think that the absence of such appraisals can alone demonstrate that the amendments fail to align the terms of the original A380 LA/MSF agreements to a market benchmark, a commercial market lender would have likely undertaken due diligence in the process of deciding whether to enter into the A380 LA/MSF amendments.

7.233. Finally, we agree with the United States that PwC's "net-advantage/net-negative" analysis does not accurately determine the Airbus governments' "net" financial positions at the time of the [\*\*\*] amendment because the comparisons applied are based on *nominal* future cash flows, instead of the *net present value* of those cash flows. By way of example, the United States recalls that the PwC report concludes that the Spanish amendment offered a [\*\*\*]. The United States notes, however, that this was despite the fact that under the original Spanish A380 LA/MSF agreement and the Airbus/PwC expected delivery schedule, Airbus would pay an additional [\*\*\*] in cash flows from 2020 to 2028, beyond what the [\*\*\*] amendment requires in those years [\*\*\*]. The United States goes on to note that under the Spanish amendment, Airbus eventually pays this [\*\*\*] in cash flows [\*\*\*]. Thus, the United States argues that PwC incorrectly treats [\*\*\*] as being equivalent to [\*\*\*].<sup>447</sup> In our view, PwC's reply to these United States' criticisms does not address the point made by the United States<sup>448</sup>, which we consider to be valid, and it fails to convince us that the time-value of money should not have been taken into account in PwC's calculations.

7.234. Thus, for all of the above reasons, we find that the European Union has failed to demonstrate that the [\*\*\*] amendments to the A380 LA/MSF agreements bring the subsidized terms of the loans into line with market financing instruments. Accordingly, we conclude that the European Union has failed to demonstrate that the [\*\*\*] amendments to the A380 LA/MSF agreements has brought it into compliance with the obligation to "withdraw the subsidy" under Article 7.8 of the SCM Agreement.

#### **7.4.5.2 Withdrawal of the Spanish A380 LA/MSF subsidy by means of the amortization of benefit through the passage of time**

##### **7.4.5.2.1 Main arguments of the parties**

7.235. The European Union maintains that the life of a subsidized loan may be determined on the basis of the *ex ante* expectations held by the contracting parties with respect to its full repayment

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<sup>444</sup> European Union's second written submission, paras. 200-201.

<sup>445</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.651.

<sup>446</sup> Declaration by [\*\*\*], 4 October 2018, (Exhibit EU-19 (BCI)).

<sup>447</sup> NERA A380 LA/MSF Report, (Exhibit USA-8 (HSBI/BCI)), paras. 40-42.

<sup>448</sup> PwC Response Report, (Exhibit EU-86 (BCI)), para. 39.

on subsidized terms.<sup>449</sup> Accordingly, the European Union claims that the benefit of the Spanish A380 LA/MSF fully amortized [\*\*\*], when it was anticipated, on the basis of the expectations held by Airbus and the Spanish government at the time loan was agreed in [\*\*\*], that the principal and interest accruing to the Spanish government would have been fully repaid. In support of this submission, the European Union relies upon a report prepared by its consultant, TradeRx, which reviews the terms of the Spanish A380 LA/MSF, maps out the expected disbursements and repayment terms, and concludes that the benefit of the Spanish A380 LA/MSF contract would be fully amortized by [\*\*\*].<sup>450</sup>

7.236. The United States argues that the European Union's assessment is flawed because TradeRx's assessment of the life of the subsidy improperly relies exclusively on the "loan life" without taking into account the anticipated "marketing life" of the A380, and because the European Union ignores that amendments to the Spanish loan agreement prolonged the *ex ante* life of the Spanish A380 LA/MSF subsidy. The United States submits that the Appellate Body and first compliance panel both recognized that analysing a subsidy in relation to its "marketing life" is a valid way to measure the life of the LA/MSF subsidies, and by ignoring this, the United States argues that TradeRx's analysis of the *ex ante* life of Spanish LA/MSF for the A380 "is incomplete and thus unreliable".<sup>451</sup> In addition, the United States argues that neither the [\*\*\*] and [\*\*\*] amendments to the Spanish A380 LA/MSF was anticipated at the time that the original Spanish A380 LA/MSF agreement was concluded, and therefore these two amendments may be understood to have extended the *ex ante* life of the Spanish A380 LA/MSF to a point in time well beyond 2018.<sup>452</sup>

#### 7.4.5.2.2 Evaluation by the Panel

7.237. The European Union's consultant, TradeRx, seeks to determine whether the benefit conferred by the Spanish A380 LA/MSF loan agreement has fully amortized [\*\*\*] by allocating the alleged benefit of the Spanish A380 LA/MSF loan over the period during which full repayment of principal and interest, along with foreseen royalties, was expected to occur. The rationale for this approach is that the alleged benefit conferred through the financial contribution (i.e. the subsidized loan) would be enjoyed during the expected repayment period, which the European Union refers to as the expected "loan life".<sup>453</sup>

7.238. We see a number of reasons why the European Union's approach is not an appropriate basis to establish that the Spanish A380 LA/MSF subsidy has been withdrawn for purposes of Article 7.8 of the SCM Agreement.

7.239. First, and fundamentally, the European Union relies upon expectations about the period of time it was anticipated for Airbus to repay the loan *on its own subsidized terms*. For reasons already explained elsewhere in this report, we do not agree with the European Union that the repayment of the outstanding principal and accrued interest under a loan *on its subsidized terms* means that the subsidy has been withdrawn for the purpose of Article 7.8 of the SCM Agreement. Rather, in our view, the repayment of a loan on its subsidized terms merely confirms that the subsidized financial contribution has been fully provided, in the same way, for instance, that the act of transferring the funding associated with a one-off cash grant confirms that the cash grant has been fully provided. Therefore, the life of a subsidized loan will not *necessarily* come to an end after it has been fully

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<sup>449</sup> The European Union argues that the compliance panel or the Appellate Body did not express a preference between measuring the life of LA/MSF subsidies based on *ex ante* expectations with respect to its full repayment on subsidized terms, or based on amortizing the benefit of a subsidized LA/MSF loan over the course of the anticipated marketing life of a funded aircraft. (European Union's first written submission, para. 124).

<sup>450</sup> Specifically, Trade Rx concludes that "the *ex ante* amount for (re)payment ... adds up to [\*\*\*] by the end of 2017 with [\*\*\*]. (TradeRx Report on Expected Life of LA/MSF, (Exhibit EU-24 (HSBI/BCI)), para. 51).

<sup>451</sup> United States' first written submission, para. 84.

<sup>452</sup> United States' second written submission, para. 93.

<sup>453</sup> We recall that PwC followed the same approach in the first compliance proceeding in analysing whether the benefit conferred by the pre-A380 LA/MSF subsidies had fully amortized, which the Panel referred to as the "Loan Life" approach. In the first compliance proceeding, PwC additionally evaluated the pre-A380 LA/MSF subsidies by allocating the benefit over the expected marketing life of the funded A300, A310, A320 and A330/A340 LCA programmes, referred to as the "Marketing Life" approach. (Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.869-6.879).

repaid on its subsidized terms. In both the one-off grant and subsidized loan situations, the life of the subsidy will depend upon the extent to which the recipient is continuing to use the financial contribution for its originally intended purpose without having repaid at least the remaining value of the benefit on a prospective basis.

7.240. Second, we note that the European Union argues that the life of the Spanish A380 LA/MSF subsidy should be determined on the basis of the anticipated repayment period because, in its view, A380 LA/MSF was not found to be "critical" to the ability of Airbus to bring the A380 (and A350XWB) aircraft to market.<sup>454</sup> In support of this line of argument, the European Union refers to the findings of the first compliance panel and the Appellate Body that the A380 and A350XWB LA/MSF loans enabled Airbus to launch these aircraft "as and when it did"<sup>455</sup>, which the European Union understands to mean that the subsidies had a limited accelerating effect on the launch of these aircraft.<sup>456</sup> In our view, the European Union has mischaracterized the panel's findings.

7.241. We recall that the original panel concluded that it would not have been possible for Airbus to have launched the A380 as originally designed and at the time it did without LA/MSF. However, the panel went further, observing that:

... while the A380 business case suggests, *but by no means demonstrates*, that as a stand-alone proposition the project might have been economically viable even without LA/MSF, in our view, that conclusion rests *in part* on the assumption that at the time of the launch, Airbus would have been in a position to not only design and manufacture the A380, *i.e.*, had the necessary development and production technologies available to it, but also would have been able to obtain all the necessary financing on market terms.<sup>457</sup>

7.242. Moreover, as we discuss in further detail below, after having excluded from the scope of the compliance proceedings all "indirect effects" on the A380 and A350XWB arising from pre-A380 LA/MSF, the Appellate Body went on to confirm the first compliance panel's findings that Airbus' sales and deliveries of the A380 during the 2011-2013 period were a genuine and substantial cause of serious prejudice in the VLA market in the form of significant lost sales and market displacement. In our view, it logically follows from these findings that the market presence of the A380 in the 2011-2013 period was attributable to *only the direct effects of A380 LA/MSF*, implying that Airbus could not have launched and subsequently developed the A380 by the end of the 2011-2013 period in the absence of A380 LA/MSF. In this respect, we note that elsewhere in its submissions, the European Union has accepted that the adverse effects caused by the market presence of the A380 in the 2011-2013 period were "attributed to the 'direct effects' of A380 LA/MSF alone".<sup>458</sup> Thus, the original panel and Appellate Body compliance stage findings do not support the European Union's contention that A380 LA/MSF was *not* "critical" to the market presence of the A380.

7.243. We note that the Spanish A380 LA/MSF agreement has been amended twice since it entered into force. The European Union has not addressed the United States' arguments that these amendments are "intervening events" extending the life of the Spanish A380 LA/MSF subsidy, other than to argue that that the United States "offers no explanation as to why, or how, any such alleged intervening events prolonged the *ex ante* anticipated Loan Life for the Spanish A380 MSF subsidy."<sup>459</sup>

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<sup>454</sup> European Union's first written submission, fn 303; and second written submission, paras. 125-126.

<sup>455</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1723 and 6.1760; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.646.

<sup>456</sup> European Union's second written submission, paras. 125-127. The European Union estimates the A380 LA/MSF and A350XWB LA/MSF accelerated the respective launches of the A380 and the A350XWB by two years or less. The European Union argues that, if the "life" of the A380 LA/MSF subsidies were to be estimated based on considering the effect of the subsidies on the marketing life of the A380, then the subsidy should be amortized over the duration of the accelerating effect of the subsidies. Instead, TradeRx allocated the benefit over the period during which full repayment of principal and interest, along with foreseen royalties, was expected to occur, which TradeRx concludes was [\*\*\*]. (See TradeRx Report on Expected Life of LA/MSF, (Exhibit EU-24 (BCI)), Table 1).

<sup>457</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1948. (emphasis added)

<sup>458</sup> European Union's submission regarding the wind-down of the A380 programme, para. 3.

<sup>459</sup> European Union's second written submission, para. 128.

We note, however, that the European Union has itself argued that the [\*\*\*] A380 LA/MSF amendments could be characterized as "intervening events".<sup>460</sup>

7.244. In our view, the [\*\*\*] A380 LA/MSF amendments are properly considered to be "intervening events" because they were unexpected at the time the original A380 LA/MSF agreements were concluded.<sup>461</sup> In our view, the modifications made under the amendments change the expectations regarding the anticipated repayment period. In the case of Spanish A380 LA/MSF, the [\*\*\*] amendment [\*\*\*] Airbus' obligation to make per-aircraft repayments on [\*\*\*] that were anticipated to occur between [\*\*\*]. The amendment [\*\*\*] per-aircraft levies on other deliveries beyond those subject to [\*\*\*], and additionally creates a new obligation for Airbus to [\*\*\*]<sup>462</sup> Thus, the [\*\*\*] amendment modified the *ex ante* expectations regarding the repayment period for Spanish A380 LA/MSF, extending that period (notably through the obligation to pay royalties) beyond what was anticipated previously.<sup>463</sup> In other words, even by the European Union's own "loan life" standard, the life of the Spanish A380 LA/MSF subsidy has not come to an end because the [\*\*\*] amendment extended the repayment terms beyond the contracting parties' *ex ante* expectations.<sup>464</sup>

7.245. For the foregoing reasons, we find that the European Union has failed to demonstrate that the Spanish A380 LA/MSF subsidy has been withdrawn for the purpose of Article 7.8 as a result of the alleged amortization of benefit by [\*\*\*].

#### **7.4.5.3 Whether Airbus' announcement to "wind down" the A380 programme achieves withdrawal of the French, German, Spanish and UK A380 LA/MSF subsidies**

##### **7.4.5.3.1 Main arguments of the parties**

7.246. The European Union claims that Airbus' announcement to "wind down" the A380 programme provides "further confirmation" and "an independent basis" to find that the European Union has withdrawn the French, German, Spanish and UK A380 LA/MSF subsidies.<sup>465</sup> The European Union characterizes Airbus' announcement as a relevant, post-establishment "fact"<sup>466</sup> that serves as evidence of compliance with the DSB's recommendations and rulings. The European Union submits that Airbus' announcement is "an event that falls within the terms of the European Union's Panel Request", and "is, in the context of an evolving factual and market situation, inextricably linked with measures that have explicitly been identified in the {European Union's} panel request as achieving compliance under Article 7.8."<sup>467</sup>

7.247. The European Union maintains the Airbus' "wind down" announcement supports its claim of withdrawal of the A380 LA/MSF subsidies for two principal reasons. First, the European Union asserts that Airbus' announcement of the "wind down" of the A380 programme has triggered a requirement for Airbus to [\*\*\*] the outstanding principal and interest under the [\*\*\*] A380 LA/MSF agreement, scheduled to take place through [\*\*\*].<sup>468</sup> The European Union argues that this requirement

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<sup>460</sup> European Union's response to Panel question No. 29, paras. 161-163.

<sup>461</sup> We recall 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. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.646 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 709)).

<sup>462</sup> [\*\*\*] Spanish A380 LA/MSF Amendment, (Exhibit EU-23 (BCI)), p. 5.

<sup>463</sup> We consider that this understanding is compatible with the Appellate Body's discussion of the *ex ante* life of a subsidy in the original proceeding, which focused on the projected uses to which a subsidy has been put, not on the expected duration of a financial contribution. (See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 707).

<sup>464</sup> The European Union argues, for instance, that that the *ex ante* expected life of the subsidy will end when either the terms of the loan agreement foresee no further repayments, or when the expected delivery forecast ends. (European Union's second written submission, paras. 122-123).

<sup>465</sup> European Union's submission regarding the wind-down of the A380 programme, para. 5.

<sup>466</sup> European Union's submission regarding the wind-down of the A380 programme, paras. 4 and 8.

<sup>467</sup> European Union's submission regarding the wind-down of the A380 programme, paras. 12-14, and 17-25.

<sup>468</sup> European Union's comments on arguments and evidence that the United States filed with its 25 June 2019 Comments on EU responses to the Panel's questions, para. 2 (referring to [\*\*\*], (Exhibit EU-113 (BCI))).

"confirms {the} previous demonstration that the [\*\*\*] A380 MSF subsidy is withdrawn as of [\*\*\*]".<sup>469</sup> In the alternative, the European Union argues that the [\*\*\*] A380 LA/MSF subsidy will be withdrawn on [\*\*\*], when final payment is made.<sup>470</sup> Second, the European Union argues that Airbus' announcement constitutes an "intervening event" that "drastically changes 'how {the} subsid{ies} will 'materialize{} over time' relative to the expectations held at the time it was granted", "provides certainty with respect to the repayment of the loan, and thus brings about an earlier end to the lives of the subsidies than was anticipated *ex ante*", thus confirming that all four A380 LA/MSF subsidies have been withdrawn.<sup>471</sup>

7.248. The United States argues that Airbus' announcement regarding the future of the A380 programme is not a "measure taken to comply" by the European Union, and neither the announcement nor the situation it describes can be part of the Panel's terms of reference to support the European Union's argument that it has withdrawn the A380 LA/MSF subsidies.<sup>472</sup> The United States submits that the European Union has not itself asserted that the announcement was a "measure taken to comply", and that it has instead chosen to characterize the announcement as a "fact" that is somehow relevant to the Panel's assessment. Moreover, the United States argues that any Airbus action with respect to the programme would appear to be a private business decision without government endorsement or involvement.<sup>473</sup> While the United States appears to accept that exhibits contained in the European Union's submission in connection with the announcement can serve as relevant *evidence* in this dispute, the United States disputes the *relevance* of this evidence, describing the details contained in Airbus' 14 February 2019 press release not as "facts" but instead, as "statements of Airbus' intent or expectations".<sup>474</sup>

7.249. In any case, the United States argues that Airbus' announcement does not involve any removal of the subsidy previously granted to Airbus and thus does not support the European Union's arguments that the A380 LA/MSF subsidies have been withdrawn. The United States argues that the European Union's arguments concerning repayment of [\*\*\*] A380 LA/MSF are incorrect, as the repayment of a financial contribution on subsidized terms does not achieve the withdrawal of the subsidy. Finally, the United States argues that the announcement of the intent to terminate the A380 programme in the future does not constitute an "intervening event" that brings an end to the life of the subsidies. In this respect, the United States recalls that the A380 programme remains operational. In addition, the United States recalls that the first compliance panel previously rejected an argument regarding the termination of the A340 programme, considering the fact that the A340 could terminate before full repayment was achieved to be an inherent feature of the LA/MSF agreements. The United States argues that the same reasoning should apply to the A380 programme as well, and "all the more so, given that Airbus has not yet terminated the A380 programme."<sup>475</sup>

#### 7.4.5.3.2 Evaluation by the Panel

7.250. On 14 February 2019, Airbus issued a press release announcing its full-year results. In this press release, Airbus announced that Emirates Airlines had cancelled 39 A380 orders and that, as a consequence, Airbus would cease deliveries of the A380 in 2021 due a lack of order backlog from other customers. The press release revealed that Airbus received 12 A380 orders in 2018 and that

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<sup>469</sup> European Union's comments on arguments and evidence that the United States filed with its 25 June 2019 Comments on EU responses to the Panel's questions, para. 2.

<sup>470</sup> European Union's comments on arguments and evidence that the United States filed with its 25 June 2019 Comments on EU responses to the Panel's questions, para. 3.

<sup>471</sup> European Union's submission regarding the wind-down of the A380 programme, paras. 33-38.

<sup>472</sup> United States' second written submission, paras. 19-20 and 86; opening statement at the meeting of the Panel, para. 62.

<sup>473</sup> United States' second written submission, para. 19.

<sup>474</sup> United States' second written submission, paras. 15-18.

<sup>475</sup> United States' second written submission, paras. 88-91.

Airbus would deliver 14 additional A380 to Emirates before terminating the programme in 2021.<sup>476</sup> The European Union has confirmed that [\*\*\*] will be made to [\*\*\*], with the [\*\*\*].<sup>477</sup>

7.251. On 14 August 2019, the European Union informed the Panel of an agreement reached on [\*\*\*] between the [\*\*\*] and Airbus, confirming that Airbus would, as a result of Airbus' termination announcement, [\*\*\*] under the [\*\*\*] A380 LA/MSF agreement, in accordance with the specific terms of that contract. The European Union set out its argument with respect to this agreement in two paragraphs of its comments to the United States' comments on the European Union's response to the Panel's questions following the substantive meeting.<sup>478</sup>

7.252. We accept that the European Union is entitled to have us consider its contention that Airbus' termination announcement was an "intervening event" that brought the life of the A380 LA/MSF subsidies to an end. In this respect, we agree with the first compliance panel that, once a complainant in a dispute under Article 21.5 DSU has properly identified the subsidies and legal provisions that are part of its claims, it need not also exhaustively explain how the implementing Member may have failed to withdraw those subsidies and/or bring their adverse effects to an end. As the first compliance panel explained:

Once the complainant clearly identifies the relevant subsidies and the legal bases supporting its claims with sufficient clarity and detail, the implementing Member will know what the dispute is about, and it will then be up to the complainant to justify its claims on the basis of arguments and evidence presented *during the panel process*. In our view, part of this justification may, where relevant and necessary, need to include an explanation of the extent to which the subsidies clearly identified {in the panel request} continue to exist ... as a result of an "intervening event".<sup>479</sup>

7.253. We have doubts, however, about whether the [\*\*\*] agreement between the [\*\*\*] and Airbus, and the accompanying evidence submitted by the European Union, fall within the scope of our terms of reference. Although related to the alleged "intervening event" discussed above, the facts and arguments the European Union has asked us to consider go beyond the alleged "intervening event" itself, and concern the alleged implications for compliance of a new measure (the [\*\*\*] agreement), which entered into force well after the establishment of this compliance Panel. Notwithstanding these reservations, we do not find it necessary to express a definitive view on this matter for the purpose of this dispute, because as explained in section 7.4.5.3.2.2, we disagree with the European Union's submission that the [\*\*\*] agreement confirms that the [\*\*\*] A380 LA/MSF subsidy has been withdrawn. Thus, even assuming *arguendo* that the [\*\*\*] agreement is properly without our terms of reference, it would not demonstrate that compliance has been achieved with respect to the [\*\*\*] A380 LA/MSF subsidy.

#### **7.4.5.3.2.1 The [\*\*\*] "wind-down" announcement**

7.254. The European Union argues that the wind-down announcement constitutes an "intervening event" that brings the life of the A380 LA/MSF subsidies to an end because it confirms that the end

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<sup>476</sup> Airbus SE, Unaudited Condensed IFRS Consolidated Financial Information for the year ended 31 December 2018, <https://www.airbus.com/content/dam/corporate-topics/financial-and-company-information/FY2018-Airbus-FINANCIAL-STATEMENTS.pdf>, p. 17; Airbus Press Release, "Airbus reports strong full-year 2018 results, delivers on guidance", 14 February 2019, <https://www.airbus.com/content/dam/corporate-topics/financial-and-company-information/FY2018-Airbus-PRESS-RELEASE.pdf>; and Airbus, "FY Results 2018" (Presentation), <https://www.airbus.com/content/dam/corporate-topics/financial-and-company-information/FY2018-Airbus-PRESENTATION.pdf>, pp. 4 and 11.

<sup>477</sup> European Union's opening statement at the meeting of the Panel, para. 22; and Airbus, "Timing of remaining Emirates A380 deliveries" (Exhibit EU-99 (BCI)).

<sup>478</sup> European Union's comments on arguments and evidence that the United States filed with its 25 June 2019 Comments on EU responses to the Panel's questions, para. 2; [\*\*\*], (Exhibit EU-113 (BCI)); [\*\*\*], (Exhibit EU-114 (BCI)); and Email from [\*\*\*] to Airbus, 8 August 2019 (Exhibit EU-115 (BCI)). The European Union initially submitted that Airbus would execute full repayment of outstanding principal and accrued interest [\*\*\*], later submitting that the [\*\*\*]. (European Union's submission regarding the wind-down of the A380 programme, para. 32; and response to Panel question No. 31, para. 175).

<sup>479</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.915. (emphasis original)

date for final repayments under the French, German, Spanish and UK A380 LA/MSF contracts will be made in [\*\*\*].<sup>480</sup>

7.255. At present, Airbus continues to produce the A380 and termination will only take place once outstanding deliveries are completed in July 2021. In light of this, we do not see how Airbus' announcement can be said to have brought the "life" of the A380 LA/MSF subsidies to an end at present. We therefore disagree with the European Union's submission that Airbus' announcement to wind-down the A380 programme establishes, on its own, that the European Union has achieved the withdrawal of the French, German, Spanish and UK A380 LA/MSF subsidies for the purpose of Article 7.8 of the SCM Agreement.

#### 7.4.5.3.2.2 The [\*\*\*] agreement between [\*\*\*] and Airbus

7.256. We last turn to the European Union's argument that the announcement of the "wind-down" of the A380 LA/MSF programme has resulted in the withdrawal of the [\*\*\*] A380 LA/MSF subsidy by triggering an obligation for Airbus to repay the principal and interest accrued under the [\*\*\*] A380 LA/MSF contract. Under the terms of the [\*\*\*] agreement, Airbus is required to [\*\*\*].<sup>481</sup> [\*\*\*].<sup>482</sup>

7.257. The European Union asks us to find that the repayment under the [\*\*\*] agreement achieves withdrawal of the [\*\*\*] A380 LA/MSF subsidy in one of two ways. First, the European Union argues that the [\*\*\*] agreement has had the effect of converting Airbus' repayment obligations into [\*\*\*], as the European Union submits that repayment is no longer dependent on deliveries. The European Union further submits that the applicable interest rate (which the European Union estimates was [\*\*\*]) under the agreement is above what Airbus would have to pay to obtain the same amount of funding on the market<sup>483</sup>, and thus the [\*\*\*] A380 LA/MSF subsidy has been withdrawn as of [\*\*\*] when the first repayment instalment took place under the agreement. Alternatively, the European Union submits that the [\*\*\*] A380 LA/MSF will be withdrawn on [\*\*\*] when Airbus makes its final repayment of outstanding principal and accrued interest.<sup>484</sup>

7.258. As we understand it, the [\*\*\*] agreement sets out how the contracting parties agreed to give effect to the [\*\*\*] provisions of the [\*\*\*] amendment to the original [\*\*\*] A380 LA/MSF agreement. Specifically, under the [\*\*\*] amendment, Airbus agreed to effectuate [\*\*\*] were Airbus to announce that the A380 programme would cease in the future.<sup>485</sup> The [\*\*\*] agreement provides how Airbus must perform this obligation.<sup>486</sup> We note, however, that this feature of the [\*\*\*] amendment did not change the [\*\*\*] government's position *vis-à-vis* the original A380 LA/MSF agreement. As explained by the European Union, Airbus was already required to ensure [\*\*\*] in the event the A380 programme were terminated [\*\*\*] under *the original [\*\*\*] A380 LA/MSF contract*.<sup>487</sup> In other words, the possibility of [\*\*\*] was already a feature of the *subsidized [\*\*\*] A380 LA/MSF agreement*. We note, moreover, that the interest rates applied on the amounts of outstanding principal and accrued interest are derived through the application of the same [\*\*\*] formula set out in the original LA/MSF agreement.<sup>488</sup> Thus, in practice, the [\*\*\*] agreement appears to have done nothing more than simply give effect to the terms of the original [\*\*\*] A380 LA/MSF

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<sup>480</sup> The European Union also argues that the announcement to "wind-down" the A380 programme is an "intervening event" that achieves the removal of all adverse effects related to the market presence of the A380. We address this argument in section 7.5.5.5 below.

<sup>481</sup> European Union's comments on arguments and evidence that the United States filed with its 25 June 2019 Comments on EU responses to the Panel's questions, para. 2; and [\*\*\*], (Exhibit EU-113 (BCI)), Clause 2.3.

<sup>482</sup> Interest accrues at the rate of the previous year's [\*\*\*]. (European Union's comments on arguments and evidence that the United States filed with its 25 June 2019 Comments on EU responses to the Panel's questions, para. 2; [\*\*\*]; [\*\*\*]; and [\*\*\*].)

<sup>483</sup> The European Union argues that Airbus enjoys an A+ credit rating and Airbus' corporate borrowing rate for [\*\*\*]. (European Union's comments on arguments and evidence that the United States filed with its 25 June 2019 Comments on EU responses to the Panel's questions, para. 2; Airbus, "Hedging & Debt Information", <https://www.airbus.com/investors/investors/hedging-and-debt-information.html>; and Email from [\*\*\*] to Airbus, 8 August 2019 (Exhibit EU-115 (BCI))).

<sup>484</sup> European Union's comments on arguments and evidence that the United States filed with its 25 June 2019 Comments on EU responses to the Panel's questions, para. 3 and fn 6.

<sup>485</sup> [\*\*\*].

<sup>486</sup> [\*\*\*].

<sup>487</sup> European Union's first written submission, paras. 123 and 171.

<sup>488</sup> Compare [\*\*\*] with [\*\*\*], and [\*\*\*], all in essentially the same terms.

agreement prescribing Airbus' repayment obligations in the event of programme termination. We do not understand the [\*\*\*] agreement to have imposed on Airbus an obligation that did not already exist under the original, subsidized, arrangement. To this extent, we do not agree with the European Union when it argues that the [\*\*\*] agreement replaced the original [\*\*\*] A380 LA/MSF agreement with a *new* loan agreement on market terms. The [\*\*\*] agreement has not converted Airbus' obligations under the [\*\*\*] A380 LA/MSF agreement into a [\*\*\*], as the European Union maintains. Rather, it simply prescribes how Airbus and the [\*\*\*] government have agreed that Airbus will perform its obligation to [\*\*\*] under the existing, subsidized, A380 LA/MSF arrangements. Accordingly, we find that the [\*\*\*] agreement has not withdrawn the [\*\*\*] A380 LA/MSF subsidy.

#### 7.4.6 Conclusions

7.259. In the light of the reasoning and findings set out above, we conclude that the German and UK A350XWB LA/MSF subsidies, and the French, German, Spanish and UK A380 LA/MSF subsidies, have not been withdrawn for the purpose of Article 7.8 of the SCM Agreement. We reach this conclusion based on the following considerations:

- a. As regards the German A350XWB LA/MSF agreement:
  - i. there is no sufficient factual basis to accept the premise underlying the European Union's withdrawal claim, namely, that Airbus was seriously considering exercising its rights under [\*\*\*] of the original German A350XWB LA/MSF loan agreement in order to refinance the German A350XWB LA/MSF using market-based instruments around the time of the [\*\*\*] amendment; and
  - ii. even if we were to accept that there was a credible possibility that Airbus could have invoked [\*\*\*] to repay and refinance the German A350XWB LA/MSF, we are not convinced that the test for determining whether the amended terms of the German A350XWB LA/MSF agreement were market-based should be focused, as the European Union argues, on comparing the expected IRR of the amended contract with the expected IRR that a market lender would expect to achieve for the same or similar loan entered into at the time of the amendment. Rather, the question that must be answered is whether a market lender would have preferred the expected returns associated with the amended German A350XWB LA/MSF agreement over the returns it could have expected to achieve as a result of a decision on the part of Airbus to invoke its right under [\*\*\*] to repay the outstanding principal and accrued interest. The European Union has failed to make this demonstration.
- b. As regards the UK A350XWB LA/MSF agreement:
  - i. Airbus repaid all outstanding principal and interest accrued under the UK A350XWB LA/MSF loan agreement on [\*\*\*] with a final payment totalling [\*\*\*], which represents the repayment of the full amount of principal that Airbus actually drew down and received, and accrued interest; however,
  - ii. the European Union's claim that the repayment of the UK A350XWB LA/MSF agreement on its subsidized terms achieves the withdrawal of the subsidy cannot be sustained because we have found that the full repayment of a loan on subsidized terms does not *alone* "remove" the subsidy or otherwise bring the life of a subsidy to an end, but rather confirms that a subsidy has been fully provided.
- c. As regards the French, German, Spanish and UK A380 LA/MSF agreements:
  - i. the European Union's claim that the [\*\*\*] amendments to the A380 LA/MSF agreements achieve the withdrawal of the subsidy cannot be sustained because the European Union has failed to show that a commercial lender, faced with the likely termination of the A380 programme, would have entered into the A380 LA/MSF amendments on the terms agreed between Airbus and the Airbus governments.

- ii. the European Union's claim that the Spanish A380 LA/MSF subsidy has been withdrawn as a result of the alleged amortization of benefit, in the light of the *ex ante* expectations concerning the anticipated full repayment of principal and interest on subsidized terms, cannot be sustained because we have found that the full repayment of a loan on its subsidized terms does not alone bring the life of the subsidy conferred to an end. Even by the European Union's own standard of amortization, we have found that the life of the Spanish A380 LA/MSF subsidy has not come to an end because the [\*\*\*] amendment to the Spanish A380 LA/MSF extended the repayment terms beyond the contracting parties' original *ex ante* expectations.
- iii. the European Union's claim that Airbus' announcement to wind-down the A380 programme achieves the withdrawal of the French, German, Spanish and UK A380 LA/MSF subsidies cannot be sustained because Airbus continues to produce the A380 and termination will only take place once outstanding deliveries are completed in July 2021, which fails to bring the life of the A380 LA/MSF subsidies to an end at present. We also reject the European Union's argument that Airbus' [\*\*\*] agreement with [\*\*\*] to repay the principal and interest accrued under the [\*\*\*] A380 LA/MSF contract results in the replacement of the original [\*\*\*] A380 LA/MSF agreement with a *new* loan agreement on market terms, or otherwise achieves withdrawal for purposes of Article 7.8.

## **7.5 Whether the European Union and the relevant member States have complied with the requirement to "take appropriate steps to remove the adverse effects" under the terms of Article 7.8 of the SCM Agreement**

### **7.5.1 Introduction**

7.260. In the preceding section, we concluded that the European Union has failed to establish that it has "withdraw{n}" any of the A380 or A350XWB LA/MSF subsidies for the purpose of Article 7.8 of the SCM Agreement. In this section, we examine the merits of the European Union's submission that it has "remove{d} the adverse effects" of these subsidies, within the meaning of Article 7.8, because none of the subsidies "individually or collectively, constitutes a genuine and substantial cause of any present adverse effects".<sup>489</sup> The United States disagrees with the European Union on this point, arguing that the A380 and A350XWB LA/MSF subsidies continue to be a genuine and substantial cause of present adverse effects in the VLA product market (in relation to sales and market share won by the A380) and twin-aisle LCA product market (in relation to sales and market share won by the A350XWB and the A330neo).

7.261. As an initial matter, we underline that, in the light of our conclusion that none of the eight A380 or A350XWB LA/MSF subsidies have been withdrawn, we must consider whether these eight subsidy measures are a genuine and substantial cause of adverse effects at *present*. We recall in this regard that in the first compliance proceeding, the panel and, specifically, the Appellate Body, made certain findings regarding the effects of these same subsidies in the relevant time-period from 1 December 2011 through year-end 2013 (the "First Compliance Reference Period"). Although our task is to determine whether these same subsidies cause *present* adverse effects, we consider the findings in the first compliance proceeding regarding the effects of the same subsidies in the First Compliance Reference Period to be relevant to this analysis.

7.262. Our analysis proceeds in six parts. We begin by exploring and identifying the appropriate counterfactual for determining the effects of the A380 and A350XWB LA/MSF subsidies, before addressing the appropriate reference period. We then review the adopted findings in this dispute concerning the effects of the A380 and A350XWB LA/MSF subsidies in the reference period used in the first compliance proceeding. Using those findings as a starting point, we then determine the extent to which the A380 and A350XWB LA/MSF subsidies continue to have "product" effects after the end of the reference period used in the first compliance dispute. Finally, we examine the present impact of those effects in the relevant product markets.

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<sup>489</sup> European Union's first written submission, para. 244.

## 7.5.2 The appropriate counterfactual

7.263. The European Union argues that the counterfactual that must be applied in this dispute to determine whether any non-withdrawn LA/MSF subsidies continue to cause adverse effects "entails comparing the actual market situation ... with the market situation that would have existed *if the challenged subsidies had been withdrawn at the end of the implementation period*", i.e. at 1 December 2011.<sup>490</sup> The European Union maintains that the use of such a counterfactual would be consistent with the requirements of Article 7.8, and appropriate to use in this proceeding, because "if the ... counterfactual market situation where the subsidies are withdrawn is equivalent to the actual market situation where those subsidies remain", then ... 'the remaining subsidies are not causing any adverse effects that may exist in the market'.<sup>491</sup> In light of this line of argument, the European Union asserts that the withdrawal of the A380 and A350XWB LA/MSF subsidies by the end of the implementation period through any of the means examined in the previous section of this report<sup>492</sup>, would have left entirely unaffected the launches of the A380 in December 2000 and the A350XWB in 2006. Accordingly, the European Union argues that, under the appropriate counterfactual, there is no basis to find present adverse effects in respect of the A380 and A350XWB because both models of LCA would be present on the market today.<sup>493</sup>

7.264. The United States argues that the appropriate counterfactual is one in which the challenged subsidies were never granted to Airbus. According to the United States, this approach is consistent with the text of Article 7.8, which treats the two relevant compliance options (withdrawal or removal of adverse effects) as distinct, and is the counterfactual used in the first compliance proceeding from which the European Union offers no reason to depart. The United States also asserts that the European Union's counterfactual: (i) would lead to arbitrary results because a panel may have to choose between one of many potential withdrawal options, which may have different impacts on relevant market conditions in the counterfactual; (ii) it would needlessly increase the complexity of compliance proceedings as it requires a panel's evaluation of hypothetical withdrawal scenarios; (iii) it improperly assumes that the withdrawal of a subsidy leads to the termination of its effects; and (iv) can only feasibly detect whether the European Union's failure to withdraw the subsidy (which is not the relevant issue) causes present adverse effects.<sup>494</sup>

7.265. We are not persuaded by the European Union's submissions concerning the appropriate counterfactual. We find the European Union's proposed approach to be problematic because it is based on the view that, in order to determine whether an implementing Member has taken "appropriate steps to remove the adverse effects" of a non-withdrawn subsidy, a comparison must be made between the market situation with and without the *withdrawal* of that subsidy, as opposed to the market situation with and without the *provision* of the non-withdrawn subsidy. By focusing on the market effects of the withdrawal of a subsidy as of the end of the implementation period, the European Union's proposed counterfactual ignores all prior effects of the non-withdrawn subsidy, which may well be important to understanding its present-day effects. We see no reason why such effects of a non-withdrawn subsidy must be excluded, as a matter of law, from an assessment of the extent to which the same non-withdrawn subsidy continues to cause adverse effects in the post-implementation period. In our view, the European Union's proposed approach would not answer the question that is asked by the compliance requirement in Article 7.8 because it fails to identify whether the provision of a non-withdrawn subsidy that continues to exist in the post-implementation period has present day effects.

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<sup>490</sup> European Union's first written submission, paras. 215 and 278. (emphasis added)

<sup>491</sup> European Union's second written submission, para. 319 (quoting Canada's third-party submission, para. 34).

<sup>492</sup> The four means by which the European Union argues the LA/MSF subsidies would be withdrawn are: (i) full repayment of the loan on subsidized terms; (ii) replacement of a subsidized financial contribution with a non-subsidized financial contribution; (iii) the expiry of benefit over time; and (iv) an intervening event that brings about the end of the benefit of a subsidy. (European Union's first written submission, para. 279).

<sup>493</sup> European Union's first written submission, para. 281. We note that "Canada considers that, in these second compliance proceedings, the correct counterfactual would be one under which the remaining subsidies associated with the A380 and A350XWB are withdrawn by the date of the European Union's second compliance communication, i.e. 17 May 2018". (Canada's third-party submission, para. 27).

<sup>494</sup> United States' first written submission, paras. 175-185; second written submission, paras. 166-175; response to Panel question No. 53; and comments on the European Union's responses to Panel question Nos. 53 and 55.

7.266. We recall, moreover, that of the four hypothetical scenarios the European Union maintains would withdraw the subsidy, we have already found that one – the repayment of a subsidized loan on its subsidized terms – cannot, alone, constitute the withdrawal of a subsidy. As regards the other three possibilities, we note that, apart from asserting that the withdrawal of the A380 and A350XWB LA/MSF subsidies would have left unaffected the launches of the A380 in December 2000 and the A350XWB in 2006, the European Union has not advanced any specific explanation of how the way those subsidies could have been withdrawn would have impacted Airbus' ability to market and deliver LCA's in the relevant period. The European Union argues that the application of its counterfactual in this dispute is a straight-forward exercise.<sup>495</sup> However, the European Union does not explain how the different modes of potential withdrawal could have impacted Airbus' counterfactual market situation, which under its proposed approach, ultimately is what must be compared with the actual market situation. For instance, the European Union does not explain how the adjusted terms of a LA/MSF contract that was properly aligned to a market benchmark could have affected Airbus' ability to market and win A350XWB and A380 sales in the relevant period. In our view, the withdrawal of the LA/MSF subsidies by aligning their terms with a market benchmark might well have increased the overall cost of repayments to Airbus, thereby increasing the costs of the programmes. Such a difference would need to be taken into account in comparing the actual market situation with the counterfactual market situation.

7.267. Finally, the fact that the hypothetical withdrawal options posited by the European Union would have had potentially different effects on Airbus' ability to make present day sales and deliveries of the A380 and A350XWB implies that different, *possibly competing*, scenarios, could result from the application of the European Union's proposed counterfactual. Although the European Union argues that a panel would need to only examine the withdrawal scenarios proposed by the respondent, it is not clear to us that the universe of hypothetical withdrawal options should be left to a respondent to decide, as a complainant might well conceive of other possible withdrawal options that would have a different counterfactual market effect.

7.268. For all of the above reasons, we see no reason to depart from the counterfactual used by the panel and Appellate Body in the first compliance proceeding. Thus, for the purpose of this section, we will proceed with our analysis of the European Union's assertion of compliance through the removal of the adverse effects by applying a counterfactual under which A380 and A350XWB LA/MSF subsidies were never granted to Airbus (which, for ease of reference, we will refer to as "the absence of" the LA/MSF subsidies). In doing so, we bear in mind that, consistent with the Appellate Body's findings in the first compliance proceeding, the counterfactual under which we must operate is one where the effects of the pre-A380 LA/MSF subsidies must be disregarded for the purpose of assessing compliance.<sup>496</sup> We understand this to mean that we must assume that Airbus, in the counterfactual, had launched all of its pre-A380 LCA as and when it did in reality.

### 7.5.3 The appropriate reference period

7.269. The European Union argues that the appropriate reference period in this proceeding would begin no earlier than the time of adoption of the DSB's recommendations and rulings in the first compliance proceeding, i.e. 28 May 2018, and extend at minimum until present day. According to the European Union this is so because the reference period must enable an assessment of adverse effects under current factual conditions as influenced by the European Union's measures taken to comply, and a relatively recent reference period is appropriate because data arising further in the past is less probative of current factual market conditions. Citing the panel report in *US – Upland Cotton (Article 21.5 – Brazil)*, the European Union further argues that a compliance panel must also take into account events that post-date the end of the defined reference period, as a compliance panel must assess compliance at the time it gives its ruling.<sup>497</sup>

7.270. The United States argues that the appropriate reference period in this proceeding would begin on 1 January 2014 and extend until present day. According to the United States, this is so

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<sup>495</sup> European Union's first written submission, para. 281; and second written submission, para. 324.

<sup>496</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 5.361-5.383.

<sup>497</sup> European Union's first written submission, para. 226 and fn 354 (citing Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 9.67-9.71, 10.104, and 10.248); and second written submission, paras. 307-313.

because the first compliance proceeding already determined the European Union's compliance up through its own reference period, i.e. December 2011 through year-end 2013, and thus the European Union must show that it removed the adverse effects sometime after 2013. The United States further argues that the European Union's proposed reference period, beginning in May 2018, is inappropriately short in the light of the conditions of competition in the LCA industry, and is unsupported by any rationale.<sup>498</sup>

7.271. We recall that the SCM Agreement contains no specific guidance on the selection of a reference period for the purpose of determining whether an implementing Member has achieved *present-day* compliance with the obligation to "take appropriate steps to remove the adverse effects" within the meaning of Article 7.8.<sup>499</sup> We note, however, that "the unavailability of immediate data means that it is impossible to assess the 'present' situation"<sup>500</sup> on the basis of contemporaneous information. As such, "a review of the past is necessary to draw conclusions about the present".<sup>501</sup> Thus, like the first compliance panel, we "see no need to make any *a priori* choice of reference period"<sup>502</sup>, and consider it "appropriate to examine the entirety of the evidence and arguments put forward by the {parties} ... including the most recent information where relevant and reliable"<sup>503</sup>, with a view to determining whether the A380 and A350XWB LA/MSF subsidies are a genuine and substantial cause of *present* adverse effects.

#### 7.5.4 Effects of the A380 and A350XWB LA/MSF subsidies through 2013

7.272. The first compliance panel found that the European Union and certain member States had "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'".<sup>504</sup> The Appellate Body reached the same conclusion but on the basis of different reasoning.<sup>505</sup> In particular, the Appellate Body based its findings solely on the effects of the French, German, Spanish, and UK A380 LA/MSF subsidies and the French, German, Spanish, and UK A350XWB LA/MSF subsidies<sup>506</sup> (i.e. the same set of measures being examined in this part of our report), whereas the compliance panel had based its conclusions on a broader set of subsidy measures.<sup>507</sup> Thus, for present purposes, we focus our attention on the findings of the Appellate Body report in the first compliance proceeding where it addressed the market effects of the identical set of subsidy measures that are at issue in this proceeding.

7.273. The Appellate Body's findings confirmed that A380 and A350XWB LA/MSF subsidies were a genuine and substantial cause of significant lost sales and impedance within the meaning of Article 6.3(a)-(c) of the SCM Agreement in the VLA product market, and significant lost sales within the meaning of Article 6.3(c) in the twin-aisle product market, in the First Compliance Reference Period.<sup>508</sup> The parties interpret these findings in different ways.

7.274. The European Union argues that the Appellate Body findings leave the launch dates of the A380 and A350XWB, in the absence of the A380 and A350XWB LA/MSF subsidies, entirely open questions. Accordingly, the European Union bases its assertion of compliance on a counterfactual in

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<sup>498</sup> United States' first written submission, paras. 170-174; and second written submission, paras. 160-165.

<sup>499</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1444.

<sup>500</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1443. (internal quotation marks and citation omitted)

<sup>501</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1443. (internal quotation marks and citation omitted)

<sup>502</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1444.

<sup>503</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1444.

<sup>504</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 7.2.

<sup>505</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, section 6.

<sup>506</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.412 and section 6. See also Panel Reports, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, section 6.5.2.3.1 (describing A350XWB LA/MSF measures); and *EC and certain member States – Large Civil Aircraft*, paras. 7.367-7.381 and Table 1 (describing A380 LA/MSF measures).

<sup>507</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, section 7.

<sup>508</sup> Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU, Action by the Dispute Settlement Body, WT/DS316/35.

which Airbus launched the A380 and A350XWB in or around 2002 and in 2007/2008, respectively.<sup>509</sup> Thus, the European Union maintains that it follows from the Appellate Body's findings that non-subsidized versions of the A380 and A350XWB would have been available for order and delivery during the First Compliance Reference Period, explaining that the counterfactual orders actually lost to Boeing up to and including that period resulted from the delayed counterfactual launches of the two LCA, which meant that Airbus offered less attractive delivery slots.<sup>510</sup>

7.275. The United States maintains that the Appellate Body's findings preclude any counterfactual launch of either the A380 or the A350XWB until at least the end of 2013, and that the European Union's attempts to reconcile the Appellate Body's findings of adverse effects with the European Union's proposed counterfactual launch dates for the two LCA finds no support in the first compliance panel's or Appellate Body's reasoning. Thus, the United States argues that any counterfactual that the Panel may use to determine whether the European Union has removed the adverse effects within the meaning of Article 7.8 must be one in which neither the A380 nor the A350XWB would have been launched before 2013.<sup>511</sup>

#### **7.5.4.1 Appellate Body findings concerning the market presence of the A380 through 2013**

7.276. In this section, we review the Appellate Body's compliance report by focusing on the three aspects of its findings and analysis we believe most materially bear on the issue of the market presence of the A380 in the First Compliance Reference Period: (a) the Appellate Body's findings and analysis concerning the effects of A380 LA/MSF subsidies on the launch, development and bringing to market of the A380; (b) the Appellate Body's causation analysis and findings in relation to lost sales in the VLA product market; and (c) the Appellate Body's causation analysis and findings in relation to impedance in the VLA product market. We address each of these aspects in turn.

##### **7.5.4.1.1 Effects of the A380 LA/MSF subsidies on the A380**

7.277. We recall that the United States has pursued its claims throughout the various proceedings in this dispute relying upon what has been described as the "product" theory of causation.<sup>512</sup> Under this theory of causation, "market distortion and *adverse effects flow directly from Airbus' entry at a particular time with a particular aircraft*, which in the United States' view would not have been possible but for the subsidies".<sup>513</sup> The first compliance panel found that, in the absence of the "product effect" of *all pre-A350XWB LA/MSF subsidies* (arising from the "indirect" effects<sup>514</sup> of pre-

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<sup>509</sup> The United States asserts that "{b}oth the United States and the EU have mistakenly referred to the EU's proposed A380 counterfactual launch date as being 2002. ... the confusion likely stems from adding the {European Union's} estimate of the purported delay – two years – to the year of the real world A380 launch, 2000. However, the European Union's actual position appears to be that Airbus would have launched the A380 in 2003 {without the A380 LA/MSF subsidies.} ... Previous U.S. references to 2002 should be read instead as referring to 2003". (United States' comments on the European Union's response to Panel question No. 68(b), fn 427).

<sup>510</sup> European Union's first written submission, paras. 272-276; second written submission, paras. 269-275, 276-295, 300-306, 430-431, and 433-437; responses to Panel question No. 68, paras. 354 and 359-360, and No. 71, para. 374; comments on the United States' responses to Panel question No. 59, para. 272, No. 60, para. 284, No. 70, paras. 326, 369, and No. 75, para. 385; and Airbus Counterfactual Launch Statement, (Exhibit EU-92 (HSBI/BCI)), paras. 24 and 27.

<sup>511</sup> United States' first written submission, paras. 207-235; and second written submission, paras. 135-147 and 231. See also United States' comments on the European Union's response to Panel question No. 60.

<sup>512</sup> In the original dispute the United States also offered a "price" theory of causation, which was rejected by the original panel and not pursued on appeal by the United States. (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1877. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, fn 1618).

<sup>513</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.587. (emphasis original) See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.416 (describing "product effects" as "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"). (emphasis original)

<sup>514</sup> "Indirect effects" are 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, subsequent model of LCA. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 5.563 and 5.594).

A380 LA/MSF subsidies and the "direct" effects<sup>515</sup> of A380 LA/MSF subsidies), the A380 programme would not have existed before or during the First Compliance Reference Period.<sup>516</sup> The Appellate Body, however, found that *only* the effects of *A380 LA/MSF subsidies* could be considered *vis-à-vis* the A380 programme in the counterfactual. Accordingly, in deciding whether the compliance panel had erred in reaching its adverse effects findings, the Appellate Body examined "whether the Panel's analysis regarding the 'product effects' of {A380 LA/MSF subsidies *alone*} support a finding of a genuine and substantial causal relationship between these subsidies ... and the market phenomena identified in the post-implementation period" in the VLA product market.<sup>517</sup>

7.278. The Appellate Body determined that A380 LA/MSF subsidies had a "genuine impact on Airbus' ability to fund the timely launch of the A380"<sup>518</sup>, that "these 'direct effects' of A380 LA/MSF continued after the original reference period {which ended in 2006}", and 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* {had} a sufficient evidentiary basis".<sup>519</sup> The Appellate Body further characterized the "product effects" of A380 LA/MSF subsidies as follows: (a) they "enabled Airbus ... to bring to market and to continue developing the A380", an event that was "crucial to renew and sustain Airbus' competitiveness in the post-implementation period"<sup>520</sup>; (b) they "made it possible ... to bring to market the A380"<sup>521</sup>; (c) they "continued to have effects on Airbus' ability to bring to market and to continue developing the A380 *after* the original reference period"<sup>522</sup>; and (d) in the absence of A380 LA/MSF subsidies, "Airbus would not have been able to offer the A380 at the time it did".<sup>523</sup>

7.279. Thus, the Appellate Body expressly concluded that A380 LA/MSF subsidies impacted Airbus' ability to undertake a timely launch of the A380, to bring it to market, and to continue to develop the A380 aircraft after 2006.<sup>524</sup> In other words, A380 LA/MSF subsidies affected Airbus' ability to launch and market the A380 programme, and to actually develop the aircraft post-launch. Relatedly, and as noted above, the Appellate Body directly stated that A380 LA/MSF "made it possible ... to bring to market the A380". This, in our view, is a direct statement asserting that the A380 would not have been brought to market without A380 LA/MSF subsidies. Accordingly, we find that the

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<sup>515</sup> "Direct effects" are 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. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.563).

<sup>516</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 7.1(d)(xii).

<sup>517</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.599.

<sup>518</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.609.

<sup>519</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.609. (emphasis original) The Appellate Body also considered it "important ... that the A380 programme suffered 'extensive' production delays in 2005 and 2006", during which time "Airbus continued to receive disbursements" under A380 LA/MSF measures. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.608). See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.646 (stating 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" and concluding that A380 LA/MSF "made it possible ... to bring to market the A380"). (emphasis original)

<sup>520</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 5.647 and 6.23.

<sup>521</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.646.

<sup>522</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.635.

<sup>523</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 5.766, 5.769, and 5.773.

<sup>524</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.558.

Appellate Body's characterizations of the "product effects" of A380 LA/MSF strongly suggest that it considered the A380 would not have been available for either order or delivery by year-end 2013.<sup>525</sup>

#### **7.5.4.1.2 Causation of lost sales in the VLA product market**

7.280. We now turn to examine the Appellate Body's analysis of whether the "product effects" of A380 LA/MSF subsidies were a genuine and substantial cause of lost sales in the VLA product market during the First Compliance Reference Period.<sup>526</sup>

7.281. We start by noting that at no point in its analysis did the Appellate Body state that the A380 would have been available for order at any time leading up to and including the First Compliance Reference Period. Indeed, had the Appellate Body considered that a non-subsidized A380 could have been available, it would have needed to explain how the A380 LA/MSF subsidies could have been a "genuine and substantial" cause of the lost sales in the First Compliance Reference Period given the market presence of an unsubsidized A380. However, no such explanation can be found in the Appellate Body's analysis. The absence of such an explanation, and the lack of any other Appellate Body statements concerning the causal mechanism through which A380 LA/MSF caused lost sales, suggests that the causal mechanism relied upon by the Appellate Body was the one described in the compliance panel report, namely, the A380 was unavailable for order during the First Compliance Reference Period.

7.282. In the course of its lost sales analysis, the Appellate Body explained that "the Panel's findings ... 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".<sup>527</sup> This was so because the A380 LA/MSF subsidies "enabled Airbus to bring the A380 to market and continue its development in the face of extensive production delays".<sup>528</sup> The Appellate Body went on to clarify that "{i}n other words, in the absence of {A380 LA/MSF}, 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".<sup>529</sup> The Appellate Body again stated that the A380 LA/MSF subsidies "enabled Airbus to bring the A380 aircraft to market and continue its development", without suggesting that Airbus could have brought to market and developed the A380 otherwise. Importantly, the Appellate Body found that the Airbus company operating in the counterfactual, would have been unable to present an aircraft "identical" to the A380 in the sales campaigns leading to the Transaero and Emirates lost sales. In our view, this statement cannot be reconciled with the European Union's interpretation of the Appellate Body's findings. Rather, it seems to us to confirm that like the compliance panel, the Appellate Body was satisfied that Airbus could not have offered an unsubsidized A380 in the First Compliance Reference Period. The Appellate Body's statement that A380 LA/MSF subsidies "renewed and sustained" Airbus' "competitiveness in the VLA market" in the counterfactual post-implementation period is also consistent with the conclusion that, in the absence of the A380 LA/MSF subsidies, the A380 would have been unavailable for order in the First Compliance Reference Period.

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<sup>525</sup> For clarity, when this section refers to the A380, it refers to the A380 that was in fact ordered and delivered in the First Compliance Reference Period. At no time has the European Union ever argued that any "inferior" version of the A380 would have been launched. On the contrary, the European Union argues that the market would not have accepted an inferior version. (European Union's response to Panel question No. 59; comments on the United States' response to Panel question No. 59).

<sup>526</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, section 5.6.4.6.4.1. The lost sales in the VLA product market were the 2012 Transaero order for four A380 aircraft and the 2013 Emirates order for 50 A380 aircraft.

<sup>527</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.725.

<sup>528</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.725.

<sup>529</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.726 (quoting Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1789).

7.283. Finally, we note that in rejecting the European Union's argument that the compliance panel improperly dismissed certain of the European Union's non-attribution factors, the Appellate Body gave the following explanation:

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. 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.<sup>530</sup>

7.284. In stating that the "more advanced technologies and greater size" of the A380s actually offered during the First Compliance Reference Period were not "unrelated to the effects of {A380 LA/MSF} subsidies", this passage, in our view, further confirms that the Appellate Body considered that the A380 would have been unavailable for offer in the First Compliance Reference Period in the counterfactual scenario.

7.285. In sum, our assessment of the Appellate Body's VLA lost sales analysis indicates that the Appellate Body's findings were based on the conclusion that Airbus would not have been able to offer the A380 by the end of the First Compliance Reference Period in the absence of the A380 LA/MSF subsidies. This, of course, implies that Airbus could not have launched the A380 before the end 2013 without the A380 LA/MSF subsidies.

#### **7.5.4.1.3 Causation of impedance in the VLA product market**

7.286. In examining the Appellate Body's analysis of whether the "product effects" of A380 LA/MSF were a genuine and substantial cause of impedance in six geographic markets, we see nothing directly indicating that it was of the view that an unsubsidized A380 would have been available for delivery in the First Compliance Reference Period. Indeed, had the Appellate Body considered that a non-subsidized A380 could have been available for delivery, it would have needed to explain how the A380 LA/MSF subsidies could have been a genuine and substantial cause of impedance, given the presence of an unsubsidized A380 in the same geographic markets. However, no such explanation can be found in the Appellate Body's analysis. The absence of such an explanation, and the lack of any other Appellate Body statements concerning the causal mechanism through which A380 LA/MSF caused lost sales, suggests that the causal mechanism relied upon by the Appellate Body was the one described in the compliance panel report, namely, the A380 was unavailable for delivery during the First Compliance Reference Period.

7.287. This, we believe, finds further confirmation in the fact that the Appellate Body affirmed that even the low number of A380 impedance deliveries present in Australia (a single A380 delivery), China (four A380 deliveries), Korea (three A380 deliveries), and Singapore (five A380 deliveries) during the First Compliance Reference Period could support findings of impedance in each separate

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<sup>530</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.729. (fn omitted; emphasis added) We note that other reasons that the European Union alleged led Transaero and Emirates to order the A380 aircraft over the 747-8I aircraft appeared to be HSBI. (Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, fn 3275 (citing HSBI versions of submissions and HSBI exhibits when discussing the European Union's arguments in this context)). The European Union appears to suggest that in this statement the Appellate Body was addressing "Airbus' choices about the *initial* product characteristics of the A380". (European Union's comments on the United States' response to Panel question No. 63, para. 313 (underline omitted)). The relevance of this argument is somewhat unclear to us, but we note that, "initial" or not, the Appellate Body was clearly addressing "product-related advantages" (e.g. size and technologies) of the A380.

geographic market.<sup>531</sup> Again, had the Appellate Body considered that an unsubsidized A380 could have been delivered during the First Compliance Reference Period, it is difficult to see how it could have also found that such small volumes of deliveries would have been captured by Boeing, without explaining how an unsubsidized A380 would have failed to win them. The Appellate Body's findings concerning these low volume deliveries suggest that it was of the view that, in the absence of the A380 LA/MSF subsidies, Boeing would have captured 100% of deliveries – a view that would be consistent with the conclusion that Airbus could not have been present in the relevant markets with an unsubsidized A380.

7.288. We also note the Appellate Body's rejection of the European Union's appeal against the first compliance panel's dismissal of its non-attribution arguments concerning delays in the 747-8I programme. The first compliance panel had expressed the following opinion on the impact of those delays on the merits of the United States' claims:

{W}e do not see the delays in the development and production of ... the 747-8 to mean that, in the absence of the "product" effects of the LA/MSF subsidies, Boeing or the United States' LCA industry would not have won the orders corresponding to the deliveries made in the ... market { } for ... very large LCA. The fact that Airbus would not have existed in the absence of the LA/MSF subsidies means that customers that could not wait for the 787 and 747-8 to become available would have turned to either Boeing's other twin-aisle LCA, the 767 and the 777.<sup>3326</sup>

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<sup>3326</sup> We recall that ... there is evidence that the larger versions of the 777 may also at times challenge for sales in the market for very large LCA. (footnote original)<sup>532</sup>

7.289. The Appellate Body rejected the European Union's appeal against the first compliance panel's findings, stating:

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. 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}". 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*. 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.<sup>533</sup>

7.290. In our view, the Appellate Body's affirmation of the reasoning of the compliance panel that expressly included an assumption regarding the "absence of Airbus' VLA offerings" further confirms that the A380 would have been absent from the market in the years leading up to the First Compliance Reference Period, i.e. when the A380 orders resulting in the A380 deliveries evidencing impedance would have occurred. Relatedly, it was left unexplained why, if the A380 had been in the market in the counterfactual such that it could have competed for orders that resulted in the relevant A380 deliveries, and if customers would have substituted away from the 747-8I, due to production delays, customers would have opted for a twin-aisle LCA that is not a VLA (i.e. the 777 model) rather than simply purchased Airbus VLA (i.e. the A380) instead. We consider the most reasonable explanation to be that the A380 was unavailable, thus essentially forcing customers to accept an LCA that only "at times" competed with VLA for sales, i.e. larger versions of the 777.

7.291. In our assessment, these aspects of the Appellate Body's VLA impedance analysis confirm that the adopted findings were based on the conclusion that the A380 would not have been launched

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<sup>531</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.739.

<sup>532</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1816 and fn 3326.

<sup>533</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.735. (fns omitted; emphasis added)

in the years leading up to the First Compliance Reference Period, i.e. the time-period in which the A380 orders resulting in the A380 deliveries evidencing impedance would have occurred.

#### **7.5.4.2 Appellate Body findings concerning the market presence of the A350XWB through 2013**

##### **7.5.4.2.1 Effects of A380 and A350XWB LA/MSF subsidies on the A350XWB**

7.292. In the first compliance proceeding, the panel found that, in the absence of the "product effect" of *all* of the challenged LA/MSF subsidies (arising from the "indirect" effects of pre-A350XWB LA/MSF subsidies and the "direct" effects of A350XWB LA/MSF subsidies), the A350XWB would not have existed before or during the First Compliance Reference Period.<sup>534</sup> The Appellate Body, however, found that only the effects of *A380 and A350XWB LA/MSF subsidies* could be considered *vis-à-vis* the A350XWB programme in the counterfactual. Accordingly, in deciding whether the compliance panel had erred in reaching its adverse effects findings, the Appellate Body examined "whether the Panel's analysis regarding the 'product effects' of {A380 and A350XWB LA/MSF subsidies *alone*} support a finding of a genuine and substantial causal relationship between these subsidies ... and the market phenomena identified in the post-implementation period" in the twin-aisle product market.<sup>535</sup>

7.293. The Appellate Body confirmed the compliance panel's finding that the A350XWB LA/MSF subsidies had "direct effects" on the A350XWB programme, and in particular that in the absence of A350XWB LA/MSF subsidies, "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".<sup>536</sup> The Appellate Body also upheld the compliance panel's findings that the A380 LA/MSF subsidies had "indirect effects" on the A350XWB programme, such that the "A350XWB significantly benefitted from the 'learning effects' of the A380" and the "A380 LA/MSF had 'financial effects' on Airbus' ability to launch the A350XWB as and when it did".<sup>537</sup> Thus, the Appellate Body concluded 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".<sup>538</sup> In other words, the Appellate Body confirmed that A380 and A350XWB LA/MSF subsidies "enabled Airbus to proceed with the timely launch and development of the A350XWB", an event that was "crucial to renew and sustain Airbus' competitiveness in the post-implementation period".<sup>539</sup> These Appellate Body statements and findings do not support the European Union's position that an unsubsidized A350XWB would have been launched any time before the end of the First Compliance Reference Period. On the contrary, insofar as the Appellate Body found that the A380 and A350XWB LA/MSF subsidies "enabled Airbus to proceed with the timely launch and development of the A350XWB", which was "crucial to renew and sustain Airbus' competitiveness *in the post-implementation period*", we understand the Appellate Body to have found that an unsubsidized A350XWB could not have been launched before the end of 2013. This is because if an unsubsidized A350XWB had been launched prior to that date, and particularly near the

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<sup>534</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 7.1(d)(xiii).

<sup>535</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.599.

<sup>536</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.632 (quoting Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1717). (emphases original)

<sup>537</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 5.637-5.638. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1747 (noting that "the A350XWB programme significantly benefitted from Learning effects arising from previous, subsidized Airbus LCA programmes, especially (but not only) the A380 programme").

<sup>538</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.639. These "aggregated" effects consisted of the "direct" effects of A350XWB LA/MSF and the "indirect" effects of A380 LA/MSF. The Appellate Body also stated elsewhere in its report that in the absence of A380 and A350XWB LA/MSF, Airbus "would have been unable to launch the A350XWB or an A350XWB-type aircraft by the end of 2006". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.714).

<sup>539</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.647.

time of actual launch in 2006, it would have been difficult to conclude, without further explanation, that Airbus' competitiveness would have suffered without the launch of the A350XWB in 2006 to the degree that the Appellate Body's language appears to indicate.

#### 7.5.4.2.2 Causation of lost sales in the twin-aisle product market

7.294. We now turn to examine the Appellate Body's analysis of whether the "product effects" of A380 LA/MSF subsidies were a genuine and substantial cause of lost sales in the twin-aisle product market during the First Compliance Reference Period.<sup>540</sup>

7.295. We start by noting that at no stage in its analysis did the Appellate Body state that a non-subsidized A350XWB would have been launched or available for order by any particular point in time. Had the Appellate Body considered that a non-subsidized A350XWB could have been launched or been available for order prior to the First Compliance Reference Period, it would have needed to explain how the A380 and A350XWB LA/MSF subsidies could have been a genuine and substantial cause of adverse effects, given the market presence of an unsubsidized A350XWB. However, no such explanation can be found in the Appellate Body's analysis. The absence of such an explanation, and the lack of any other Appellate Body statements concerning the causal mechanism through which the A380 and A350XWB LA/MSF subsidies caused lost sales, suggests that the causal mechanism relied upon by the Appellate Body was the one described in the compliance panel report, namely, the A350XWB was unavailable for order during the First Compliance Reference Period.

7.296. In the course of its analysis, the Appellate Body stated that "in the absence of the {A380 and A350XWB} LA/MSF subsidies ... *Airbus would not have been able to offer the A350XWB at the time it did and with the features that the A350XWB contained*".<sup>541</sup> Thus, according to the Appellate Body, "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".<sup>542</sup> In our view, these statements also confirm that without the product effects of the A380 and the A350XWB LA/MSF subsidies, the A350XWB could not have been offered by Airbus for sale during the First Compliance Reference Period. This, of course, implies that Airbus could not have launched an unsubsidized A350XWB prior to or during the First Compliance Reference Period.

7.297. Finally, we note that the Appellate Body rejected the European Union's appeal against the first compliance panel's dismissal of its non-attribution arguments. In doing so, the Appellate Body observed that it shared "the Panel's view that most of the alleged non-attribution factors with regard to lost sales in the twin-aisle LCA market ... 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".<sup>543</sup> Moreover, the Appellate Body agreed "with the Panel's assessment of the non-attribution factor concerning Singapore Airlines' wish to split orders between Boeing and Airbus", finding that "{i}ndeed, *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".<sup>544</sup> In our view, these statements provide further confirmation that the Appellate Body considered the A350XWB would have been unavailable for order in the First Compliance Reference Period absent the A380 and A350XWB LA/MSF subsidies. Again, had the Appellate Body considered that an unsubsidized A350XWB could have been available for consideration in the Singapore Airlines campaign that resulted in split orders

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<sup>540</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, section 5.6.4.6.3.1. The lost sales in the twin-aisle product market were the 2012 Cathay Pacific Airways order for 10 A350XWB-1000 aircraft, and the 2013 orders by Singapore Airways and United Airlines for 30 A350XWB-900 aircraft and 10 A350XWB-1000 aircraft, respectively.

<sup>541</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.709. (emphasis added)

<sup>542</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.709. (emphasis added)

<sup>543</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.714. (emphasis added) We note that the Appellate Body did not specify which alleged non-attribution factors examined by the compliance panel were, in the Appellate Body's view, unrelated to A380 and A350XWB LA/MSF. However, as discussed above, other aspects of the Appellate Body's analysis appear to clarify that the A350XWB aircraft, as it existed, would not have been available for order in the 2011-2013 Reference Period.

<sup>544</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.714. (emphasis added)

in 2013, it would have needed to explain why it nevertheless found that the Singapore Airlines orders of the subsidized A350XWB constituted Boeing lost sales. In our view, the absence of any such explanation or discussion leads us to conclude that the Appellate Body's findings must be logically understood to mean that the Appellate Body was of the view that Airbus would not have launched an unsubsidized A350XWB by the end of the First Compliance Reference Period.

#### **7.5.4.3 Conclusion – effects of the A380 and A350XWB LA/MSF subsidies through 2013**

7.298. Having carefully reviewed the Appellate Body's findings concerning the effects of the A380 and A350XWB LA/MSF subsidies on the market presence of the A380 and A350XWB in the First Compliance Reference Period, as well as the Appellate Body's findings of significant lost sales and impedance caused by those subsidies, we see no basis to accept the European Union's submission that Airbus would have launched the A380 and A350XWB in or around 2002 and in 2007/2008, respectively, in the absence of the relevant LA/MSF subsidies. Unlike the European Union, we do not understand the Appellate Body's findings to confirm that the A380 and A350XWB would have been available for order and delivery during the First Compliance Reference Period in the absence of LA/MSF subsidies. We do not agree with the European Union that the Appellate Body's findings can be reasonably interpreted to mean that the Airbus company, that did not receive LA/MSF and then present in the market, would have been losing orders to Boeing up to and including in the First Compliance Reference Period because the delayed counterfactual launches of the non-subsidized A380 and A350XWB meant that Airbus would have offered less attractive delivery slots. Rather, as indicated in the above analysis, we consider that there are several parts of the Appellate Body's findings and underlying analysis that can be reasonably understood to leave open only one conclusion – namely, that neither the A380 nor the A350XWB would have been launched before the end of the First Compliance Reference Period in the absence of A380 and A350XWB LA/MSF subsidies; or, in other words, that both LCA models would not have been available for *order* or *delivery* at least until year-end 2013.<sup>545</sup>

#### **7.5.5 Effects of A380 and A350XWB LA/MSF subsidies after 2013 and to the present day**

7.299. In this section we examine the parties' submissions concerning the effects of the A380 and A350XWB LA/MSF subsidies after 2013 and up to the present day. At the outset, we note that the European Union has consistently based its arguments regarding the removal of adverse effects on a counterfactual in which Airbus launched the A380 in or around 2002 and the A350XWB in 2007/2008. However, for the reasons explained in the previous section, the Appellate Body's findings from the first compliance proceeding preclude the launch of the A380 and the A350XWB before the end of 2013. The European Union has not addressed the possibility of this outcome in its submissions, having advanced no arguments or evidence to support the view that Airbus would have launched the A380 and A350XWB programmes at any time after the end of 2013<sup>546</sup>, or that Airbus would have

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<sup>545</sup> We also discern no basis in the Appellate Body's findings for concluding that Airbus would have launched any "inferior" version of either the A380 or A350XWB before year-end 2013. Indeed, there was no argumentation to this effect before the first compliance panel, and the Appellate Body never intimated that such inferior versions would have been launched and brought to market. Moreover, when Airbus attempted to do precisely this, with the Original A350 (essentially an inferior version of the A350XWB), the market rejected the aircraft causing Airbus to abandon the project. (Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.463). In addition, we note that the Appellate Body rejected the European Union's claim that the first compliance panel improperly failed to 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". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.631).

<sup>546</sup> European Union's comments on the United States' response to Panel question No. 75, para. 388 (stating that "the European Union has never asserted a counterfactual launch {of the A350XWB} after 2013"). We further note that the European Union consistently asserts that Airbus would have launched both the A380 and the A350XWB in the counterfactual and the gap between their respective launches would have been the same as it was in reality, i.e. with a launch of the A380 six years before the launch of the A350XWB. (European Union's first written submission, paras. 344-345; second written submission, para. 430; response to Panel question No. 68, paras. 359-360; and Airbus Counterfactual Launch Statement, (Exhibit EU-92 (HSBI/BCI)), para. 25).

launched, from the year 2000 until present day, any alternative LCA programmes instead of the A380 and A350XWB programmes.<sup>547</sup>

7.300. As already noted, the United States advocates a counterfactual in which the earliest time that the A380 or the A350XWB would have been launched is 2014, and offers some argumentation and evidence in order to illustrate the alleged difficulties Airbus would have had in launching either LCA programme even then. The United States, however, offers no specific counterfactual launch date of either aircraft, and generally asserts in this context that the European Union has simply not carried its burden to show that the A380, A350XWB, or A330neo would be available for order or delivery today in the absence of the A380 and A350XWB LA/MSF subsidies.

7.301. The parties' limited submissions concerning the effects of the A380 and A350XWB LA/MSF subsidies in the period after the end of the First Compliance Reference Period means that there is little direct evidence before us addressing if and when Airbus would have launched the A380 or the A350XWB (or developed the A330neo variant) after 2013, in the absence of the A380 and A350XWB LA/MSF subsidies. Nevertheless, in the sections that follow, we proceed to examine the arguments and evidence that have been made with a view to determining the extent to which the "product" effects of A380 and A350XWB LA/MSF subsidies found to persist until the end of 2013, continue in the post-2013 period to the present day.

#### **7.5.5.1 Aggregation of the effects of A380 and A350XWB LA/MSF subsidies**

7.302. The Appellate Body has explained that "an *ex ante* decision taken by a panel to undertake a single analysis of the effects of multiple subsidies whose structure, design, and operation are similar and thereby to assess in an integrated causation analysis the collective effects of such subsidy measures" is known as "aggregation".<sup>548</sup> This integrated causation analysis is used to "determine whether there is a genuine and substantial causal relationship between these multiple subsidies and {alleged adverse effects}".<sup>549</sup> In both the original and first compliance proceedings, both the panels and the Appellate Body followed this approach *vis-à-vis* LA/MSF subsidies, and we consider this approach appropriate going forward as well. Thus, we will analyse the effects of A380 and A350XWB LA/MSF subsidies on an aggregated basis.

7.303. We note that the A350XWB was launched six years after the A380, and both parties assume in their arguments that the A380 would not have been launched after the A350XWB in any presented scenario. Accordingly, consistent with the analytic approaches taken by both the panel and Appellate Body in the first compliance proceeding<sup>550</sup>, we will proceed to assess: (a) the "direct" effects of A380 LA/MSF subsidies on the A380; and (b) the aggregated "indirect" effects of A380 LA/MSF subsidies and "direct" effects of A350XWB LA/MSF subsidies on the A350XWB.

7.304. The parties disagree, however, about whether the Panel may assess: (a) the "indirect" effects of A350XWB LA/MSF on the A380; and (b) the "indirect" effects of A380 and A350XWB LA/MSF on the A330neo. The United States argues that it would be legally and procedurally permissible, and factually appropriate, for the Panel to do so. The European Union argues that doing so would be factually unsound because "indirect" effects arising from one set of LA/MSF measures directed at a particular LCA programme only impact other LCA programmes that were launched after the launch of the previously LA/MSF-subsidized LCA programme. The European Union also argues that the United States has never argued that "indirect" effects arising from one LA/MSF-subsidized

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<sup>547</sup> The United States and European Union argue that there is no basis in the record supporting the view that Airbus would have launched some inferior version of the A380 at any relevant time. (United States' responses to Panel question Nos. 59 and 74; and comments on the European Union's response to Panel question No. 59; European Union's response to Panel question No. 59; and comments on the United States' response to Panel question No. 59). We further discern no argumentation by the European Union that Airbus would have launched any twin-aisle LCA programme instead of the A350XWB at any particular time.

<sup>548</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1282.

<sup>549</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1285.

<sup>550</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1448-6.1451, 6.1480-6.1515, 6.1528-6.1534, 6.1535-6.1540, 6.1713-6.1723, and 6.1774-6.1778. See also Appellate Body Reports *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 5.610-5.632, and 5.633-5.639; *EC and certain member States – Large Civil Aircraft*, paras. 1269, 1281, 1352, 1355, and 1356; and Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1935-7.1948.

LCA programme affect the post-launch development of any other LCA programme, appearing to suggest that it would be procedurally unsound for the Panel to undertake such an analysis. The European Union also states that the United States' claims regarding the indirect effects of A380 and A350XWB LA/MSF subsidies on the A330neo are not in the Panel's terms of reference.<sup>551</sup>

7.305. As an initial matter, we are not persuaded by the European Union's contention that the United States' arguments concerning the alleged "indirect" effects of the A380 and/or A350XWB LA/MSF subsidies on the A330neo are outside our terms of reference. The United States' submissions purport to explain how measures that are explicitly *within* our terms of reference, i.e. A380 and A350XWB LA/MSF measures, continue to result in present adverse effects within the meaning of Articles 5 and 6 of the SCM Agreement. The A330neo is simply a vehicle through which such effects are alleged to have occurred. To this extent, we understand the United States' arguments to fall within the scope of this proceeding.

7.306. We note, furthermore, that the United States could not have reasonably pursued the same line of argument in the first compliance proceeding. According to Airbus documents, the A330neo was launched in 2014<sup>552</sup>, which is after the end of the First Compliance Reference Period. Thus, we see no legal or procedural impediment to considering the United States' submissions concerning the alleged "indirect" effects of the A380 and A350XWB LA/MSF subsidies on the A330neo.

#### 7.5.5.2 Conditions of competition and product markets

7.307. The European Union asserts that general conditions of competition in the LCA industry, as described by the original and compliance panels, have not materially changed up to present day, and has identified no material changes that would have occurred in the counterfactual.<sup>553</sup> The United States, while not excluding the possibility that such conditions might have changed in some ways between the first and second compliance proceedings, identifies no particular changes that have occurred or would have occurred to the overall conditions of competition in the counterfactual.<sup>554</sup>

7.308. We discern nothing on the record indicating that the following general conditions of competition in the LCA industry, which were identified in the original and first compliance proceedings, do not continue to be relevant and applicable in the period after 2013 and at present: (a) development and production of LCA is "an enormously complex and expensive undertaking"<sup>555</sup> generally requiring the sale of hundreds of a given LCA in order to make that LCA programme profitable; (b) economies of scope and scale reinforce incumbent firms' competitive advantages and that make it difficult for an LCA manufacturer to enter just one market segment; (c) important "learning", scope, and financial effects arising from LCA programmes that enable LCA manufacturers to more easily launch subsequent LCA programmes<sup>556</sup>; (d) incumbent firms' incentive to adopt "detering price strategies"<sup>557</sup>; (e) customers' preference for fleet commonality; (f) pervasive and strong competition between Airbus and Boeing; (g) relatively infrequent but large orders for LCA; and (h) an Airbus-Boeing duopoly in the twin-aisle and VLA product markets.<sup>558</sup>

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<sup>551</sup> European Union's comments on the United States' response to Panel question No. 60, para. 280 ("If the United States wished to obtain a finding that some subsidy at issue had effects manifesting in the market presence of the A330neo, it should properly have brought the matter within the Panel's terms of reference"). See also United States' first written submission, paras. 236-238; and responses to Panel question No. 60, paras. 146-147, and No. 67, para. 154. See also European Union's comments on the United States' response to Panel question No. 67, para. 319.

<sup>552</sup> Airbus A330neo Presentation, (Exhibit USA-51), slide 19. See European Union's comments on the United States' response to Panel question No. 67, para. 319 (indicating that the United States did not allege that A350XWB LA/MSF had any effects on the A330neo programme in prior proceedings in this dispute).

<sup>553</sup> European Union's comments on the United States' response to Panel question No. 70.

<sup>554</sup> United States' comments on the European Union's response to Panel question No. 81, para. 325.

<sup>555</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1717.

<sup>556</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1510-6.1511.

<sup>557</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1717.

<sup>558</sup> Panel Reports, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1214-6.1217; and *EC and certain member States – Large Civil Aircraft*, paras. 7.1716-7.1728. We agree with the analysis of the Arbitrator in this dispute that, in the counterfactual, up through year-end 2013,

7.309. Although the European Union recalls certain general findings made in the original proceeding regarding the importance of analysing adverse effects *vis-à-vis* properly defined product markets<sup>559</sup>, neither party calls into question that the three LCA product markets identified in the first compliance proceeding (i.e. single-aisle, twin-aisle, and VLA) continue to be those "within which most competitive interactions between the relevant aircraft will commonly take place".<sup>560</sup> Indeed, both parties appear to implicitly accept and structure their arguments around these product markets in this proceeding.<sup>561</sup>

7.310. The analysis that follows proceeds on the basis of our understanding that the above-described conditions of competition would have prevailed in the counterfactual and would have operated in conjunction with the three product markets identified in the first compliance proceeding (i.e. single-aisle, twin-aisle, and VLA product markets).

### **7.5.5.3 Market presence of the A380, A350XWB and A330neo after 2013 in the absence of the A380 and A350XWB LA/MSF subsidies**

7.311. The United States argues that the European Union has not established that, in the counterfactual, Airbus would have launched either the A380 or the A350XWB at any time after 2013. According to the United States, in order to do so, the European Union would have to establish that launching either of these LCA programmes after 2013 in the counterfactual was economically viable, financially feasible, and technologically practicable for Airbus. In this context, the United States asserts that the A380's viability after 2013 is doubtful due to the then-weakening demand for VLA and Boeing's counterfactual incumbency advantages in the VLA product market. Further, the United States argues that there is no evidence establishing the viability of the A350XWB after 2013, and that the aircraft would have been difficult to fund had Airbus financed the A380 in the counterfactual with financing on market terms rather than with LA/MSF. Moreover, insofar as Airbus would have wished to launch the A350XWB having not launched the A380 first, the United States argues that it would have been difficult for Airbus to do so without the learning effects gained from Airbus' experiences with the A380 programme. The United States also reiterates its argument from the first compliance proceeding that a "weaker" Airbus could not have launched the A350XWB at any relevant time in the counterfactual. Relatedly, in the United States' view, changed circumstances as between the times of the actual launches of the A380 (2000) and A350XWB (2006) and the conditions in the counterfactual post-2013 period mean that the A380 and A350XWB "Business Cases", authored at the times of the actual launches of the A380 and A350XWB, are of limited value in establishing the viability of these two LCA programmes in the counterfactual post-2013 period.<sup>562</sup>

7.312. The United States also argues that the European Union has not established that Airbus would have or could have launched the A330neo after 2013 in the counterfactual, although the United States' arguments *vis-à-vis* this particular LCA are limited relative to those advanced by the United States' *vis-à-vis* the A380 and A350XWB.<sup>563</sup>

7.313. As already noted, the European Union presents no arguments or evidence intended to support the specific conclusion that either the A380 or A350XWB would have been launched after 2013. However, the European Union does assert that both LCA would have been available for orders and deliveries by the present day in the counterfactual, just as they are in reality, in the context of arguing that the counterfactual launch times of the A380 and A350XWB would have been in or around 2002 and in 2007/2008, respectively. According to the European Union, the evidence

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Airbus and Boeing would have competed in a duopoly in the twin-aisle and VLA product markets. (Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, paras. 6.78-6.79).

<sup>559</sup> European Union's first written submission, paras. 218-223.

<sup>560</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1416.

<sup>561</sup> European Union's submission regarding the wind-down of the A380 programme, para. 27 (arguing that with the wind-down of the A380 programme Boeing's "exports will no longer be obstructed or hindered by Airbus products in that product market"); United States' second written submission, section VII.D (structuring allegations of specific adverse effects around these three product markets). See also European Union's panel request, para. 11 ("In relation to the removal of adverse effects, the European Union has also given close consideration to the Appellate Body's guidance on the delineation of product markets").

<sup>562</sup> United States' first written submission, paras. 229, 233; second written submission, paras. 145-147, 157-159, 229, 237-238, and 243-245; responses to Panel question No. 70, para. 160, No. 75, paras. 173 and 176-177; and comments on the European Union's responses to Panel question No. 60, para. 198, No. 68, paras. 268-269, No. 69, and No. 72, paras. 303-305.

<sup>563</sup> United States' first written submission, para. 328; and second written submission, para. 234.

it has submitted in this proceeding, when combined with the previously adopted findings in this dispute, establish that the A380 and the A350XWB would have been present on the market place in the absence of the A380 and A350XWB LA/MSF subsidies. The European Union stresses that the findings in this dispute establish that both the A380 and A350XWB programmes would have been launched in the counterfactual, just with a delay. The European Union thus argues that there is no need to address the counterfactual viability of either LCA programme or Airbus' counterfactual technological ability to launch either LCA programme anew in this proceeding because these issues were effectively mooted by the adopted findings that Airbus would have launched both LCA in the counterfactual. According to the European Union, this is especially so because, at the time of any delayed launches of the A380 and A350XWB, Airbus would have been a more integrated company than it was at the times of the actual launches, with a "can do" attitude, and, further, any relevant circumstances would not have changed in between the times of actual versus counterfactual launches so as to make any viability or technological-capacity arguments worth examining anew in this proceeding. The European Union further criticizes the United States as not offering any specific counterfactual launch times for either the A380 or A350XWB, and asserts that the United States has provided insufficient evidence to demonstrate that the A330neo would not have been launched and brought to market in the counterfactual as it was in reality.<sup>564</sup>

7.314. Given the parties' arguments and the record evidence, we consider that in order to assess the counterfactual market presence of the A380, A350XWB, and A330neo in the post-2013 period, we should examine the following issues *vis-à-vis* that period: (a) Airbus' counterfactual competitive position; (b) Airbus' counterfactual financial position; (c) Airbus' counterfactual technological and production-related capabilities; and (d) counterfactual demand for the A380, A350XWB, and A330neo. Such analyses will inform our determination of the extent to which Airbus would have found it feasible and commercially viable to launch the A380 and/or the A350XWB in the counterfactual post-2013 period. The following sections address each of these matters in turn.<sup>565</sup>

#### **7.5.5.3.1 Airbus' counterfactual competitive position after 2013**

7.315. The European Union has explained that it was in Airbus' vital interest to be present and competitive in all LCA product markets at all relevant times, given incumbency advantages that would have accrued for Boeing in the absence of competitive Airbus LCA in a given product market. Accordingly, the European Union indicates that the A380 (in the VLA product market) would have been "a necessity for Airbus to launch"<sup>566</sup> and recalls that launching the A350XWB (in the twin-aisle

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<sup>564</sup> European Union's first written submission, paras. 44, 264, 272, 326, 344, 350, and 421-422; second written submission, paras. 126, 228, 274, and 446-455; responses to Panel question No. 68(b), paras. 356-360, and No. 70, para. 370; and comments on the United States' responses to Panel question No. 59, paras. 272 and 284, and No. 70, paras. 324 and 330. See also Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1507, fn 2597. See also *One Journey: One Team – Interview with Tom Enders*, Airbus Annual Review 2014, (Exhibit EU-43).

<sup>565</sup> We note the European Union's position that the adopted findings in this dispute confirm that Airbus would have launched the A380 and the A350XWB, albeit with a delay. (European Union's response to Panel question No. 68, para. 358; and comments on the United States' response to Panel question No. 75, para. 378). We disagree. We discern nothing in the adopted findings stating that, in the counterfactual under which we operate, Airbus would have in fact launched either the A380 or A350XWB at any particular time. In particular, any findings by the Appellate Body that indicate that, in this counterfactual, Airbus could not have launched the A380 or the A350XWB "as and when" Airbus actually did leaves the question of whether, or when, Airbus would actually have launched either LCA open.

<sup>566</sup> European Union's second written submission, para. 454 (citing Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1943 ("the A380 business case predicts a positive NPV for the programme even assuming no LA/MSF is provided, as well as a positive NPV in circumstances where a Realistic Worst Case scenario is contemplated in situations where the project is supported by LA/MSF"), 7.1665 ("Since its inception, Airbus has recognized the importance to its continued success in the LCA market of developing a full line - a family - of different LCA models ... the need to offer separate products whose commonality keep operating costs down for customer airlines across the fleet but which can perform the various missions dictated by an airline's route structure has historically meant that no manufacturer of a single product or family of products, no matter how compelling, has survived in the LCA industry") (emphases added), and 7.1957 (recognizing Airbus' goal of developing a full range of LCA for the market); Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1355 (finding that Airbus would be "much weaker" in a counterfactual where it does not offer a "full range" of LCA); Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1475 (finding that Airbus would be "much weaker" in a counterfactual where it does not offer a "full range" of LCA); Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.558(b)).

product market) was "critical for Airbus' ability to continue to be a mainstream competitor against Boeing".<sup>567</sup> The European Union also asserts that launching the A380 was a "very significant intermediate step, in terms of its learning effects, for Airbus' future work with composites", a skill that was important so that Airbus could "remain a viable competitor in the {LCA} duopoly".<sup>568</sup>

7.316. The United States argues that any assessment of Airbus' counterfactual competitive position after 2013 would need to take into account Boeing's enhanced incumbency advantages that would have accrued in the 2001-2013 period in the absence of the A380 and the A350XWB.<sup>569</sup>

7.317. In our view, the adopted findings in this dispute and the record evidence indicate that Airbus' counterfactual competitive position after 2013 would have been generally compromised relative to what its actual competitive condition was at that time. We further consider that this would have been so with respect to all three product markets, albeit to different degrees.

7.318. Airbus' counterfactual competitive position would have begun to weaken (relative to what it was in reality) in 2000 with the absence of the A380's launch. In the absence of the A380, Airbus would have ceded the VLA product market to Boeing, who thus would have had a monopoly in that product market for the next 13 years at least (i.e. until at least year-end 2013). In the absence of the A380, Boeing would have captured larger numbers of VLA orders with its 747 family of LCA in the years following 2000 and up to 2013.<sup>570</sup> We consider that Boeing's increased sales of VLA in the absence of the A380 would also have resulted in increased Boeing sales in the single-aisle and twin-aisle LCA product markets due to two main factors. First, on the demand side, capturing significant additional VLA orders would have enhanced Boeing's incumbency advantages, causing airlines to gravitate toward Boeing single-aisle and twin-aisle LCA in order to realize fleet-commonality advantages. In this regard, we note that the A380 Business Case itself envisions the "[\*\*\*]" and that these represent "significant potential upsides" of launching the A380.<sup>571</sup>

7.319. Second, on the supply side, Boeing would also have benefitted from enhanced economies of scope and scale, and additional "learning" effects, arising from its increased VLA, twin-aisle, and single-aisle LCA production, thus becoming more efficient and profitable overall. Additionally, as Boeing began delivering counterfactually more VLA, twin-aisle, and single-aisle LCA as a comparatively more efficient LCA producer<sup>572</sup>, Boeing would have realized greater revenues and profits, giving Boeing more flexibility with pricing of single-aisle and twin-aisle LCA.<sup>573</sup> We consider

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<sup>567</sup> European Union's second written submission, para. 453 (quoting Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1713).

<sup>568</sup> European Union's response to Panel question No. 68, para. 365.

<sup>569</sup> United States' second written submission, paras. 243-245; Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1828-7.1832, 7.1845, and 7.2025; Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 1414(p); Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1781, 6.1789-6.1791, 6.1798, and 6.1806.

<sup>570</sup> According to the Ascend database, the net total number of A380 orders from 2000-2013 was 296. (Updated Ascend Data, (Exhibit USA-158)). Regarding Exhibit USA-158, the European Union argues that the Panel, when requesting the United States to submit this exhibit, did not explain the relevance of this exhibit, and thus drawing any conclusions from Exhibit USA-158 would be improperly "making a case" for the United States and deprive the European Union of its due process rights because the European Union would not know "the case against it". Further, the European Union asserts that the data in Exhibit USA-158 is deficient in certain respects. (European Union's comments on the United States' response to Panel question No. 58). We note that: (a) we only use the record evidence to assess the arguments that the parties themselves have made; (b) insofar as the European Union has indicated deficiencies in this exhibit, we take them into consideration; and (c) the European Union has had an opportunity to comment on this exhibit. We therefore consider that using this exhibit does not improperly "make a case" for the United States or deprive the European Union of its due process rights.

<sup>571</sup> A380 Business Case, (Exhibit EU-78 (HSBI)), p. 5.

<sup>572</sup> "Aircraft manufacturers earn the bulk of the revenue on a sale not at the time the aircraft are sold, i.e., ordered, but at the time of delivery." (Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.2106 and 7.2178). See also Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1806 (explaining that "we recall that deliveries of new LCA will lag their order date by typically at least three years, and usually many more years in respect of newly launched aircraft"). (emphasis added)

<sup>573</sup> We note that such additional revenue gains could likely have been achieved starting in the early 2000s and increasing over time. This is so because Boeing had both twin-aisle and single-aisle LCA available for sale and delivery during the entire 2011-2013 period. We note, however, that there would likely have been a time-period from around 2005-2012 during which Boeing would not have delivered, and realized

it likely that Boeing would have used this pricing flexibility to put additional competitive pressures on Airbus in the single-aisle and twin-aisle product markets in an attempt to capture additional market share from Airbus.<sup>574</sup> We further note that the demand- and supply-side issues above appear to reinforce one-another, i.e. incumbency advantages lead to increased production, which leads to greater efficiencies and price flexibility, which leads to even greater sales and incumbency advantages.

7.320. Absence of the A350XWB launch in 2006 would significantly have exacerbated the competitive disadvantages that Airbus would already have been experiencing due to the absence of the A380. It will be recalled that Airbus viewed the A350XWB as a necessity to remain a mainstream competitor to Boeing. This was so because without the A350XWB, going forward from 2006, Airbus would have been forced to compete against Boeing's twin-aisle LCA with the A330 and A340 LCA families. As the first compliance panel explained, however:

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. Indeed, the evidence indicates that in 2005 Airbus sold only 15 A340s whereas Boeing sold approximately ten times as many 777s. Such developments had significant implications for Airbus' overall sales performance as well; as of July 2006, Boeing had reportedly captured 75% of all new aircraft orders thus far that year. According to the European Union, this situation "clarified that Airbus aircraft within the twin-aisle market had lost their competitive edge to the Boeing 787".<sup>575</sup>

7.321. After 2006, considering the conditions of competition in the LCA industry, it appears likely that Boeing's competitive advantages would have increased further as Boeing continued its monopoly in the VLA market and likely captured the significant majority of twin-aisle LCA sales.<sup>576</sup> This would have occurred through the same demand- and supply-side processes that were described above in paragraphs 7.318 and 7.319.<sup>577</sup> As the first compliance panel found, based in large part on its analysis of the A350XWB Business Case, "although the failure to launch the A350XWB would likely not present an existential threat to Airbus and EADS, the companies considered the A350XWB programme to be essential to Airbus' continued relevance as a healthy competitor to Boeing *in all market segments* at least through the foreseeable future".<sup>578</sup>

7.322. In sum, beginning in 2000, the heightened competitive pressures from Boeing would likely have begun to erode Airbus' market shares across the three product markets. This erosion would likely have accelerated to some degree over time as Boeing's advantages on the demand and supply

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revenues from additional VLA sales. This is so because the last 747-400 was delivered in 2005, and its predecessor model, the 747-8I, was not delivered until 2012. We further note that the 787, launched 2004, was first delivered in 2011. (Updated Ascend Data, (Exhibit USA-158)).

<sup>574</sup> See A380 Business Case, (Exhibit EU-78 (HSBI)), p. 6, last sentence of second paragraph under "Note".

<sup>575</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1544. (fns omitted) See also Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1572 ("In November 2006, Goldman Sachs predicted that without the A350XWB, Airbus' overall market share could fall to 35%, thus characterizing it as 'essential for Airbus to remain a mainstream competitor to Boeing'. Significantly, the Goldman Sachs report also indicates that a failure to launch the A350XWB would not only harm Airbus' twin-aisle market presence, but could also result in a lower single-aisle market presence 'as many airlines may want commonality, and buy larger and smaller aircraft in packages'") (internal citations omitted)

<sup>576</sup> See above paragraph 7.308.

<sup>577</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1713 ("The A350XWB programme was of significant strategic importance to Airbus and, in the short-term, critical for Airbus' ability to continue to be a mainstream competitor against Boeing. The evidence shows that around the time of launch, Airbus was of the view that it needed to develop a new generation of twin-aisle aircraft in the near term in order to compete effectively against the Boeing 777 and 787, not only to maintain market share in the twin-aisle segment, but also to avoid losing ground in other markets with respect to customers interested in fleet commonality").

<sup>578</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1572. (emphasis added) See also Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1602 (noting that a UK Government appraisal regarding whether to provide UK A350XWB LA/MSF to Airbus indicating that "the A350XWB project is a sound project of great strategic importance for Airbus") (internal quotation marks and citation omitted)

sides began to reinforce each other. Considering the significant competitive disadvantages that Airbus was experiencing in reality in and around 2006 in the absence of the A350XWB but in the presence of the A380, we consider that it is probable that, by 2014, in the absence of both the A380 and A350XWB, Airbus' competitive position would have been significantly compromised across all three product markets. That the overall damage that such a scenario would have inflicted on Airbus' general competitive position would have been significant is confirmed by not only the European Union explanation that the A380 and A350XWB were critical in maintaining Airbus' competitiveness overall, but also the compliance panel's finding that "the Business Case outlined severe strategic disadvantages and costs to Airbus that were assumed to accrue in the absence of the A350XWB programme".<sup>579</sup> Our conclusions in this respect are consistent with the explanation in the original proceeding regarding how critical competitiveness in all LCA product markets is for an LCA manufacturer, i.e. that "no manufacturer of a single product or family of products, no matter how compelling, has survived in the LCA industry".<sup>580</sup>

7.323. We note that Airbus may have been able to mitigate the competitive damage inflicted by Boeing in the counterfactual years before 2013 by making ongoing progress in its pre-existing LCA products, and in particular the A330.<sup>581</sup> We also consider that Airbus could have, and very likely would have had to, lower the prices of its twin-aisle and single-aisle LCA so as to counter Boeing's increasing price flexibility in those markets.<sup>582</sup> We have doubts, however, as to how successful such efforts would have been. The lagging sales of the A330 and A340 in and around 2006 show just how far Airbus had fallen behind Boeing in the twin-aisle LCA product market, in particular after the launch of the fuel-efficient 787. Indeed, we recall that the Original A350<sup>583</sup> was essentially envisioned "as a long-range, fuel-efficient version of Airbus A330 airliner and a rival to the {Boeing} 7E7' (i.e. the Boeing 787)".<sup>584</sup> However:

... by the spring of 2006 major customers and industry analysts had determined that the Original A350 could not effectively compete with the Boeing 787, especially in terms of fuel efficiency. In fact, some critics judged the Original A350 as so plainly inadequate that they called for Airbus to scrap the programme in favour of a redesigned aircraft. The European Union itself acknowledges that in response to Boeing's launch of the 787 in 2004, Airbus had initially launched the Original A350. The Original A350 was supposed to have a composite wing, but was otherwise based on the aluminium fuselage of the A330. Customers rejected the design of the Original A350 as not being able to match the weight savings and fuel efficiency promised by the 787.<sup>585</sup>

7.324. Thus, we consider that even had Airbus been able to improve its existing twin-aisle LCA offerings in the counterfactual years before 2013, it would have been insufficient to avoid suffering significant competitive damage at the hands of Boeing.

7.325. We note that there appears little evidence that the A320 was not generally competitive with Boeing's single-aisle offerings during all relevant times. Thus, we consider that Airbus' mitigation strategies would have been somewhat more successful in the single-aisle market, although Airbus' position in that product market would still have been compromised by Boeing leveraging its advantages in the other two product markets into the single-aisle market via processes explained above.

7.326. We thus conclude that, in the counterfactual and coming into the year 2014, Airbus' competitive position *vis-à-vis* Boeing in all three product markets would have been generally compromised relative to what its actual competitive condition was at that time. More specifically,

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<sup>579</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1705. (footnote omitted)

<sup>580</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1665.

<sup>581</sup> The A340 programme was terminated in 2011.

<sup>582</sup> We recognize, however, that Boeing's market power in any given product market in the counterfactual would likely have been limited by the negotiating power of Boeing's sophisticated airline customers.

<sup>583</sup> The "original A350" was the "Airbus A350 aircraft design proposed between 2004-2006 (Original A350) programme launched in December 2004". (Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.53).

<sup>584</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1542.

<sup>585</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1543. (footnotes and internal quotation marks omitted)

Boeing would have had a monopoly in the VLA market, would have been capturing the large majority of sales in the twin-aisle LCA market, and also would have made gains in market share in the single-aisle market.

#### 7.5.5.3.2 Airbus' counterfactual financial condition after 2013

7.327. Regarding Airbus' financial condition in the counterfactual post-2013 period, the European Union has indicated that, if Airbus had delayed the launch of the A380 and/or A350XWB in the counterfactual, then between the time of actual launch and the counterfactual launch of either LCA, Airbus would not have had to shoulder the burdens of the development costs of these LCA programmes, suggesting that Airbus would have had more financial resources available for other activities if Airbus had wished to pursue them. The European Union also offers two expert reports – the Wessels Report and the Airbus Counterfactual Launch Statement – which discuss several aspects of Airbus' financial situation under certain counterfactual scenarios. The European Union furthermore notes that Airbus' actual credit rating in 2006 was "A-" which would have allowed Airbus to raise debt to fund large projects such as an LCA launch.<sup>586</sup>

7.328. The United States argues that there are reasons to believe that Airbus would not have been in a sound financial state in the counterfactual post-2013 period. The United States asserts that the Wessels Report and the Airbus Counterfactual Launch Statement are immaterial under the relevant counterfactual. Furthermore, the United States asserts that Airbus' counterfactual post-2013 financial position would need to be assessed in the light of Boeing's increased incumbency in the VLA and twin-aisle markets due to the absence of the A380 and A350XWB. The United States also indicates that financing the A380 (or A350XWB) on market terms instead of with LA/MSF would have been more expensive for Airbus in the counterfactual, and doing so thus would have negatively affected Airbus' credit rating.<sup>587</sup>

7.329. In the sections that follow, we examine the merits of the parties' submissions with a view to determining what Airbus' financial condition would have been in the counterfactual post-2013 period. We begin by recalling the findings from the first compliance proceeding we consider to be relevant to this analysis, before turning to examine the Wessels Report, the Airbus Counterfactual Launch Statement, and the implications of the European Union's assertion that Airbus would have been spared the expenses of developing the A380 and A350XWB for any period during which their launches were delayed.

##### 7.5.5.3.2.1 Relevant findings of the first compliance panel

7.330. We note that the first compliance panel examined Airbus' *actual* financial condition in the periods leading up to and following the launch of the A350XWB in 2006 in some detail.<sup>588</sup> The first compliance panel essentially found that, in and around 2006, "the assortment of financial resources that Airbus, via EADS, had at its disposal would have been, collectively, sufficient to effectively replace the monies Airbus is entitled to under the actual A350XWB LA/MSF contracts", but it would have been difficult and risky for Airbus to do so and thus "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".<sup>589</sup>

7.331. In making these findings, the first compliance panel identified multiple factors that impacted Airbus', and its parent company EADS', financial condition in and around 2006. In our view, some of these factors would likely not have significantly changed in the counterfactual applied in this proceeding. These factors include the development and production problems associated with the A400M military transport plane, which was experiencing significant cost overruns during this time-

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<sup>586</sup> European Union's first written submission, paras. 339-343 and 347 (citing EADS, Financial Statements and Corporate Governance, 2006, (Exhibit EU-45)).

<sup>587</sup> United States' first written submission, paras. 221-235; second written submission, paras. 228-245; and comments on the European Union's response to Panel question No. 68, para. 263.

<sup>588</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1550-6.1566, 6.1580-6.1587, and 6.1640-6.1700.

<sup>589</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1715-6.1717. (emphasis original)

period and as late as mid-2009<sup>590</sup>, and a weak US dollar in 2005 and as late as 2010.<sup>591</sup> Other important factors in that analysis would have changed under our counterfactual, and notably the impact of the A380's launch and subsequent development. In this respect, we recall that the A380 was an expensive programme that experienced substantial cost overruns<sup>592</sup>, spending and overruns which negatively impacted Airbus' financial position in the short run, but also that the A380 prevented Boeing from having a monopoly in the VLA product market, which was likely beneficial to Airbus' competitive position overall and thus likely positively impacted its financial position to some degree.<sup>593</sup> Whether certain other events that occurred in this time-frame that materially impacted Airbus' financial position would have also occurred in the counterfactual is less clear to us, and notably the institution of Airbus' "Power8" cost-cutting programme, implemented in response to the A380 production problems and the need to fund the A350XWB programme.<sup>594</sup> We also note, however, that the first compliance panel did not extend its analysis of Airbus' financial condition up to year-end 2013 or beyond, and at no time projected what Airbus' financial condition would have been at any time after 2006 in the absence of the A380 and A350XWB programmes. As explained above, the absence of both the A380 and the A350XWB until at least 2014 would have significantly impacted Airbus' overall sales in all three product markets.

7.332. Due to the significant differences between the circumstances that Airbus would have encountered in our counterfactual and Airbus' actual circumstances in the period examined by the first compliance panel, we find it difficult to use the analyses of the first compliance panel as a baseline from which to extrapolate Airbus' financial conditions under the counterfactual in the post-2013 period. In general, however, we consider that if the subsidized Airbus company that actually existed in 2006 would only have had the financial means with which to pursue the A350XWB by a narrow margin, we have doubts as to whether the financial condition of Airbus in the counterfactual post-2013 period, considering its generally compromised competitive position, would have considered itself to have had the financial means with which to launch the very expensive<sup>595</sup> A350XWB with confidence.

#### 7.5.5.3.2.2 The Wessels Report

7.333. In support of its arguments that Airbus could have launched the A380 in or around 2002 and the A350XWB in 2007/2008, the European Union offers the Wessels Report. The Wessels Report is a report authored in 2012 by Professor David Wessels of the Wharton School at the University of Pennsylvania. The Wessels Report was originally authored for the United States and presented by the United States as evidence in the first compliance proceeding. The first compliance panel explained that "the Wessels Report purports to demonstrate that, had Airbus launched its pre-A380 subsidized LCA with financing on market terms, Airbus' resulting debt burden would have been approximately EUR 24.3 billion. The Wessels Report concludes that this debt burden is so massive that it would have prohibited Airbus from launching either the A380 or the A350XWB until at least 2019".<sup>596</sup> The first compliance panel's analysis of the report consists of one paragraph, and simply concludes that "the Wessels Report restates what the original panel, as affirmed by the Appellate Body, already found. That is, even assuming that Airbus had launched all its pre-A380 LCA with market financing rather than LA/MSF, Airbus' resulting debt burden would have made it extremely difficult, and perhaps impossible, for Airbus to launch the A380 as and when it did".<sup>597</sup>

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<sup>590</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1581 (explaining that "A June 2009 *Financial Times* article reported that EADS had recently undergone a reorganization that came 'in response to the debacle over the development of the A400M military transport aircraft, which is already running at least three years late with billions of euros of extra costs and with work almost halted, while EADS and its seven European government customers haggle over the future of the project.'").

<sup>591</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1581 (explaining that "the European Union has further explained that in 2010 EADS' financial performance suffered, in part, due to a weak US dollar"). A weak US dollar relative to the EUR affects Airbus' profitability because "although LCA are priced in US dollars, Airbus keeps its financial accounts, incurs much of its costs, and accounts for its profits, in Euros". (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 4.595).

<sup>592</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1675.

<sup>593</sup> See paragraph 7.326 above.

<sup>594</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1554.

<sup>595</sup> See paragraph 7.341 below.

<sup>596</sup> Wessels Report, (Exhibits EU-40, USA-47), p. 6.

<sup>597</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1769.

The Appellate Body mentioned the Wessels Report only in passing in one paragraph and one accompanying footnote.<sup>598</sup> In short, neither the first compliance panel nor the Appellate Body materially relied on the content of the Wessels Report in making their findings.

7.334. The European Union offers the Wessels Report in this proceeding as purporting to demonstrate the time at which Airbus would have had the financial means with which to have launched the A380 and A350XWB in the counterfactual. To that end, the European Union observes that the Wessels Report concludes that even if Airbus were burdened with "massive" debt starting in 2000, Airbus' credit rating would have been sufficient to allow Airbus to raise enough money with debt to fund the launch of the A380 and/or A350XWB by 2019. Therefore, according to the European Union, because in the counterfactual Airbus would not have been burdened with that debt in 2000, Airbus would have been able to launch the A380 and/or A350XWB years before 2019.<sup>599</sup> The United States argues that, for various reasons, the Wessels Report is immaterial for purposes of this compliance proceeding.<sup>600</sup>

7.335. We are not convinced by the European Union's reliance on the Wessels Report. First, the Wessels Report operates under a counterfactual materially different from the counterfactual we operate under here, i.e. a counterfactual in which Airbus funded its pre-A380 LCA programmes with market financing, a scenario that the Wessels Report itself recalls was "not possible" under the findings by the original panel.<sup>601</sup> Under our counterfactual, however, Airbus is presumed to have received pre-A380 LA/MSF and developed all of its pre-A380 models of LCA as and when it did with the LA/MSF subsidies.<sup>602</sup> Second, the Wessels Report makes assumptions that do not capture key counterfactual considerations. In particular, the Wessels Report uses "conservative assumptions" to forecast Airbus' financial performance after 2005, including "forecast{ing Airbus'} revenue growth using Airbus' own passenger traffic growth projections of 4.9% between 2000 and 2019".<sup>603</sup> Further, "{t}o forecast other income statement line items {the report} use{s} the company's financial ratios as of 2005" which is "quite conservative, since 2005 matches the company's best operating margins" as of 2012.<sup>604</sup> We consider that these conservative assumptions do not therefore take into account that, had Airbus failed to launch the A380 and A350XWB at any time before 2013, starting in 2000 Airbus would have been, as explained above, under considerable increasing competitive pressures from Boeing in all three product markets that would have significantly and negatively affected its overall financial condition. In particular, we do not consider that an assumption of steady revenue growth of almost 5% by Airbus starting in 2005 has been demonstrated to be a reasonable assumption in the light of that counterfactual competitive picture. We further have doubts as to the impact of a significantly decreased order book on Airbus' credit rating.<sup>605</sup> We thus consider that the Wessels Report cannot be meaningfully used to illustrate Airbus' financial condition in the counterfactual post-2013 period.

#### **7.5.5.3.2.3 The Airbus Counterfactual Launch Statement**

7.336. In support of its arguments that Airbus could have launched the A380 in or around 2002 and the A350XWB in 2007/2008, the European Union offers the Airbus Counterfactual Launch Statement. The Launch Statement adapts the Wessels Report based on a counterfactual in line with that prescribed by the Appellate Body in the first compliance proceeding, i.e. one in which Airbus is presumed to have received pre-A380 LA/MSF but the effects of such subsidies are disregarded for the purpose of determining continued adverse effects. The Launch Statement therefore "modifies one critical assumption {of the Wessels Report} – that Airbus would have accumulated massive debt

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<sup>598</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.577 and fn 1588.

<sup>599</sup> European Union's first written submission, sections V.B.4.d.ii-iii.

<sup>600</sup> United States' first written submission, paras. 221-223; and second written submission, paras. 235-241.

<sup>601</sup> Wessels Report, (Exhibits EU-40, USA-47), p. 6.

<sup>602</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 5.361-5.383, and 5.652.

<sup>603</sup> Wessels Report, (Exhibits EU-40, USA-47), p. 4.

<sup>604</sup> Wessels Report, (Exhibits EU-40, USA-47), pp. 4-5.

<sup>605</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1749 ("Boeing and Airbus undoubtedly make future plans taking into account their current order book, and ... market actors will take the future {revenue} flows from those orders into account in evaluating each company").

by 2001 as a result of launching Airbus' pre-A380 aircraft programmes".<sup>606</sup> The Launch Statement then proceeds to use an adapted version of the Wessels Report's methodology to conclude that Airbus would have had sufficient debt-raising capacity to fund a launch of the A380 in 2001 and the launch of the A350XWB in 2006, i.e. essentially the times at which these two LCA were actually launched.<sup>607</sup>

7.337. The European Union offers the Counterfactual Launch Statement as purporting to demonstrate the time at which Airbus would have had the financial means with which to have launched the A380 and A350XWB in the counterfactual. The United States generally argues that, for various reasons including that it contradicts the adopted findings from both the original and first compliance proceedings, the Launch Statement is immaterial for purposes of this compliance proceeding.<sup>608</sup>

7.338. In our view, the Launch Statement does not demonstrate that Airbus would have launched the A380 and A350XWB in or around 2002 and in 2007/2008 respectively for two main and related reasons. First, the Launch Statement assumes the launch of the A380 in 2003, and from that date moving forward it assumes, in its financial analysis, the presence of the A380 programme.<sup>609</sup> This materially differs from the counterfactual under which we operate, i.e. that the A380 could not have been launched until end of 2013 at the earliest. The Launch Statement also fails to capture that the absence of the A380 during the 2000-2008 period would have placed Airbus under considerable competitive pressures from Boeing. Second, the Launch Statement ends its counterfactual analysis of Airbus in 2008 – six years before Airbus could have launched the A350XWB in the counterfactual we apply and during a period where Airbus would have been suffering from Boeing's competitive pressures. We thus consider that the Airbus Counterfactual Launch Statement cannot be meaningfully used to illustrate Airbus' financial condition in the counterfactual post-2013 period.

#### **7.5.5.3.2.4 Savings from the absence of A380 and A350XWB development costs**

7.339. The European Union asserts that, had Airbus delayed the launches of the A380 and A350XWB, Airbus would not have had to shoulder the large development costs of these LCA programmes during the delay period, the suggestion being that Airbus would have had that money available for other ends and/or generally available to stabilize its overall financial position. The European Union also puts forth evidence indicating that the A380 only reached a financial "break-even" point in 2015<sup>610</sup>, while the A350XWB had not done so by May 2019<sup>611</sup>, evidencing that Airbus continues to bear an overall financial burden from these programmes for many years following launch.<sup>612</sup>

7.340. The United States counters that the A380 and A350XWB programmes were still "cash-generating" even before their "break-even" points and thus benefitted Airbus financially.<sup>613</sup>

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<sup>606</sup> Airbus Counterfactual Launch Statement, (Exhibit EU-92 (HSBI/BCI)), para. 16.

<sup>607</sup> Airbus Counterfactual Launch Statement, (Exhibit EU-92 (HSBI/BCI)), para. 18.

<sup>608</sup> United States' second written submission, para. 230; and comments European Union's response to Panel question No. 70.

<sup>609</sup> Airbus Counterfactual Launch Statement, (Exhibit EU-92 (HSBI/BCI)), para. 24.

<sup>610</sup> According to the European Union, the A380 programme reached a "break-even point over recurring costs in 2015". (European Union's second written submission, para. 168. See also United States' first written submission, para. 65; FlightGlobal, "Airbus assures on A380 break-even this year, David Kaminski-Morrow", (27 February 2015), (Exhibit USA-16); Airbus Annual Report, 2017, p. 77 (Exhibit USA-9); and *Airbus may cut A380 production to six planes a year: sources*, Reuters, 11 December 2017, (Exhibit EU-90)). From these submissions and exhibits it is apparent that by "break-even" the European Union essentially means that cost of production per aircraft equals the revenues realized from that aircraft.

<sup>611</sup> European Union's comment on the United States' response to Panel question No. 67, para. 322 (citing *A350 closes on production-rate target*, David Kaminski-Morrow, FlightGlobal (27 April 2015), <<https://www.flightglobal.com/news/articles/a350-closes-on-production-rate-target-448127/>>, accessed 15 September 2019).

<sup>612</sup> United States' second written submission, para. 221. The United States argues that R&TD subsidies also meant that Airbus did not use funds exclusively through sales of the A320s and A330s. (United States' second written submission, para. 222). We recall that the R&TD subsidies are outside the scope of this compliance proceeding insofar as they relate to the United States' arguments that those measures have "product effects" that "complement and supplement" the effects of the LA/MSF subsidies.

<sup>613</sup> United States' second written submission, para. 220.

7.341. We recall that the development and production of LCA is "an enormously complex and expensive undertaking" generally requiring the sale of hundreds of a given LCA in order to make that LCA programme profitable.<sup>614</sup> In the counterfactual we apply, Airbus would have funded the launches of the A380 and A350XWB on market terms. The non-recurring costs of the A380 were expected to be [\*\*\*]<sup>615</sup> in 2000, and for the A350XWB, they were expected to be EUR 12 billion as late as 2009.<sup>616</sup> Moreover, Airbus' spending on the A380 and A350XWB programmes would have been particularly high in the initial phases of each programme before significant numbers of deliveries were even made.<sup>617</sup> We thus accept that Airbus, had it not launched the A380 and A350XWB before 2014, would not have had to fund these programmes, which would have entailed expenditures of many hundreds of millions of EUR before Airbus saw any appreciable revenues arise from sales of the A380 or A350XWB.<sup>618</sup>

#### **7.5.5.3.2.5 Conclusion – Airbus' counterfactual financial condition post-2013**

7.342. In the light of the above analysis, we discern two general competing considerations when assessing Airbus' counterfactual financial position after the end of 2013. On the one hand, Airbus' competitive position would have been generally compromised, resulting in diminished orders across all three product markets during the counterfactual 2000-2013 period. On the other hand, Airbus would not have had to fund the expensive A380 and A350XWB programmes during this time, thus being able to put financial resources that would have otherwise been directed to those programmes to other ends. Overall, and on balance, we consider that the negative consequences flowing from the former consideration would have outweighed advantages arising from the latter, at least by year-end 2013. This is so because Airbus' revenues would have been diminished through lower sales of LCA over this time-period. As explained, it would have become increasingly difficult for Airbus to make sales over time in the 2000-2013 period as Boeing's competitive advantages grew. Moreover, part of Airbus' available cash would likely have to have been channelled towards competitively pricing Airbus' remaining LCA models to enable them to compete with Boeing. Further, Airbus' significantly diminished order book would likely have made Airbus less attractive from investors' standpoint, making it harder for Airbus to raise debt and equity. In short, we consider that Airbus' overall financial condition in the counterfactual post-2013 period would have roughly reflected its overall competitive position, i.e. it would have been generally compromised. We note, however, that the paucity of evidence that the parties have provided us in this context prevents us from more meaningfully quantifying Airbus' financial position.<sup>619</sup>

#### **7.5.5.3.3 Airbus' counterfactual technological and production capabilities after 2013**

7.343. The European Union has indicated that the development and launch of the A380 represented a significant technological step forward for Airbus, particularly with respect to Airbus' competences in using composite materials. The European Union has also indicated that, even if the launches of the A380 and A350XWB had been delayed in the counterfactual to some extent, during the delay

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<sup>614</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1717. See A380 Business Case, (Exhibit EU-78 (HSBI)), p. 6 (giving estimated break-even point for the programme).

<sup>615</sup> A380 Business Case, (Exhibit EU-78 (HSBI)), p. 5, 7<sup>th</sup> bullet. See also Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, fn 2746 (describing the adopted convention of what the "cost" of an LCA programme is in that report).

<sup>616</sup> See Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.485, 6.1602, 6.1578, and 6.1710.

<sup>617</sup> The first compliance panel also indicates that, generally speaking, the most spending-intense periods in the launch of an LCA begins after the initial technologies are proven and production ramp-up begins. In the case of the A350XWB, this occurred roughly three years following launch. (Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1577-6.1578).

<sup>618</sup> We recall that the A380 was launched in 2000 but the first delivery was only made in 2007. The A350XWB was launched in December 2006.

<sup>619</sup> We note that the European Union has, in other contexts, provided certain of Airbus' financial information in the post-2013 period. (See European Union's submission regarding the wind-down of the A380 Programme, fn 1 (containing links to Airbus financial data from 2018)). None of this information, however, takes into account the significantly changed competitive position that Airbus would have faced in the counterfactual 2000-2013 period, and thus cannot be meaningfully used to estimate Airbus' counterfactual post-2013 financial condition.

period Airbus would still have made progress in developing its technological capabilities through processes other than developing and launching a specific LCA programme such as the A380.<sup>620</sup>

7.344. The United States also draws attention to the fact that, because the A380 represented a significant technological step forward for Airbus in many ways, the failure to launch the A380 at least until 2014 would have deprived Airbus of significant learning effects that would have hampered Airbus' ability to launch other advanced LCA models such as the A350XWB.<sup>621</sup>

7.345. In our view, any failure by Airbus to launch the A380 before any launch of the A350XWB would have deprived Airbus of valuable "learning" effects that arose from the A380 programme. The importance of "learning effects" to an LCA manufacturer's ability to design, develop, produce, and market LCA has been emphasized by panels and the Appellate Body throughout this dispute.<sup>622</sup>

7.346. The first compliance panel found that the A350XWB programme had benefitted from "learning" effects arising from previous Airbus LCA programmes in the following areas: (a) managerial know-how; (b) pre-existing infrastructure and engineering resources; (c) experience with composite materials; (d) specific structural features and on-board systems of the A350XWB; and (e) Airbus' ability to effectively market the A350XWB.<sup>623</sup> Although these "learning" effects were derived from multiple Airbus' pre-A350XWB LCA programmes, generally, the first compliance panel report documented that many were specifically derived from the A380 programme. For instance, the first compliance panel noted how the A350XWB programme benefited from the A380 programme in the following ways: (a) Airbus' experience with using composite materials in the context of the A380 programme<sup>624</sup>; (b) the A350XWB contained components and features derived from the A380<sup>625</sup>; (c) Airbus gained experience with using RSPs in the A380 programme<sup>626</sup>; and (d) Airbus changed its design and testing processes to avoid problems that had arisen with the A380 programme.<sup>627</sup> The Appellate Body agreed with the first compliance panel that the A350XWB derived significant "learning" effects from the A380 programme. These "learning" effects were especially important for Airbus in the context of the A350XWB programme, because of its high risk profile<sup>628</sup> given the use of unprecedented high amounts of composite materials<sup>629</sup>, the unprecedented high degree of outsourcing, and the fact that Airbus was attempting to significantly speed up the development and production of the A350XWB relative to prior Airbus LCA programmes.<sup>630</sup> In short, Airbus needed to draw on all its experience in order to produce the A350XWB.

7.347. However, we accept that even in the absence of the launch of the A380 and/or A350XWB, it would be unreasonable to expect Airbus' technological and production capabilities to have remained static. We agree that in the counterfactual, and at least up until year-end 2013, Airbus would likely have continued to make progress in these areas to some degree. This is so because Airbus would have continued to glean certain "learning" effects from its other LCA programmes, and in particular production of the A320 and A330. In this respect, we note that the European Union has presented evidence demonstrating that Airbus has continued to make investments and improvements in its A330 LCA family on an ongoing basis.<sup>631</sup> We also accept that Airbus could have made certain

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<sup>620</sup> European Union's response to Panel question No. 68, paras. 359-367.

<sup>621</sup> United States' comments on the European Union's responses to Panel question Nos. 68 and 72.

<sup>622</sup> See above, paras. 7.315 and 7.319.

<sup>623</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1754-6.1759.

<sup>624</sup> Panel Reports, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.473, 6.469, 6.1735-6.1736, and 6.1745, first bullet, 6.1746, sixth, ninth, tenth, and eleventh bullets, and para. 6.469. Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.492.

<sup>625</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1757 and fn 3222.

<sup>626</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, fn 811.

<sup>627</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1754.

<sup>628</sup> See Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.468-6.487.

<sup>629</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.469, 6.492, 6.1547, 6.1620-6.1621, 6.1728-6.1731, and 6.1621.

<sup>630</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.499-6.505.

<sup>631</sup> "[T]he A330neo benefits from continuous investment of over 150 million euro every year". (*A330 Family*, Airbus website, (Exhibit USA-50), p. 1). We recognize that the United States generally argues that the

progress in the area of composite materials, as the record confirms Airbus' ability to perform research and development with respect to such materials outside the context of a specific LCA programme like the A380.<sup>632</sup>

7.348. We do not exclude that technological and LCA-production-related advances that Airbus could have made during the counterfactual 2000-2013 period could have effectively replaced at least some of the "learning" effects that had actually arisen from the A380 programme. Indeed, we consider that, to some extent at least, it is reasonable to assume that this would have occurred particularly in the field of developing understanding of composite materials given the strong incentives that Airbus would have had to enhance its understanding of these materials with a view to future production of increasingly composite-based LCA. We note, however, that there is no appreciable evidence on the record indicating that Airbus could have reached the same stage of competence working with composite materials by year-end 2013 in the absence of the A380 programme. Indeed, we recall in this regard the European Union's own position that launching the A380 was a "very significant intermediate step, in terms of its learning effects, for Airbus' future work with composites", a competence that was important so that Airbus could "remain a viable competitor in the {LCA} duopoly".<sup>633</sup> There is also no evidence to suggest that Airbus could have replaced all "learning" effects arising from the A380 in the realm of managerial know-how through other processes and experiences in the counterfactual.<sup>634</sup> On the contrary, to the extent that the A380 raised several new and unexpected challenges which Airbus eventually resolved, it is clear that the same type of expertise and know-how could not have been developed in its absence.<sup>635</sup>

7.349. In sum, although we recognize that an Airbus company that did not launch the A380 and A350XWB in the years up to the end of 2013 would have continued to work and improve its technological and production capabilities, we do not believe those capabilities would have been of the same nature and quality that enabled the subsidized Airbus company to actually launch and develop the A350XWB between 2006 and 2013.

#### **7.5.5.3.4 Counterfactual demand**

##### **7.5.5.3.4.1 A380**

7.350. The United States argues that post-2013 demand levels for the A380 would have been materially lower than they were looking forward in time in 2000 for two main reasons. First, the United States asserts that the market for VLA was, generally, by around 2013, shifting away from large, four-engine VLA. Second, the United States asserts that the A380 would likely have been able to capture a proportionately smaller segment of the VLA market after 2013 than it could have going forward from 2000, as Boeing's incumbency advantages would have been reinforced during the previous 13 years, particularly with the introduction of the 747-8I in 2005.<sup>636</sup>

7.351. The European Union appears to agree that the demand levels for the A380 were low going forward from year-end 2013. The European Union, for instance, agrees with the United States that the LCA market was moving away from VLA during this time. The European Union also asserts that the weak demand levels for the A380 ultimately led Airbus to announce the wind-down of the entire A380 programme in 2019.<sup>637</sup>

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European Union has not demonstrated that such investments are not, at least in part, due to the effects of subsidies. (See section 7.5.5.4.4 below). For present purposes, we consider that whether or not Airbus has, in fact, funded, in whole or in part, research and development activities outside the specific context of the A380 and A350XWB programmes to be immaterial. At this point, we simply note that Airbus does indeed conduct such activities in the presence of resources with which to perform them.

<sup>632</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.516 and 6.1728.

<sup>633</sup> European Union's response to Panel question No. 68, para. 365.

<sup>634</sup> See paragraph 7.315 above.

<sup>635</sup> For example, Airbus discovered problems with its computer-design software in the context of the A380 programme, problems that resulted in serious A380 production delays and cost overruns. (Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.509).

<sup>636</sup> United States' second written submission, paras. 243-245; and comments on the European Union's response to Panel question No. 68, para. 263.

<sup>637</sup> European Union's comments on the United States' response to Panel question No. 73, para. 349.

7.352. The evidence before us reveals that the levels of demand for VLA, including the A380, were low after 2013. As the parties indicate, this was mainly due to the fact that customers were shifting away from four-engine VLA generally, and toward more fuel-efficient and flexible twin-aisle LCA.<sup>638</sup> Boeing's 2015 Current Market Outlook (CMO) indicates that the market for large twin-aisle aircraft (i.e. VLA) was on the decline. That CMO forecasts global demand for 540 large wide-body aircraft over the 20-year period 2015-2034<sup>639</sup>, in contrast to the A380 Business Case's projected higher demand [\*\*\*] moving forward from 2000.<sup>640</sup> We further note that the evidence on record indicates that the 747-8I (i.e. Boeing's only VLA for sale in the post-2013 period) had secured no orders in the 2014-2018 period, inclusive.<sup>641</sup> Also, as of May 2019, Boeing only had a backlog of four orders for the 747-8I.<sup>642</sup> Moreover, it was Airbus' failure to maintain an acceptable backlog of orders of the A380 that led Airbus to announce the discontinuation of the A380 programme in 2019.<sup>643</sup>

7.353. In the counterfactual world where Airbus had not launched the A380 and A350XWB, the incumbency advantages that Boeing would likely have accrued as a monopolist in the VLA product market would have made it more difficult for Airbus to secure orders for the A380 in the post-2013 period compared with the market it faced when it actually launched A380 in 2000. This would have been particularly so because, in reality, when the A380 was launched Boeing was marketing the 747-400. Boeing only launched its successor and improved 747 model, the 747-8I, in 2005<sup>644</sup>, which only became available for delivery in 2012.<sup>645</sup> Thus, in 2013, the A380 would have had to compete against a relatively advanced model of the 747 that was already being produced and available for delivery to customers.

7.354. In sum, in the counterfactual post-2013 period, Airbus would not only have faced low demand for VLA like the A380, generally, but would have likely found it difficult to capture an appreciable portion of what market demand for VLA did exist with the A380.

#### **7.5.5.3.4.2 A350XWB**

7.355. We consider that the demand outlook for twin-aisle LCA such as the A350XWB would have been significantly positive in the counterfactual beginning in 2014. This is so for four reasons. First, the 2015 Boeing CMO indicates that the twin-aisle market was still extremely valuable, i.e. worth USD 2.7 trillion over the next 20 years.<sup>646</sup> We further note that an expert report submitted by the European Union forecasts "substantial demand for A350XWB aircraft over the next 20 years" beginning in 2018.<sup>647</sup> Second, we recall that one of the reasons that the VLA market was declining in and around 2014 was that airlines were switching away from four-engine VLA in favour of comparatively more fuel-efficient twin-aisle VLA such as the A350XWB.<sup>648</sup> Third, we note that overall, orders for the A350XWB in 2014, 2015, 2016, and 2017 stood at 57, 16, 51, and 44 respectively,

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<sup>638</sup> United States' second written submission, para. 244.

<sup>639</sup> Boeing CMO 2015-2034, (Exhibit USA-153), pp. 24 and 27. Further, the European Union indicates that Airbus, in the post-2013 period, had forecast that although demand for VLA may improve, it would not do so until the mid-2020s. (European Union's first written submission, paras. 132, 137, 145, and 164; second written submission, para. 187; and comments on the United States' response to Panel question No. 37, para. 142. But see the European Union's opening statement at the meeting of the Panel, para. 32 ("Recent announcements by major customers confirm the view that there is no future interest or strategic fleet fit for the A380: Amedeo cancelled its orders of 20 aircraft, Qantas cancelled the outstanding 8 deliveries, and Qatar announced that it will retire its existing fleet of 10 aircraft by 2024, while Lufthansa and Air France announced that they will half their existing fleets by 2022 (Lufthansa from 14 down to 8 aircraft, and Air France from 12 down to 5)").

<sup>640</sup> A380 Business Case, (Exhibit-EU 78 (HSBI)), p. 13. We note that, although the Business Case apparently includes VLA [\*\*\*]. (See A380 Business Case, (Exhibit-EU 78 (HSBI)), pp. 13-14).

<sup>641</sup> Ascend Data, (Exhibit USA-138).

<sup>642</sup> United States' response to Panel question No. 73, para. 165.

<sup>643</sup> European Union's submission regarding the wind-down of the A380 programme, para. 1. (Updated Ascend Data, (Exhibit USA-158)). Some of these may have been cancelled.

<sup>644</sup> *Boeing Launches New 747-8 Family*, Boeing website, <<https://boeing.mediaroom.com/2005-11-14-Boeing-Launches-New-747-8-Family>>, accessed 25 September 2019.

<sup>645</sup> United States' second written submission, para. 244 (citing Boeing press release, "Boeing Delivers First Lufthansa 747-8 Intercontinental", (25 April 2012), (Exhibit USA-126)).

<sup>646</sup> Boeing CMO 2015-2034, (Exhibit USA-153), p. 27.

<sup>647</sup> TradeRx A350XWB LA/MSF Report, para. 3 (Exhibit EU-11 (HSBI/BCI)).

<sup>648</sup> See paragraph 7.352 above. See also Boeing CMO 2015-2034, (Exhibit USA-153), p. 27 (indicating decreasing demand for VLA).

indicating, in our view, steady and significant demand levels.<sup>649</sup> Finally, we discern no argumentation or evidence on the record materially indicating that, beginning in 2014, the demand for twin-aisle LCA such as the A350XWB would have been anything but positive.

7.356. Balanced against this positive overall demand picture, however, is the fact that, in the counterfactual, by 2014 Boeing would have accumulated significant incumbency positions with many customers through its superior competitive position in the 2000-2013 period. Thus, we consider that Airbus would have had a relatively more difficult time selling the A350XWB to customers in and immediately after 2014 than it did in 2006 when it was actually launched.

#### **7.5.5.3.4.3 A330neo**

7.357. We consider that the overall demand outlook for the A330neo would have been positive in the counterfactual beginning in 2014. Indeed, we note that, in reality, the A330neo was launched in 2014, presumably because demand was sufficient to justify a launch. We further note that overall demand for modern twin-aisle LCA appeared particularly strong, generally, during this time-period. Airbus documentation reveals perceived strong demand of the A330neo<sup>650</sup>, and we detect no argumentation or evidence on the record to indicate that this would not be the case. As with the A350XWB, however, this overall positive demand picture would have to be viewed in the light of Boeing's significant incumbency advantages in the counterfactual, which would have made it more difficult for Airbus to sell the A330neo beginning in 2014 in the counterfactual relative to how difficult it was in 2014 in reality.

#### **7.5.5.3.5 Conclusions – counterfactual market presence of the A380, A350XWB and A330neo after 2013**

7.358. In the light of the foregoing analysis, we turn to assess in conclusion, whether, in the absence of the A380 and A350XWB LA/MSF subsidies, the A380, A350XWB, and A330neo programmes would have been sufficiently attractive (i.e. "viable") for Airbus to pursue in the counterfactual post-2013 time-period.<sup>651</sup> We set out our conclusions in respect to each LCA programme in turn, making reference – as needed and insofar as the limited evidence on the record allows – to the same four factors that the first compliance panel used in its "viability" analysis concerning the A350XWB in the absence of A350XWB LA/MSF: (a) Airbus' expected ability to effectively fund the relevant programme with financing on market terms; (b) the relevant programme's base-case forecast NPV; (c) the strategic reasons for Airbus to pursue the relevant programme; and (d) the relevant programme's risks.

##### **7.5.5.3.5.1 A380**

7.359. With respect to the viability of the A380 programme in the counterfactual post-2013 period, we begin our analysis by noting that the A380 Business Case, which was relied upon by Airbus to launch the A380, was authored in the year 2000<sup>652</sup> – 14 years before the counterfactual post-2013 time-period began. It was thus authored under very different competitive circumstances than those that would have faced Airbus in the counterfactual post-2013 period. Thus, while the A380 Business Case indicates a positive expected NPV for the A380 programme at the time of actual launch even in the absence of A380 LA/MSF<sup>653</sup>, we do not believe this assessment can be relied upon to conclude that a launch of the A380 in the post-2013 period would have been expected to generate a positive NPV. We believe this to be the case mainly because of the lack of demand that would exist for the A380 in the post-2013 period.

7.360. We recall that demand for the A380 was weak in the post-2013 period. Indeed, the European Union has submitted evidence indicating that, as of December 2017, the most recent order for A380s had occurred in February 2014 by leasing company Amedeo. After December 2017,

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<sup>649</sup> Updated Ascend Data, (Exhibit USA-158).

<sup>650</sup> See Airbus A330neo Presentation, (Exhibit USA-51), slide 3.

<sup>651</sup> See Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1637 (using the term "viability" in a similar way).

<sup>652</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1922.

<sup>653</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1943.

Emirates ordered 20 A380s, [\*\*\*] the 2014 Amedeo order.<sup>654</sup> We further note that as of May 2019, Boeing only had a backlog of four orders for the 747-8I.<sup>655</sup> We see no reason to believe that Airbus would have secured any additional A380 orders in the counterfactual in this time-frame, and no particular reason to believe that Airbus would have earlier predicted receiving any in this time-frame. This contrasts with the situation as it existed in the 2000-2003 period in reality, during which Airbus received 112 orders for the A380.<sup>656</sup> We recall that "orders are crucial for a newly launched LCA model to be successful, due to the substantial economies of scale in production as well as the steep learning curve cost reductions generated thereby".<sup>657</sup> We thus discern no convincing reason to think that Airbus would have launched the A380 until Airbus could either secure or expect to secure immediate and substantial interest from customers.<sup>658</sup>

7.361. Moreover, we consider that the perceived strategic benefits of the A380 programme beginning in 2014 in the counterfactual would likely have been rather low. With the lagging sales of 747-8I aircraft in this time-period, it appears unlikely to us that Airbus would have viewed competing with Boeing in the VLA market as such an imperative as it was in the early 2000s when demand for VLA was much higher. This would have been all the more so given the enormous expenses associated with the A380 programme and the attendant risks associated with any LCA programme of that magnitude.<sup>659</sup>

7.362. We note that Airbus received an order for 20 A380s in 2018 from Emirates. This, however, does not convince us that Airbus would have launched the A380 at that time. This is so for three main reasons. First, Airbus presumably would have been aware that overall demand for the A380 was weak due to the low level of interest from customers in VLA in the immediately preceding years. Second, we have doubts as to whether Airbus would have won this 2018 Emirates order in the first place. This is so because Emirates had been a consistent A380 (rather than 747) customer for many years, with A380 orders stretching back to 2001.<sup>660</sup> In the absence of the A380 we consider it highly likely that Emirates would have ordered Boeing VLA (and/or perhaps larger 777s<sup>661</sup>) instead. Thus, Boeing would likely have had a significant VLA incumbency advantage with Emirates by 2018 in the counterfactual. In the light of such considerations, we consider it less than certain that Emirates would have, in 2018, introduced an entirely new Airbus VLA into its fleet in the counterfactual. Finally, we note that 2018 was only one year before Airbus' decision, in reality, to discontinue the entire A380 programme in the light of weak demand.<sup>662</sup> We consider it likely, therefore, that Airbus would have judged VLA demand as being too weak at that time to justify a launch of the A380.

7.363. Our conclusions regarding Airbus' competitive and financial condition in the counterfactual post-2013 period reinforce this view. In this period, Airbus' competitive position would have been compromised in all three product markets. Airbus' financial situation would most likely have approximated its competitive position, i.e. it would have been generally compromised. We have found nothing on the record indicating that Airbus could have, in that set of circumstances, launched *both* the A380 and the A350XWB essentially simultaneously. In short, in and immediately around 2014 in the counterfactual, Airbus would have had to choose between launching the A380 or a twin-aisle aircraft like the A350XWB. We consider it highly unlikely that Airbus would have opted to spend billions of euros on launching an A380 programme in the face of such weak demand for the A380.

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<sup>654</sup> See paragraph 7.435 below. See also European Union comments on the United States' response to Panel question No. 58, Table at para. 268; and Airbus, "Status of A380 orders and deliveries", (Exhibit EU-94 (BCI)).

<sup>655</sup> United States' response to Panel question No. 73, para. 165.

<sup>656</sup> Including 78 in 2001 and 34 in 2003. (Updated Ascend Data, (Exhibit USA-158)).

<sup>657</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1726.

<sup>658</sup> We recall that in Airbus predicted that demand for VLA would pick up again in the mid-2020s. (European Union's first written submission, paras. 132, 137, 145, and 164; second written submission, para. 187; and comments on the United States' response to Panel question No. 37, para. 142). This may have been so in the counterfactual as well, but we discern nothing on the record suggesting that Airbus would have launched the A380 in the hopes of receiving orders in ten years' time.

<sup>659</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1943 (explaining that "the A380 was a massive project with respect to both the technical aspects of development of the aircraft, and its associated costs") and 7.1948 (noting the risks associated with LCA programmes such as the A380).

<sup>660</sup> Updated Ascend Data, (Exhibit USA-158).

<sup>661</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, fn 3326 (explaining that "there is evidence that the larger versions of the 777 may also at times challenge for sales in the market for {VLA}").

<sup>662</sup> See section 7.5.5.5 below.

Rather, we consider that Airbus would have opted to launch a twin-aisle LCA programme for the reasons discussed in the next two sections.<sup>663</sup>

7.364. In sum, we conclude that the A380 would not likely have been available for either order or delivery at any time in the counterfactual post-2013 period. Accordingly, we find that the A380 LA/MSF subsidies continue to be a "genuine and substantial" cause of the market presence of the A380.

#### **7.5.5.3.5.2 A350XWB**

7.365. In assessing the viability of the A350XWB in the counterfactual post-2013 period, we first note that the strategic benefits of launching the A350XWB would likely have been high. After enduring heightened competitive pressures from Boeing across all three product markets for multiple years, and with the market for VLA too weak to warrant a launch of the A380, we consider that Airbus would have sought to launch as strong a competitor to the Boeing 777 and 787 that Airbus could as quickly as possible. Such a launch would not only be directed to re-establishing Airbus' competitiveness in the valuable twin-aisle LCA market, but also reduce Boeing's incumbency advantages and Boeing's ability to cross-subsidize prices across the product markets, thus shoring up Airbus' competitive position in the single-aisle market as well. Indeed, we recall that such concerns over Airbus' general competitive position were significant factors for Airbus in determining to launch the A350XWB in reality. Thus, we consider that Airbus' would have been strongly motivated to launch the A350XWB in the counterfactual post-2013 period.

7.366. We also consider that Airbus would have perceived sufficient general market demand for twin-aisle LCA like the A350XWB. Indeed, the main reason why Boeing would have been able to exert heightened competitive pressures on Airbus during the counterfactual 2006-2013 time-period was that Boeing would have had more advanced and fuel-efficient twin-aisle LCA, which were achieving high levels of sales, and that lacked a meaningful competitor from Airbus.<sup>664</sup> Balanced against this overall demand picture, however, is the fact that if Airbus had launched the A350XWB after 2013 in the counterfactual, then Airbus would have encountered a different competitive environment than it did in 2006. The key changed aspect of this environment, in our view, is that Boeing would have accumulated significant incumbency advantages in the twin-aisle LCA product market over the past eight years. This would have limited to some degree the demand for the A350XWB. On balance, however, we consider that the overall strong demand for twin-aisle LCA like the A350XWB would have provided a strong demand for the A350XWB.

7.367. We have some reservations about whether Airbus' financial condition in the post-2013 period would have enabled Airbus to launch and fund a programme as expensive and risky as the A350XWB with financing instruments on market terms, which would not have had the "risk-transferring" qualities that LA/MSF possessed.<sup>665</sup> There is, however, little material evidence before us to address this point, and, as discussed above, it is difficult to use the existing findings on the record to meaningfully discern what Airbus' financial resources would have been in the counterfactual post-2013 period. Therefore, we recall our earlier conclusion that, as a general matter, Airbus' financial condition in the post-2013 period would have reflected its competitive position, which would have been generally compromised.<sup>666</sup> Overall, in the light of the above considerations, we consider that it would be reasonable to proceed on the basis of a scenario in which Airbus would have launched the A350XWB in early 2014. This is so because Airbus would have had significant business and strategic incentives to launch the A350XWB in order to re-establish Airbus' competitiveness in the twin-aisle market and thereby boost its overall business position. However, exactly how such a launch would have proceeded in the years that followed is, in our minds, uncertain.

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<sup>663</sup> Airbus terminated the A300 and A310 programmes in 2007 and terminated the A340 programme in 2011. (Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1062 and fn 2596).

<sup>664</sup> We note that, in the 2006-2013 period Boeing received 604 net orders for 777s and 731 net orders for 787s. (See Updated Ascend Data, (Exhibit USA-158)).

<sup>665</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1934 (explaining that "LA/MSF functions as a risk transferring device which significantly alters the economics of a decision to launch any given LCA programme").

<sup>666</sup> See paragraph 7.326 above.

7.368. On the one hand, there are reasons to believe that the counterfactual post-launch period would have been difficult for Airbus. For instance, Airbus' generally compromised financial position may have slowed the pace of the programme. Furthermore, given the high risk profile and technical challenges of the A350XWB, the absence of any experience with the A380 suggests that the development and production phases of the programme would likely have been comparatively difficult for Airbus in the counterfactual, leading to cost overruns and delays. On the other hand, we accept the European Union's proposition that, at least to some degree, during the counterfactual 2006-2013 period, Airbus would have continued to evolve into a generally more integrated company and would have made gains in managerial and technological expertise even in the absence of the A380 programme.<sup>667</sup> However, in our assessment, such gains would have been insufficient to entirely overcome the financial and technological shortcomings in Airbus' position at the time of the counterfactual launch of the A350XWB in 2014. It is likely, therefore, that Airbus would have faced post-launch production difficulties – albeit perhaps not rising to the full magnitude of those affecting the A380 in its development and production phases.<sup>668</sup> Such difficulties would likely have resulted in some cost overruns and production delays, which would have negatively impacted Airbus' ability to attract customers for the A350XWB in the same numbers that Airbus actually attracted during this time-period. This is especially so because Boeing would have been already able to offer more attractive delivery positions for the 777 and 787, both of which were already available for delivery in the post-2013 period, at a time when Boeing had already secured significant incumbency advantages with customers in prior years. In such a scenario, we accept as reasonable the European Union's submission that the time-gap between the counterfactual launch of the A350XWB and the time by when Airbus could have actually delivered the A350XWB would have been at least eight years (i.e. the same time lag between launch and the first delivery of the A350XWB in reality).<sup>669</sup> Applying the European Union's estimate to a counterfactual launch in 2014 would mean that the first actual delivery of an A350XWB would take place after the present day.

7.369. In conclusion, we find that in the counterfactual scenario described above, Airbus would have launched the A350XWB in 2014, but that it would not have been able to offer delivery positions until at least eight years after its counterfactual launch date. We also consider that Airbus could only have offered the A350XWB on less attractive terms (at least in terms of delivery positions) than Boeing could offer its competitive twin-aisle LCA in the counterfactual post-2013 period.

#### **7.5.5.3.5.3 A330neo**

7.370. The United States argues that the A380 and A350XWB LA/MSF subsidies had "indirect" effects on the A330neo, which was launched in 2014. Specifically, the United States asserts that aspects of the A380 and A350XWB have been incorporated into the A330neo, and that the A380 and A350XWB programmes put Airbus in the financial position where it could launch the A330neo.<sup>670</sup>

7.371. The European Union argues that the United States has not established the causal pathway through which the A380 and A350XWB LA/MSF subsidies have had relevant effects on the A330neo programme, has not identified the subsidy that caused the unidentified effect, and generally has submitted insufficient evidence with which to support its arguments, particularly in the light of the

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<sup>667</sup> European Union's first written submission, para. 350.

<sup>668</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.509-6.510.

<sup>669</sup> The European Union argues that the time gap between the 2007/2008 launch of the A350XWB in its proposed counterfactual, and first delivery would have been as it was in reality, i.e. eight years. (European Union's comments on the United States' response to Panel question No. 74, paras. 364 and 374-376. See also European Union's first written submission, para. 348; second written submission, para. 459; and opening statement at the meeting of the Panel, para. 79).

<sup>670</sup> United States' first written submission, paras. 236-238; second written submission, paras. 232-234; response to Panel question No. 67; and comments on the European Union's response to Panel question No. 67. According to the United States, the A330neo programme includes two variants, i.e. the A330-800 (intended to compete against the Boeing 787-8) and the A330-900 (intended to compete against the Boeing 787-9). (Airbus A330neo Presentation, (Exhibit USA-51), slide 14).

fact that there are no adopted findings regarding the effects of any subsidies on the A330neo programme.<sup>671</sup>

7.372. We note that the United States makes two basic arguments in this context: (i) that the A330neo's launch would not have been financially possible for Airbus in the absence of the A380 and A350XWB (i.e. the A330neo benefitted from "financial effects" arising from the A380 and A350XWB programmes<sup>672</sup>); and (ii) that features of the A380 and A350XWB were incorporated into the A330neo (i.e. the A330neo benefitted from "learning" effects arising from the A380 and A350XWB programmes).

7.373. With respect to the "financial effects" of the A380 and A350XWB programmes on the A330neo, we recall our previous conclusion that, in the counterfactual post-2013 period, Airbus' financial situation would have reflected its overall competitive position, i.e. it would have been generally compromised. This would have been the result of a process that began in 2000 with the absence of an A380 launch and with Boeing exerting increasing competitive pressures across all three product markets over time. Thus, we accept that, in the counterfactual, after 2000 it would likely have become increasingly difficult for Airbus to fund large-scale and expensive projects as its LCA orders and deliveries (and the financial resources derived from such orders and deliveries) decreased. This suggests that Airbus would have had difficulty launching the A330neo in 2014 and thus may not have been able to make the A330neo available for order and delivery at present day in the counterfactual, compared with the position of Airbus in reality.

7.374. On balance, however, we consider that such a conclusion is unwarranted on the basis of the arguments and evidence before us. We note that the United States has presented little evidence indicating just how expensive the A330neo was to develop and launch. The United States offers one exhibit indicating that "the A330neo benefits from continuous investment of over 150 million euro every year – integrating the latest developments from the A350 XWB and A380 Families".<sup>673</sup> However, this was an investment made over time, and we note that the A330 family was launched in 1987.<sup>674</sup> We further do not know how much of that money was actually necessary for Airbus to develop the technologies to launch and produce the A330neo. The A330neo is a variant developed from a pre-existing A330 platform, and we note other evidence that the United States submits indicates that its improvements are "incremental".<sup>675</sup> In that context, we recall that, in the counterfactual period of 2000-2013, Airbus would have likely been trying to retain what market share it had in the twin-aisle LCA product market. We consider that, in the absence of the launch of the A350XWB before 2014, making incremental improvements to Airbus' only remaining line of twin-aisle LCA following 2011 (i.e. the A330) would have been a clear and perhaps necessary strategy. Thus, it seems to us that Airbus would have had strong incentives to pursue an incrementally improved A330 in the counterfactual. Thus, in the absence of an additional showing that the A330neo presented a significant financial challenge to Airbus, we do not believe the programme would not have been pursued as and when it actually was for financial reasons in the absence of the A380 and A350XWB programmes.

7.375. We turn to examine the extent to which the A330neo benefitted from "learning" effects that arose from the A380 and A350XWB programmes. Our review of the exhibits the United States offers reveals the following specific "learning" effects: (a) the cabin design of the A330neo benefitted from the cabin that was designed for the A350XWB<sup>676</sup>; (b) an indication that "Trent 1000-TEN architecture with Trent XWB technology" (the "Trent 1000" is the A330neo engine)<sup>677</sup>; (c) "{i}mproving lift-to-

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<sup>671</sup> European Union's second written submission, para. 440 (quoting Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1492 and 6.1446 (fn 2470)); and comments on the United States' responses to Panel question No. 60, paras. 276-280, and No. 67.

<sup>672</sup> Financial effects are where "the previous subsidized financing enables launches of subsequent models by alleviating the capital burdens that would otherwise exist". (Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1724-6.1725 and 6.1761-6.1771).

<sup>673</sup> *A330 Family*, Airbus website, (Exhibit USA-50), p. 1.

<sup>674</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1719.

<sup>675</sup> Airbus press release, "Airbus launches the A330neo", (14 July 2014), (Exhibit USA-53), p. 1.

<sup>676</sup> Airbus A330neo Presentation, (Exhibit USA-51); Airbus press release, "AirAsia X orders 34 more A330neo", (19 July 2018), (Exhibit USA-54); Airbus website, "A330-900", (Exhibit USA-55); and Airbus website, "A330-800", (Exhibit USA-78).

<sup>677</sup> Airbus A330neo Presentation, (Exhibit USA-51), slide 6.

drag ratio using A350 wing philosophy"<sup>678</sup>; (d) the "Electrical Bleed Air System" was "{a}lready successfully in service on A380"<sup>679</sup>; and (e) the A330neo has "A350 XWB inspired winglets".<sup>680</sup>

7.376. We consider that, without a further showing of how difficult it would have been to develop such features in the absence of the A380 and A350XWB, the submitted evidence is insufficient to demonstrate that the A330neo, in the counterfactual, would not have been available for order or delivery today. Again, such improvements appear incremental in nature, the A330 had been in the market for many years and thus allowing for much time to achieve such incremental advances. It is further unclear to us that such improvements could or would not have been made by an Airbus company motivated to incrementally improve its A330 line of LCA as it fought to sustain its competitive position in the twin-aisle market in the counterfactual.<sup>681</sup>

7.377. For the foregoing reasons, we find that the United States has failed to demonstrate that A380 and A350XWB LA/MSF subsidies are a genuine and substantial cause of the current market presence of the A330neo, i.e. that, in the counterfactual, the A330neo would not have been launched and brought to market as and when it actually was.

#### **7.5.5.4 Factors allegedly attenuating the causal link between A380 and A350XWB LA/MSF subsidies and any present adverse effects**

7.378. The European Union has identified the following factors which it argues attenuate the causal link between the A380 and A350XWB LA/MSF subsidies and any present adverse effects: (a) the "timing out" of the direct effects of the A380 LA/MSF subsidies on the continued market presence of the A380, and of the indirect and direct effects of A380 and A350XWB LA/MSF subsidies, respectively, on the continued market presence of the A350XWB; (b) the reduction in the benefit of A380 and A350XWB LA/MSF subsidies as a result of the amortisation of each of the A380 and A350XWB LA/MSF subsidies over time; (c) the reduction in the benefit of A380 and A350XWB LA/MSF subsidies as a result of the less than full drawdown of principal available under the French and UK A350XWB LA/MSF agreements and of the French A380 LA/MSF agreement; and (d) the supplanting of the "product" effects of A380 and A350XWB LA/MSF subsidies as a result of significant "non-subsidised investments" in, and related to, the A380 and A350XWB programmes

7.379. At times, the European Union appears to describe these four factors as "non-attribution factors", "the passage of time", and "intervening events". However, regardless of characterization, the substantive point the European Union raises in relation to each factor is the same – namely, that these factors, whether individually or collectively, compel the conclusion that A380 and A350XWB LA/MSF subsidies are no longer a genuine and substantial cause of present adverse effects. We address each of these factors in turn.

##### **7.5.5.4.1 "Timing out" of the effects of the A380 and A350XWB LA/MSF subsidies**

7.380. The European Union argues that both the direct and indirect effects of A380 and A350XWB LA/MSF subsidies have "timed out" and thus can longer be said to cause adverse effects at present. The European Union predicates this argument on the counterfactual launch dates of the A380 and A350XWB being in or immediately around 2002 and 2007, respectively. In this counterfactual scenario, the European Union argues that Airbus would have had many years to begin production of the A380 and A350XWB such that both the A380 and A350XWB would be available for sale and delivery in the counterfactual, exactly as they are in reality, thereby severing any causal link between A380 and/or A350XWB LA/MSF and any alleged present adverse effects.<sup>682</sup>

7.381. The European Union's submission rests entirely on the counterfactual launches of the A380 and A350XWB having occurred in the years preceding the end of 2013. These submissions have already been rejected in the preceding sections of this Report, where we concluded that the market presence of the A380 and A350XWB in the absence of the LA/MSF subsidies would have occurred in

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<sup>678</sup> Airbus A330neo Presentation, (Exhibit USA-51), slide 7.

<sup>679</sup> Airbus A330neo Presentation, (Exhibit USA-51), slide 9.

<sup>680</sup> Airbus press release, "Airbus launches the A330neo", (14 July 2014), (Exhibit USA-53).

<sup>681</sup> We also note that, in our estimation, such evidence falls short of the quantity and quality of evidence upon which the first compliance panel used to determine that the A350XWB significantly benefitted from Airbus' prior LCA programmes.

<sup>682</sup> European Union's second written submission, paras. 296-299 and 415-459.

the post-2013 period. Insofar as any specific issues remain regarding the present impact of those "product effects" that may further be construed as pertaining to this European Union argument, we consider that our analyses in section 7.5.6 below would effectively cover them. We thus do not address this issue further here.

#### **7.5.5.4.2 "Amortization" of the benefit of the A380 and A350XWB LA/MSF subsidies**

7.382. The European Union argues that the amortisation of the benefit of the A380 and A350XWB LA/MSF subsidies must be taken into account in determining whether those subsidies are a genuine and substantial cause of present adverse effects. In so arguing, the European Union cites to multiple statements made by the Appellate Body in the original and first compliance proceedings purportedly standing for the propositions that a panel should consider the issue of amortization in a compliance proceeding because amortization may affect the link that a complaining party is seeking to establish between the provision of the subsidy and its alleged effects. The European Union also offers an expert report by its consultant, TradeRx, which concludes that the benefit from all A380 and A350XWB LA/MSF subsidies has either fully or partially amortized.<sup>683</sup>

7.383. The United States argues that the European Union's argument conflates two issues, i.e. an approach for determining the "life" of a subsidy, on the one hand, and the "passage of time" as an intervening event that may attenuate the causal link between a subsidy and present adverse effects, on the other hand. According to the United States, the Appellate Body has also neither adopted amortization as a tool with which to measure the life of a subsidy nor equated the life of a subsidy with the complete dissipation of its effects. Further, the United States argues that the European Union offers no explanation as to how the amortization of benefit in this context impacts the relevant "product effects" of LA/MSF subsidies, especially considering that those effects stem from the fact that LA/MSF allowed Airbus to launch the A380 and A350XWB in the first place. Finally, the United States notes that in no prior proceedings in this dispute was the amortization of any LA/MSF subsidy materially linked to that subsidy's ability to cause adverse effects at any particular time.<sup>684</sup>

7.384. As we understand it, the rationale underlying the approach adopted in the TradeRx report the European Union relies upon is that the effects of a subsidy may be determined by identifying the extent to which the subsidy recipient was expected to benefit from that subsidy at the time it was originally granted. The TradeRx report determines the expected duration and extent of this benefit for the LA/MSF subsidies by identifying the magnitude of the outstanding repayments under each A380 and A350XWB LA/MSF contract, on the basis of the expectations held by the contracting parties at the time the LA/MSF agreements were concluded.

7.385. Although we do not exclude the possibility that a methodology focused on the amortization of the benefit of a subsidy may be one way of determining the duration and extent of the effects of a particular subsidy, we do not consider that such an approach would be appropriate in the case of the A380 and A350XWB LA/MSF subsidies. Our fundamental objection to the application of the European Union's proposed approach in this context is that it would not reflect the nature of the "product" effects found to have been caused by the A380 and A350XWB LA/MSF subsidies. The European Union's approach would imply that the effect of the subsidies could only arise as and when the below-market repayments are made. However, throughout the different stages of this dispute, and once again in this proceeding, LA/MSF has been found to have a "product" effect – simply put, the A380 and A350XWB LA/MSF subsidies have been found to have enabled Airbus to launch, develop and bring to market the A380 and A350XWB before the post-2013, when they otherwise could not have been launched by Airbus. Thus, an approach to identifying the effects of the LA/MSF

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<sup>683</sup> European Union's first written submission, paras. 303-307 and 374-375; second written submission, paras. 353-368; and comments on the United States' response to Panel question No. 62. In making these arguments, the European Union cites, *inter alia*, the Appellate Body Reports in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.386, fn 932 and *EC and certain member States – Large Civil Aircraft*, paras. 706-707, 709-710, 713-714, and 1236.

<sup>684</sup> United States' first written submission, paras. 192-197; second written submission, paras. 192-197; and response to Panel question No. 62. The United States also asserts that the [\*\*\*] amendments to the A380 LA/MSF and German A350XWB LA/MSF agreements extend the life and increases the amount of the LA/MSF measures, and thus these subsidies would not have been reduced through amortization in the way that the European Union describes. (United States' second written submission, para. 197).

subsidies that is focused on the duration and extent of the expected repayments would be inconsistent with the nature of the effects caused by the LA/MSF subsidies.

7.386. The European Union's approach is also problematic because it is focused on the *ex ante* expectations concerning the magnitude and duration of repayments, *without* also taking into account the unplanned amendments to the LA/MSF agreements that modified disbursement and repayment schedules.

7.387. Accordingly, we find that the European Union's submissions and expert evidence fails to demonstrate that the effects of the A380 and A350XWB LA/MSF subsidies have been attenuated simply because the anticipated repayment of the principal provided under the LA/MSF arrangements has been partially or fully made.

#### 7.5.5.4.3 "Less than full drawdown" of certain LA/MSF subsidies

7.388. The European Union argues that if Airbus draws down less than the full amount to which Airbus is entitled under a given LA/MSF measure, this is an intervening event that "*affects the projected value* of the subsidy as determined under the *ex ante* analysis".<sup>685</sup> The European Union asserts that the Appellate Body explained that "'{s}uch {intervening} 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'".<sup>686</sup> Therefore, according to the European Union, the Panel must account for the fact that the diminished magnitude of the subsidy "attenuates the present causal link between non-withdrawn A350XWB MSF and any alleged present adverse effects"<sup>687</sup> because "all things being equal, there will be a certain correspondence between the magnitude of a subsidy, and the degree of adverse effects that it is capable of causing".<sup>688</sup> The European Union submits data indicating that Airbus drew down less than the full amount to which Airbus was entitled under the French A380 and French and UK A350XWB LA/MSF contracts.<sup>689</sup>

7.389. The United States argues that the European Union has not established that less-than-full drawdown of a given LA/MSF measure reduces the benefit of that measure because the benefit of LA/MSF is determined at the time the measures were granted. Further, the United States asserts that, even assuming that the benefit and/or magnitude of an LA/MSF measure has been reduced through some process such as less-than-full drawdown, the European Union offers no explanation as to how that reduction impacts the relevant effects of LA/MSF subsidies considering that those effects stem from LA/MSF's ability to allow Airbus to launch the A380 and A350XWB in the first place. Finally, the United States accepts that considerations surrounding the magnitude of a subsidy might be relevant in some instances, but, given the causal pathway of the "product" effects of LA/MSF and at the present stage of the Panel's analysis, the present magnitude of any particular LA/MSF measure is no longer relevant in this proceeding.<sup>690</sup>

7.390. We accept that, as a general matter, the magnitude of a given subsidy (whether the magnitude of the "benefit" and/or "financial contribution") may affect that subsidy's ability to cause adverse effects at a given time. We note, however, that in the case of the funds not drawn-down under the French A380 and A350XWB LA/MSF contracts, the reason given for Airbus not resorting to that funding is that the development and production of A380 and [\*\*\*] was not pursued by Airbus.<sup>691</sup> The fact that Airbus did not fully draw-down the funding promised under the French A380 and A350XWB LA/MSF agreements was not the result of any decision on the part of Airbus to use other funding to launch and develop the [\*\*\*] envisaged under the LA/MSF contracts. Rather, it appears that Airbus launched and developed those [\*\*\*] of A380 and A350XWB using the amount of funding provided for under the relevant arrangements. In other words, the funding available under the French A380 and A350XWB LA/MSF agreements was used precisely as expected to launch,

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<sup>685</sup> European Union's first written submission, para. 365. (emphasis original)

<sup>686</sup> European Union's first written submission, para. 365 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 709).

<sup>687</sup> European Union's first written submission, para. 299.

<sup>688</sup> European Union's second written submission, para. 346.

<sup>689</sup> European Union's first written submission, paras. 295-296 and 367; and second written submission, paras. 329-352.

<sup>690</sup> United States' first written submission, paras. 188-191; second written submission, paras. 178-191; and comments on the European Union's response to Panel question No. 61.

<sup>691</sup> European Union's second written submission, paras. 330-331.

develop and bring to market the A380 and A350XWB. The "product" effects of the French LA/MSF subsidies were not attenuated by the less-than-full draw-down of the principal available under the French LA/MSF contracts.

7.391. The European Union has not explained why Airbus decided to draw-down less than it was entitled to under the UK A350XWB LA/MSF agreement. We note, however, that the UK A350XWB LA/MSF agreement envisaged that Airbus would produce the same [\*\*\*] identified in the French A350XWB LA/MSF contract.<sup>692</sup> Thus, to the extent that Airbus' decision not to develop and produce [\*\*\*] resulted in less work and cost for Airbus UK (the recipient of the principal disbursed under the UK LA/MSF agreement), our conclusion would be similar to that we have come to in relation to the less-than-full draw-down of the principal under the French LA/MSF contracts. We note, in this regard, that the role of Airbus UK in the A350XWB project was to design and produce its wings – which may well have been different and required additional work and cost to design and produce for the A350XWB [\*\*\*] that Airbus decided not to pursue.<sup>693</sup>

7.392. In any case, in the light of the "product" effects of the LA/MSF subsidies, it is difficult to see how a decision not to draw-down the full amount of principal under the French and UK LA/MSF agreements years after they were concluded and following the development of the initial versions of the A350XWB, could have impacted Airbus' decision in 2006 to launch and develop those versions of A350XWB. Airbus' decision to proceed with the A350XWB was based on the assurance that the full amount of funding provided for under the respective LA/MSF agreements would have been available. Moreover, Airbus actually developed and brought the A350XWB to market in reliance on the below-market funding provided under the LA/MSF agreements. Thus, it cannot be deduced from the mere fact that Airbus drew-down less than the full amount of available funding under the French and UK LA/MSF contracts that Airbus would have developed the same models of LCA at the same time, or shortly thereafter, in the absence of the provision of the LA/MSF subsidies.

7.393. Thus, in the light of the above considerations, we see no basis to conclude that the "product" effects of the French A380 and A350XWB LA/MSF subsidies and the UK A350XWB LA/MSF subsidies were attenuated by the less-than-full draw-down of the principal available under the respective LA/MSF contracts.

#### **7.5.5.4.4 "Non-subsidized investments" in the A380 and A350XWB**

7.394. The European Union asserts that Airbus made significant non-subsidized investments in the A380 and A350XWB programmes since their respective launches in 2000 and 2006, totalling a substantial amount that is HSBI over the [\*\*\*] period.<sup>694</sup> According to the European Union, these investments, and not LA/MSF, explain the current market presence and competitiveness of the A380 and A350XWB mainly because these investments constitute "intervening events" that "supplant" any relevant indirect effects arising from A380 and/or A350XWB LA/MSF, thus attenuating the causal link between the LA/MSF subsidies and any alleged present adverse effects. The European Union also argues that: (i) contrary to the United States' assertions, the adopted findings in the first compliance proceeding regarding non-subsidized investments do not support rejecting the European Union's arguments regarding alleged non-subsidized investments here; (ii) the United States has failed to demonstrate that the alleged non-subsidized investments are, rather, "subsidized" investments; and (iii) the United States has not demonstrated any relationship between the timing of the counterfactual launch of the A380 and A350XWB and Airbus' financial ability to make these non-subsidized investments. The European Union also rejects the United States' characterization of these investments as "routine" as irrelevant.<sup>695</sup>

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<sup>692</sup> UK A350XWB LA/MSF Agreement, (Exhibit EU-28 (BCI)), Article 1.

<sup>693</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.681 and 6.754.

<sup>694</sup> European Union's first written submission, paras. 314-316 and 387-389; Annual Continuing Support and Continuing Development for the A350XWB (2013-2018), Proprietary Information Extracted from Airbus' Accounts, (Exhibit EU-30 (HSBI)); and Annual Continuing Support and Continuing Development for the A380 (2013-2018), Proprietary Information Extracted from Airbus' Accounts, (Exhibit EU-53 (HSBI)).

<sup>695</sup> European Union's first written submission, paras. 308, 310-311, 383-391, and 392-396; second written submission, paras. 369-414; responses to Panel question Nos. 64, 65, and 66; and comments on the United States' response to Panel question No. 63. The European Union also asserts that such cash would

7.395. The European Union asserts that Airbus has invested in the continuing development of the A380 programme, including incremental improvements and investments into product and performance improvements and the cost of overcoming significant delays in the production of the A380. The European Union maintains that these costs were unforeseen in the A380 business case and relevant LA/MSF agreements.<sup>696</sup> The European Union further alleges that Airbus has invested in continuing support for the A380 programme to maintain and enhance its production lines, including investments into technical support; jigs and tools maintenance; and specific, non-recurring activities related to production improvements and aircraft maintenance<sup>697</sup>; and the development of the A380 Plus variant.<sup>698</sup>

7.396. The European Union also maintains that Airbus has invested in continuing development of the A350XWB programme, including: (i) incremental technological improvements to the A350XWB<sup>699</sup>; (ii) continuing support for the A350XWB programme to maintain and enhance its production lines, including investments into technical support; (iii) jigs and tools maintenance; and (iv) specific, non-recurring activities related to production improvements and developments in aircraft maintenance.<sup>700</sup> The European Union cites [\*\*\*] for the development of the A350-900ULR variant<sup>701</sup> and the Beluga XL, the latter of which transports the composite wings used in the production of the A350XWB from the UK to France.<sup>702</sup>

7.397. The United States argues that the European Union has not demonstrated that the relevant investments are, in fact, "non-subsidized". The United States further asserts that the European Union's arguments should be rejected because the only reason Airbus could make any such investments is because A380 and A350XWB LA/MSF allowed Airbus to launch those two aircraft programmes in the first place. The United States stresses in this context that these investments are "incremental" and "routine" improvements in LCA design and production that build on the foundation provided by LA/MSF. This is so according to the United States because "even if a counterfactual non-subsidized Airbus could – and would – have launched and brought to market the A380 and A350XWB in the period since 2013, it would not have had the accumulated experience and financial resources that allowed real-world Airbus to undertake the post-launch investments the EU identifies".<sup>703</sup> The United States notes that the first compliance panel and the Appellate Body in the first compliance proceeding rejected similar European Union arguments regarding the relevance of alleged non-subsidized investments under similar circumstances. Moreover, the United States asserts that even if the European Union showed that non-subsidized investments are a genuine and substantial cause of the current market presence of the A380 and A350XWB, this does not pre-empt a finding that LA/MSF is also such a cause. The United States also recalls that in the first compliance proceedings, it was only the indirect effects arising from the A300 and A310, i.e. the first two Airbus LCA programmes, that had been found to have been supplanted by later-in-time developments, and thus it is unconvincing that non-subsidized investments could supplant learning effects arising from the A380 and A350XWB so quickly in this case.<sup>704</sup>

7.398. At the outset we recall that we have determined that Airbus would not have launched the A380 at *any time* in the absence of the A380 LA/MSF subsidies. This is so because the Appellate Body's findings establish that the A380 would not have been launched before year-end 2013, and, after 2013, demand for the A380 would have been insufficient to warrant a launch. We note, therefore, that any alleged non-subsidized investments that Airbus in fact made in the A380 programme were only possible because of the "product" effects of A380 LA/MSF subsidies, which enabled Airbus to launch, develop and bring to market the A380 in the years following 2000.

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have come from the A320 and A330 sales because the A380 programme was loss-generating for Airbus until very recently. (European Union's second written submission, para. 407).

<sup>696</sup> European Union's first written submission, paras. 384 and 388.

<sup>697</sup> European Union's first written submission, para. 387.

<sup>698</sup> European Union's first written submission, paras. 385-386.

<sup>699</sup> European Union's first written submission, para. 316.

<sup>700</sup> European Union's first written submission, para. 315.

<sup>701</sup> European Union's first written submission, paras. 316-320.

<sup>702</sup> European Union's first written submission, paras. 321-323.

<sup>703</sup> United States' second written submission, para. 200.

<sup>704</sup> United States' first written submission, paras. 202-206; second written submission, paras. 198-225; and comments on the European Union's responses to Panel question No. 63, No. 64, No. 65, para. 227, and No. 66.

7.399. Accordingly, we find that the alleged non-subsidized investments in the A380 programme cannot alter the conclusion that A380 LA/MSF subsidies continue to be a "genuine and substantial" cause of the market presence of the A380.

7.400. Turning to the alleged non-subsidized investments in the A350XWB programme, we first note that the A350XWB programme could have been launched only after 2013 in the counterfactual. Again, this follows from the Appellate Body's findings in the first compliance dispute, and our own assessment of the viability of the launch of the A350XWB after 2013. Thus, for analytic purposes, we examine the relevance of alleged non-subsidized investments with respect to two time-periods, i.e. before and after 1 January 2014.

7.401. With respect to the time-period before 2014, we recall that the nature of the alleged non-subsidized investments in the A350XWB programme, according to the European Union, is related to the *continued development and support* of the A350XWB programme.<sup>705</sup> These are investments in the A350XWB programme that by nature occur *post-launch*. In the counterfactual, however, the A350XWB programme would not have been launched before year-end 2013. Thus, none of these investments would have been made in the counterfactual before year-end 2013. Accordingly, the only reason to explain the making of the alleged non-subsidized investments is the "product" effect of the relevant LA/MSF subsidies, which enabled Airbus to launch, develop and bring to market the A350XWB in the years between 2006 and 2013.

7.402. With respect to the counterfactual time-period after 2014, we recall our prior findings that in the counterfactual post-2013 period Airbus would have launched the A350XWB but would have encountered production difficulties. This would mainly have been so due to the fact that Airbus would have had comparatively less technical and managerial expertise in the absence of the A380 programme, and that Airbus would have been in a compromised financial condition. Thus, in order to find that the alleged non-subsidized investments have attenuated the "product" effects of LA/MSF in relation to the A350XWB, we would need to be convinced that those investments would have: (i) taken place; and (ii) been of a kind that would enable Airbus to overcome the obstacles that a non-subsidised Airbus would have faced in the post-2013 period to a degree that would materially alter this post-launch scenario.

7.403. We note that the specific alleged non-subsidized investments the European Union raises in this dispute in relation to the A350XWB all took place between [\*\*\*]. One set of investments enhanced Airbus' production processes and tooling for the A350XWB programme, and increased its production capacity.<sup>706</sup> Another set of investments focused on making incremental improvements to the A350XWB in order to sustain and renew its competitiveness. One example provided by the European Union is the development of the ultra-long-range A350XWB-900ULR. According to the European Union, the A350XWB-900ULR enjoys a number of advantages over other A350XWB models, in terms of range, maximum take-off weight and modified fuel systems and is attractive to potential customers.<sup>707</sup> The third specific investment the European Union identifies is the development and production of the Beluga XL, which supports the production of the A350XWB by transporting its components. The European Union explains that Airbus' investment was necessary because the five Beluga aircraft in service had proven insufficient to meet Airbus' increased transport capacity requirements, as a result of, *inter alia*, the A350XWB production ramp-up.<sup>708</sup>

7.404. We recognize that the specific investments the European Union identifies were significant and we have no reason to believe they have not assisted Airbus in the marketing, sale and delivery of the A350XWB. However, it is clear from the European Union's explanations that Airbus decided to make those investments only after at least seven years' experience with the A350XWB that would not have been launched and developed prior to end of 2013 without the A380 and A350XWB LA/MSF subsidies. In the counterfactual post-launch scenario for the A350XWB that we have found to be most likely, Airbus would not have needed to make the same types of investments at the same time because it would have been in only the early stages of the development and production process. Airbus would not have initially found its five in service Belugas to be insufficient because it would not have needed to ramp-up production in the same way that it actually did. In the initial years after launch, Airbus would not have invested in the A350XWB-900ULR because it would have concentrated

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<sup>705</sup> European Union's first written submission, paras. 315-320.

<sup>706</sup> European Union's first written submission, para. 315.

<sup>707</sup> European Union's first written submission, para. 316.

<sup>708</sup> European Union's first written submission, para. 321.

on the base A350XWB model first. Airbus would not have had the more than seven years of "learning" with this model that it had when it invested in the A350XWB-900ULR. Finally, it is also significant to note that Airbus undertook the relevant investments at a time when it was generating revenue from sales of the A350XWB. This, of course, would not be the case in the post-2013 counterfactual. Thus, we do not believe that an unsubsidized Airbus would have had the financial resources in the post-2013 period to make the same investments in the A350XWB. In short, because Airbus would have only started to develop and bring an unsubsidized base model of the A350XWB to market at the time of the relevant investments, we do not believe that Airbus would have had business incentive or the technical and financial resources, to pursue the same investments in the post-2013 counterfactual period.

7.405. Accordingly, we find that the alleged non-subsidized investments in the A350XWB programme cannot alter the conclusion that A380 and A350XWB LA/MSF subsidies continue to be a "genuine and substantial" cause of the market presence of the A350XWB.

#### 7.5.5.5 "Wind-down" of the A380 programme

7.406. The European Union argues that the announcement to "wind down" the A380 programme on 14 February 2019 is an "intervening event" that achieves the removal of all adverse effects related to the market presence of the A380. We recall that in our assessment of the European Union's withdrawal claims above<sup>709</sup>, we found that the European Union is entitled to have us consider its contention concerning the circumstances surrounding Airbus' termination announcement, although we rejected its argument that the announcement, on its own, resulted in the withdrawal of the A380 LA/MSF subsidies by bringing their lives to an end.

7.407. The European Union submits that the "wind-down" announcement has brought to an end the marketing life of the A380, which has brought to an end the "direct effects" of the A380 LA/MSF subsidies as well as the "indirect effects" of the A380 LA/MSF subsidies on the A350XWB. Resulting from this, the European Union argues that the "wind down" announcement has removed the specific adverse effects that were found by the first compliance panel to arise during the 2011-2013 period. In this regard, the European submits that "most of the A380 orders during the December 2011-2013 period that formed the basis of the first compliance panel's findings of significant lost sales {in the VLA market} have now been delivered or cancelled", leaving only eight to be delivered by the end of December 2019 and only two by the end of 2020 until the final delivery is made in July 2021.<sup>710</sup> The European Union argues that these "few remaining deliveries" "signal the end of a programme, rather than the enhancement of the advantages normally accruing to the manufacturers on the delivery of aircraft from a healthy programme with a robust competitive future", which is "not 'sufficient to establish the {continued} existence of' the significant lost sales and impedance found in the first compliance proceedings".<sup>711</sup> Of the six country markets for which the first compliance panel found impedance in the VLA market, the European Union submits that five will never again receive a delivery of the A380, subsidised or otherwise, and that for the UAE market, "a definitive course of action has been set in motion that will ensure that the deliveries of the A380 will completely cease within the next two years".<sup>712</sup>

7.408. Finally, the European Union argues that that there is no longer any basis to find that the A350XWB LA/MSF subsidies are a genuine and substantial cause of significant lost sales in the twin-aisle market, "{g}iven the withdrawal of the A380 MSF subsidies and the removal of their indirect effects".<sup>713</sup> According to the European Union, the first compliance proceedings did not result in a finding that the A350XWB LA/MSF subsidies *considered alone* were a genuine and substantial cause of any of the types of adverse effects enumerated by the compliance panel, but these were only considered *in an aggregate manner* with the "indirect effects" of the A380 LA/MSF subsidies. Thus, under the European Union's argument, since the "indirect effects" have allegedly come to an end,

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<sup>709</sup> See paragraph 7.252 above.

<sup>710</sup> European Union's submission regarding the wind-down of the A380 programme, para. 55; opening statement at the meeting of the Panel, para. 22; and Airbus, "Status of A380 orders and deliveries" (Exhibit EU-94 (BCI)).

<sup>711</sup> European Union's opening statement at the meeting of the Panel, para. 27 (quoting Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 5.341).

<sup>712</sup> European Union's opening statement at the meeting of the Panel, para. 28. See also European Union's submission regarding the wind-down of the A380 programme, paras. 44, 51, and 59-62.

<sup>713</sup> European Union's submission regarding the wind-down of the A380 programme, para. 65.

there is no longer support for the first compliance panel's finding that aggregated effects of the A380 LA/MSF subsidies and A350XWB LA/MSF subsidies are a genuine and substantial cause of adverse effects.<sup>714</sup>

7.409. The United States questions the degree of certainty surrounding whether the A380 programme will terminate in the future, arguing that there is no assurance that Airbus would not choose to continue the programme in the future if Emirates or another customer approached Airbus about a large A380 order. In any event, the United States argues that the European Union errs in arguing that the "direct effects" or "indirect effects" of A380 LA/MSF have ended or that Airbus' announcement constitutes a "step" that has removed the adverse effects in either the VLA or twin-aisle LCA markets. Rather than ending their effects, the United States argues that the wind-down demonstrates that the existing LA/MSF continues to cause adverse effects. At most, the United States maintains that the projection of final deliveries could establish that market phenomena caused by the A380 LA/MSF will cease in only 2021. Yet, the United States contends that the European Union cannot succeed in demonstrating compliance today by showing that it *expects* to achieve compliance at a future point in time. In addition, the United States argues that the first compliance panel made clear that indirect effects generated in the past could continue to support the present-day market presence of other Airbus models, and scope and learning effects are not limited to only pre-launch learning and knowledge. For example, the United States submits that the first compliance panel cited "evidence that certain Airbus and Airbus suppliers' facilities (e.g. Airbus' Nantes facility and Aerolia's Picardie facility) had become specialized in manufacturing certain LCA structures by virtue of their experience with prior Airbus programmes, and applied such skills in connection with the A350XWB programme".<sup>715</sup> The United States submits that these facilities and their specialization in manufacturing structures was not limited to pre-launch activities.<sup>716</sup>

7.410. The United States argues that there is no support for the European Union's argument that Airbus' announcement constitutes a "step" that has removed the adverse effects in the VLA or twin-aisle LCA markets. Regarding the VLA market, the United States considers the fact that deliveries remain outstanding provides evidence that impedance is continuing. In addition, the United States contends that the European Union has "repeatedly viewed ... outstanding deliveries as continuing significant lost sales" and, therefore, outstanding deliveries further demonstrate that the A380 LA/MSF subsidies presently are continuing to cause adverse effects.<sup>717</sup> The United States argues that the European Union's argument concerning adverse effects in the twin-aisle LCA market is based on a flawed premise that "indirect effects" of the A380 LA/MSF subsidies no longer continue in the twin-aisle market.<sup>718</sup>

7.411. As an initial matter, we do not share the United States' view that prospects remain high for Airbus to reverse its decision to terminate the programme, or that it would prove practicable to do so. In our assessment of the European Union's withdrawal claims above<sup>719</sup>, we highlighted the recent history of the A380, which suggested that the A380 programme's short to medium-term prospects were not good at the time of the A380 LA/MSF amendments, further suggesting that there would not likely be sufficient demand in the future to justify reviving A380 production after the final standing orders are fulfilled. In addition, the United States appears to discount the significance of the effect of the "wind-down" announcement on the outlook of potential buyers on the future viability of operating an A380 fleet going forward. Finally, we note that the European Union has submitted evidence concerning the planned phase down of the A380 programme<sup>720</sup> [\*\*\*].<sup>721</sup>

7.412. We nevertheless disagree with the European Union's assessment of the implications of the termination announcement of the A380 programme for our examination of whether the A380 and A350XWB LA/MSF subsidies are a genuine and substantial cause of present adverse effects. We do

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<sup>714</sup> European Union's submission regarding the wind-down of the A380 programme, para. 65.

<sup>715</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1755.

<sup>716</sup> United States' second written submission, paras. 89-91 and 294; and response to Panel question

No. 37.

<sup>717</sup> United States' second written submission, para. 293, citing First Written Submission of the European Union in *US – Large Civil Aircraft (Article 21.5 – EU) (Panel)*, para. 1339.

<sup>718</sup> United States' second written submission, para. 298.

<sup>719</sup> See paragraphs 7.227- 7.229.

<sup>720</sup> European Union's opening statement at the meeting of the Panel, para. 31; [\*\*\*], slide 18 (p. 10), (Exhibit EU-101 (BCI)).

<sup>721</sup> European Union's opening statement at the meeting of the Panel, para. 31; and Letter from [\*\*\*], (Exhibit EU-102 (BCI)).

not consider that Airbus' 14 February 2019 wind-down announcement achieves, on its own, the removal of the *present* adverse effects of the A380 LA/MSF subsidies as they relate to the market presence of the A380. In our view, those effects will persist while Airbus continues to produce and deliver the A380. It follows, correspondingly, that the wind-down announcement cannot also achieve the removal of any *present* adverse effects of the A380 and A350XWB LA/MSF subsidies as they relate to the market presence of the A350XWB. Accordingly, we find that the wind-down announcement does not, alone, demonstrate that the European Union has achieved compliance with the obligation in Article 7.8 to "take appropriate steps to remove the adverse effects".

### **7.5.6 The impact of the "product" effects of A380 and A350XWB LA/MSF subsidies in the relevant product markets**

7.413. In the previous sections of our analysis, we found that the "product" effects of A380 and A350XWB LA/MSF subsidies are a "genuine and substantial" cause of the *current* market presence of the A380 and A350XWB families of LCA. We determined that in the absence of the A380 and A350XWB LA/MSF subsidies, Airbus would not have launched the A380 at all, and that Airbus would have launched the A350XWB in 2014 but would have faced difficulties in the post-launch period. In this section we assess the extent to which the A380 and A350XWB LA/MSF subsidies, through these effects, are a "genuine and substantial" cause of adverse effects in the form of serious prejudice within the meaning of Article 5 and 6 of the SCM Agreement.

7.414. The United States claims that the United States LCA industry presently suffers the following adverse effects in the VLA and twin-aisle product markets: (a) significant lost sales within the meaning of Article 6.3(c) of the SCM Agreement; and (b) impedance and/or displacement within the meaning of Article 6.3(a)-(b) of the SCM Agreement.<sup>722</sup> For the reasons explained elsewhere in this Report, we will make this determination with particular emphasis on the temporal period following 2013, but cognizant of the fact that we must do so in order to discern whether such subsidies continue to cause *present* adverse effects.<sup>723</sup>

7.415. The European Union argues that the United States has selected specific "examples" of alleged lost sales, impedance, and displacement without explaining on what basis it has selected those, and not other, examples. According to the European Union, this "lack of transparency ... deprives the European Union from engaging, with argument and evidence, on the appropriateness of the factors that the United States relied upon in choosing the examples of alleged lost sales and displacement and/or impedance".<sup>724</sup> Further, the European Union asserts that the United States' approach prevents the European Union from engaging on the subject of "whether those factors are, in fact, present in the sales and markets at issue, or whether the market phenomena are, instead, driven by other factors, and in particular by non-subsidy (non-attribution) factors".<sup>725</sup>

7.416. The United States offers the delivery and order data described in the sections below to support its position that the European Union has not "take{n} appropriate steps to remove the adverse effects" of the A380 and A350XWB LA/MSF subsidies. For the reasons explained in our review of this data, we believe it is sufficient basis, in the light of our findings on the continued "product" effects of the A380 and A350XWB LA/MSF subsidies, to determine the merits of the United States continued adverse effects claims.

7.417. Finally, before proceeding with our analysis, we consider it important to explain one of the implications of our finding that, in the counterfactual, the A350XWB would plausibly have been launched before the present day. In our view, this finding does not automatically preclude the possibility that sales and/or deliveries of the subsidized A350XWB could still be the cause of present-day adverse effects. This is so because delayed delivery positions resulting from the delayed launch of the unsubsidised A350XWB would have impacted Airbus' ability to win sales and make deliveries in the relevant period. Lost sales could still be occurring, for example, insofar as customers would have found counterfactually later-in-time promised delivery dates (resulting from a delayed launch)

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<sup>722</sup> United States' second written submission, paras. 256-289.

<sup>723</sup> See section. 7.5.3 above.

<sup>724</sup> European Union's response to Panel question No. 71, para. 377. See also European Union's response to Panel question No. 71, para. 390.

<sup>725</sup> European Union's response to Panel question No. 71, para. 377. See also European Union's response to Panel question No. 71, para. 390.

so unattractive that the customers would have chosen to order Boeing over Airbus LCA in the counterfactual.<sup>726</sup>

#### 7.5.6.1 Impedance and/or displacement

7.418. With respect to "displacement", the Appellate Body has explained that:

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" – i.e. "there is a substitution effect between the subsidized product and the like product of the complaining Member". 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). 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.<sup>727</sup>

7.419. With respect to "impedance", the Appellate Body has explained that:

The term "impede", as the Appellate Body found, "connotes a broader array of situations than the term 'displace'". 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". Evidence that sales would have increased more or declined less than they did in the absence of the subsidy would indicate the existence of impedance within the meaning of Articles 6.3(a) and 6.3(b). 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". 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.<sup>728</sup>

7.420. The United States claims that, in the light of the "product" effects of the challenged LA/MSF subsidies and the conditions of competition in the LCA industry, the United States LCA industry currently suffers serious prejudice in the form of displacement and/or impedance of its LCA products

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<sup>726</sup> We note that the record of this dispute supports the proposition that customers as a general matter find later-in-time delivery positions less attractive than earlier-in-time positions. (European Union's first written submission, paras. 323 ("The Beluga XL investment allows Airbus to accelerate production, and thereby to sustain increasing overall production of Airbus aircraft, including the A350XWB models, thus maintaining its ability to ensure timely delivery slots for customers") and 389 (indicating that "timely production enabled by these investments allows Airbus to offer attractive delivery positions for its A380 customers, which further enhances the competitiveness of the aircraft"); second written submission, para. 436 ("Such delayed delivery positions would then have made Airbus' offers in sales campaigns in the December 2011-2013 reference period less attractive"); and comments on the United States' response to Panel question No. 74, para. 367 ("... the European Union agrees that counterfactual delivery positions offered to airline or leasing company customers are important in their decisions on which aircraft to order")). See also Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1264 and 6.1325; Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)*, paras. 5.405 and 5.408 (explaining that "in the context of the LCA market, determining whether the forms of serious prejudice under Article 6.3 at issue ... still exist ... requires assessing whether any acceleration effects from {relevant} subsidies also had an impact on the timing of first delivery" of a relevant LCA).

<sup>727</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.679. (fns omitted) See also Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1071 (explaining that "{a}n analysis of displacement should assess whether this phenomenon is discernible by examining trends in data relating to export volumes and market shares over an appropriately representative period").

<sup>728</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.680. (fns omitted)

in the VLA and/or twin-aisle product markets in China, the European Union, Korea, Singapore, and/or the UAE, within the meaning of Articles 6.3(a) and 6.3(b) of the SCM Agreement. To support its claims, the United States has introduced evidence of Airbus and Boeing delivery volumes and market shares in the VLA and twin-aisle product markets for each year from 2011 to 2018. Relying upon these data, the United States argues that in the absence of the "product" effects of A380 and A350XWB LA/MSF subsidies, the United States LCA industry's delivery volumes and market shares would have been higher than they actually were in each of the relevant geographic markets.

#### 7.5.6.1.1 VLA product market

7.421. With respect to the VLA product market, the United States claims the existence of displacement and/or impedance in the VLA markets of the European Union, Korea, and Singapore. For the VLA market in the United Arab Emirates the United States claims the existence only of impedance. The United States' claims are based on the following delivery and market share data, in which all Airbus deliveries are deliveries of A380s and all Boeing deliveries are deliveries of 747-8Is.<sup>729</sup>

**Table 1 – Market for very large LCA (European Union)<sup>730</sup>**

<b>Delivery Data</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
Boeing Volume (Units)	0	4	5	6	4	0	0	0
<b>Boeing Market Share</b>	<b>0.0%</b>	<b>50.0%</b>	<b>55.5%</b>	<b>42.9%</b>	<b>50.0%</b>	<b>0.0%</b>	<b>0.0%</b>	<b>0.0%</b>
Airbus Volume (Units)	6	4	4	8	4	2	0	0
<b>Airbus Market Share</b>	<b>100.0%</b>	<b>50.0%</b>	<b>45.5%</b>	<b>57.1%</b>	<b>50.0%</b>	<b>100.0%</b>	<b>0.0%</b>	<b>0.0%</b>

**Table 2 – Market for very large LCA (Korea)<sup>731</sup>**

<b>Delivery Data</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
Boeing Volume (Units)	0	0	0	0	4	3	3	0
<b>Boeing Market Share</b>	<b>0.0%</b>	<b>0.0%</b>	<b>0.0%</b>	<b>0.0%</b>	<b>66.7%</b>	<b>60.0%</b>	<b>100.0%</b>	<b>0.0%</b>
Airbus Volume (Units)	5	1	2	4	2	2	0	0
<b>Airbus Market Share</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>33.3%</b>	<b>40.0%</b>	<b>0.0%</b>	<b>0.0%</b>

**Table 3 – Market for very large LCA (Singapore)<sup>732</sup>**

<b>Delivery Data</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
Boeing Volume (Units)	0	0	0	0	0	0	0	0
<b>Boeing Market Share</b>	<b>0.0%</b>	<b>0.0%</b>	<b>0.0%</b>	<b>0.0%</b>	<b>0.0%</b>	<b>0.0%</b>	<b>0.0%</b>	<b>0.0%</b>
Airbus Volume (Units)	3	5	2	0	0	0	2	3
<b>Airbus Market Share</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>0.0%</b>	<b>0.0%</b>	<b>0.0%</b>	<b>100.0%</b>	<b>100.0%</b>

<sup>729</sup> We recall that both the original panel, first compliance panel, and the Appellate Body in the original and first compliance proceedings accepted the use of LCA delivery, rather than order, data to evidence the phenomena of impedance and displacement in this dispute. (See Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1153; *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.41, fn 2054; Panel Reports, *EC and certain member States – Large Civil Aircraft*, para. 7.1748; and *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, Tables 20-22). We thus accept the use of delivery data to evidence impedance and/or displacement in this compliance proceeding.

<sup>730</sup> Ascend Data, (Exhibit USA-138).

<sup>731</sup> Ascend Data, (Exhibit USA-138).

<sup>732</sup> Ascend Data, (Exhibit USA-138).

**Table 4 – Market for very large LCA (UAE)<sup>733</sup>**

<b>Delivery Data</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
Boeing Volume (Units)	0	0	0	0	0	0	0	0
<b>Boeing Market Share</b>	<b>0.0%</b>							
Airbus Volume (Units)	5	11	13	14	19	23	11	8
<b>Airbus Market Share</b>	<b>100.0%</b>							

7.422. With respect to impedance in the four geographic markets above, in the light of our earlier findings regarding the "product" effects of A380 and A350XWB LA/MSF subsidies, it is apparent that in the absence of the effects of the challenged LA/MSF subsidies, the volume of deliveries and market shares that would have been achieved by the United States' LCA industry would have been higher in each of the four geographic markets than were their actual levels in the years 2013-2018, i.e. the years for which the United States has supplied delivery and market-share data. This is so because in the counterfactual, from the year 2000 onwards and until present day Boeing would have had a monopoly in the VLA product market and the 747-8I, which is "sufficiently substitutable" with the A380<sup>734</sup>, and would have been the only other VLA available for delivery. This, in our minds, is a sufficient basis for concluding that Boeing would have made the deliveries actually captured by the A380.

7.423. The fact that Boeing's deliveries and market shares in each of the four relevant geographic markets would have been higher in the 2013-2018 period overall, however, does not necessarily convince us that there is *present* impedance in all of these markets. We note, in particular, that in the European Union and Korea, the last A380 deliveries occurred in 2016. This is, in our minds, insufficiently recent to demonstrate *present* impedance. Thus, on balance, we consider the pre-2017 deliveries made to the European Union and Korea to be an insufficient basis upon which to find *present* impedance.

7.424. The situation is different with respect to Singapore and the UAE, however. Airbus delivered A380s to both Singapore and the UAE in both of the two most recently completed calendar years, i.e. 2017 and 2018. These deliveries, in our minds, are sufficiently recent to evidence *present* impedance. We underline that, with respect to the UAE, the European Union has indicated that deliveries are essentially ongoing, and Airbus plans to make still more A380 deliveries into the UAE market in the future. We consider, therefore, that the case for *present* impedance in the UAE in the VLA market to be particularly strong.<sup>735</sup>

7.425. In undertaking our assessment of the United States' claims of displacement, we are guided by the Appellate Body's statement that "displacement" "is a situation where imports or exports of a like product are *replaced* by the sales of the subsidized product". We agree with this statement and understand it to follow from the ordinary meaning of the word "displace", which includes "to remove, replace with something else, take the place of, supplant".<sup>736</sup> Thus, we understand the notion of "displacement" for the purpose of Article 6.3(a) and (b) of the SCM Agreement to be premised on the existence of product deliveries or a market share of some kind which are supplanted by new or increased deliveries, and/or market share, of a subsidized like product.

<sup>733</sup> Ascend Data, (Exhibit USA-138).

<sup>734</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.36, 6.38, and 6.41.

<sup>735</sup> We note that the European Union argues that the small number of outstanding deliveries to Emirates is insufficient to demonstrate impedance, and that although there is no requirement that impedance be "significant", impedance must be "discernible". (European Union's opening statement at the meeting of the Panel, para. 27; comments on the United States' response to Panel question No. 70; United States' response to Panel question No. 70 (responding to the European Union's argument). We establish impedance based on actual deliveries rather than potential future deliveries and consider the identified instances of impedance to be "discernible".

<sup>736</sup> The New Shorter Oxford English Dictionary, 4<sup>th</sup> Edn, L.Brown (ed.) (Clarendon Press, 1993), vol. 1, p. 698.

7.426. Turning to the data, we note that in Singapore, Boeing had a 0% market share in each of the years 2014-2018. In the absence of any market trend indicating that Boeing had any existing sales or market share in the VLA segment that was replaced by deliveries of the A380, we conclude that there is an insufficient basis to find present displacement in Singapore. In the European Union, Boeing's market share was 42.9%, 50%, 0%, 0%, and 0% in the years 2014-2018, respectively. Airbus' market shares during the same years were 57.1%, 50%, 100%, 0% and 0%. We consider this overall picture to be insufficient to establish a *present* trend evidencing a relatively recent replacement of the 747-8I with the A380.<sup>737</sup> We reach the same conclusion with respect to Korea. Boeing's market share in Korea during the years 2014-2018 reveals an upward trend, starting at 0% in 2014, climbing to 66.7% in 2015, staying roughly level at 60% in 2016, and then climbing again to 100% in 2017 before falling to 0% in 2018 – which was also the Airbus' market share for 2018. We consider this overall picture insufficient to establish a *present* trend evidencing a replacement of the 747-8I with the A380.<sup>738</sup>

7.427. We therefore find that the A380 LA/MSF subsidies are a genuine and substantial cause of present impedance in the VLA product markets in the Singapore and the UAE, but that the evidence does not demonstrate present impedance in the European Union or Korea. Moreover, in the light of the absence of any evidence showing that Boeing's market shares and deliveries were *recently* replaced from the VLA markets in the European Union, Korea, and Singapore, we find that the A380 LA/MSF subsidies are not a genuine and substantial cause of *present* displacement in those geographic markets.

#### 7.5.6.1.2 Twin-aisle product market

7.428. The United States claims impedance of twin-aisle product markets in China, the European Union, Korea, and Singapore. These claims are based on delivery data of Boeing and Airbus twin-aisle LCA, found in the tables below.

**Table 5 – Market for twin-aisle LCA (European Union)**

Delivery Data	2011	2012	2013	2014	2015	2016	2017	2018
Boeing 767	0	0	0	0	0	0	0	0
Boeing 777	7	6	3	4	5	5	2	0
Boeing 787	0	2	12	11	18	28	15	30
Boeing Total	7	8	15	15	23	33	17	30
<b>Boeing Market Share</b>	<b>46.7%</b>	<b>30.8%</b>	<b>65.2%</b>	<b>75%</b>	<b>76.7%</b>	<b>66%</b>	<b>54.8%</b>	<b>65.2%</b>
Airbus A330neo	0	0	0	0	0	0	0	3
Airbus A350 XWB	0	0	0	0	3	7	9	9
A330neo & A350 XWB Market Share	0%	0%	0%	0%	9%	13.2%	29%	26.1%
Airbus Total	8	18	8	5	7	20	14	16
<b>Airbus Market Share</b>	<b>53.3%</b>	<b>69.2%</b>	<b>34.8%</b>	<b>25%</b>	<b>23.3%</b>	<b>33%</b>	<b>45.1%</b>	<b>34.8%</b>

**Table 6 – Market for twin-aisle LCA (China)**

Delivery Data	2011	2012	2013	2014	2015	2016	2017	2018
Boeing 767	0	0	0	0	0	0	0	0
Boeing 777	4	7	5	13	7	13	7	2
Boeing 787	0	0	14	6	6	16	18	28
Boeing Total	4	7	19	19	13	29	25	30
<b>Boeing Market Share</b>	<b>25%</b>	<b>30.4%</b>	<b>47.5%</b>	<b>44.2%</b>	<b>36.1%</b>	<b>70.7%</b>	<b>43.9%</b>	<b>39.4%</b>
Airbus A330neo	0	0	0	0	0	0	0	0
Airbus A350 XWB	0	0	0	0	0	0	0	11
A330neo & A350 XWB Market Share	0%	0%	0%	0%	0%	0%	0%	14.5%
Airbus Total	12	16	21	24	23	12	32	46
<b>Airbus Market Share</b>	<b>75%</b>	<b>69.6%</b>	<b>52.5%</b>	<b>55.8%</b>	<b>63.9%</b>	<b>29.3%</b>	<b>56.1%</b>	<b>60.5%</b>

<sup>737</sup> We note that our conclusion would not change even if we were to consider the market shares for the years 2011-2013, as in the latter two years Boeing's and Airbus' market shares were roughly equal as well.

<sup>738</sup> We note that our conclusion would not change even if we were to consider the market shares for the years 2011-2013, as in the latter two years Boeing's market shares were 0%, and thus would not have changed the general upward trend that we observe in the above text. We note that our conclusion would also not change even if we were to consider the market shares for only the two most recently completed calendar years, as we did in the impedance context, i.e. 2017-2018. Boeing's market shares in these two years in all four geographic markets was 0% with the exception of 2017 on Korea when it was 100%. However, Airbus made no deliveries in either 2017 or 2018 in Korea.

**Table 7 – Market for twin-aisle LCA (Korea)**

Delivery Data	2011	2012	2013	2014	2015	2016	2017	2018
Boeing 767	0	0	0	0	0	0	0	0
Boeing 777	3	2	3	0	6	2	0	4
Boeing 787	0	0	0	0	0	0	0	4
Boeing Total	3	2	3	0	6	2	5	8
<b>Boeing Market Share</b>	<b>50.0%</b>	<b>50.0%</b>	<b>50.0%</b>	<b>0.0%</b>	<b>66.7%</b>	<b>100.0%</b>	<b>55.6%</b>	<b>80%</b>
Airbus A330neo	0	0	0	0	0	0	0	0
Airbus A350 XWB	0	0	0	0	0	0	4	2
A330neo & A350XWB Market Share	0%	0%	0%	0%	0%	0%	44.4%	20%
Airbus Total	3	2	3	4	3	0	4	2
<b>Airbus Market Share</b>	<b>50.0%</b>	<b>50.0%</b>	<b>50.0%</b>	<b>100.0%</b>	<b>33.3%</b>	<b>0.0%</b>	<b>44.4%</b>	<b>20%</b>

**Table 8 – Market for twin-aisle LCA (Singapore)**

Delivery Data	2011	2012	2013	2014	2015	2016	2017	2018
Boeing 767	0	0	0	0	0	0	0	0
Boeing 777	0	0	2	2	4	0	0	0
Boeing 787	0	0	0	0	10	2	4	10
Boeing Total	0	0	2	2	14	2	4	10
<b>Boeing Market Share</b>	<b>0.0%</b>	<b>0.0%</b>	<b>25.0%</b>	<b>33.3%</b>	<b>73.7%</b>	<b>16.7%</b>	<b>28.6%</b>	<b>50.0%</b>
Airbus A330neo	0	0	0	0	0	0	0	0
Airbus A350 XWB	0	0	0	0	0	10	10	10
A330neo & A350 XWB Market Share	0%	0%	0%	0%	0%	83.3%	71.4%	50.0%
Airbus Total	0	0	6	4	5	10	10	10
<b>Airbus Market Share</b>	<b>0.0%</b>	<b>0.0%</b>	<b>75.0%</b>	<b>66.7%</b>	<b>26.3%</b>	<b>83.3%</b>	<b>71.4%</b>	<b>50.0%</b>

7.429. In the light of our earlier findings regarding the "product" effects of A380 and A350XWB LA/MSF subsidies, we consider that the record sufficiently demonstrates 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 in the counterfactual post-2013 period in each of the geographic markets mentioned above would have been higher than their actual level. This is so because, as explained, the earliest that Airbus could have launched the A350XWB in the counterfactual was in 2014, and Airbus could not have made any A350XWB deliveries at or before present day.<sup>739</sup> Also, we recall that the 777 and 787 both compete against the A350XWB in the twin-aisle product market<sup>740</sup>, that both Boeing LCA were available for order as of the actual launch date of the A350XWB (i.e. 2006), both were available for delivery in the post-2013 period, and it was these families of LCA against which Airbus' other twin-aisle LCA programmes, i.e. the A330 and the A340, could not effectively compete.<sup>741</sup> In the light of these circumstances, we consider that the sales that resulted in the A350XWB deliveries mentioned above would likely have been captured by Boeing twin-aisle LCA instead. We further note that Airbus delivered A350XWBs into all the above-mentioned geographic markets in 2018, i.e. the most recently completed calendar year.

7.430. We therefore find that A380 and A350XWB LA/MSF subsidies are a genuine and substantial cause of present impedance in the twin-aisle product market in China<sup>742</sup>, the European Union, Korea, and Singapore.<sup>743</sup>

<sup>739</sup> See paragraph 7.324 above.

<sup>740</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1307-6.1309 and 6.1365.

<sup>741</sup> See paragraph 7.323 above.

<sup>742</sup> The United States asks the Panel to find a threat of displacement or impedance in the Chinese twin-aisle market if the Panel does not find present impedance in the twin-aisle market in China. Because we have found such present impedance, we do not address the United States' threat argument. (United States' second written submission, para. 266).

<sup>743</sup> We note that the delivery data above refer to only three A330neo deliveries in the European Union market in 2018. We make no findings of impedance or displacement based on these A330neo deliveries. This is so because we found earlier in this Report that it has not been demonstrated that, in the counterfactual, the A330neo would not have been launched in 2014 as it was, or that it would not be available for order and delivery today just as it was in the counterfactual. We thus see no material basis on which to conclude that the three A330neo deliveries in the European Union market in 2018 would not have occurred as they actually did.

### 7.5.6.2 Significant lost sales

7.431. Regarding the phenomenon of significant lost sales, the Appellate Body has explained:

{U}nder Article 6.3(c), "lost sales" are sales that suppliers of the complaining Member "failed to obtain" and that instead were won by suppliers of the respondent Member. It is a relational concept and its assessment requires consideration of the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales. The assessment can focus on a specific sales campaign when such an approach is appropriate given the particular characteristics of the market or it may look more broadly at aggregate sales in the market. The complainant must show that the lost sales are significant to succeed in its claim. ... While a two-step approach to the assessment of lost sales is permissible, in our view, the most appropriate approach to assess whether lost sales are the *effect* of the challenged subsidy is through a unitary counterfactual analysis. This would involve a comparison of the sales actually made by the competing firm(s) of the complaining Member with a counterfactual scenario in which the firm(s) of the respondent Member would not have received the challenged subsidies. There would be lost sales where the counterfactual analysis shows that, in the absence of the challenged subsidy, sales won by the subsidized firm(s) of the respondent Member would have been made instead by the competing firm(s) of the complaining Member.<sup>744</sup> (emphasis original)

With respect to the meaning of "significant", the Appellate Body has noted that this term means "important, notable or consequential", and has both quantitative and qualitative dimensions.<sup>745</sup> (footnote omitted)

7.432. The United States argues that, in the light of the "product" effects of the A380 and A350XWB LA/MSF subsidies, the US LCA industry continues to suffer significant lost sales in the VLA and twin-aisle LCA product markets. We discuss these claims in the following two subsections.

#### 7.5.6.2.1 VLA product market

7.433. The United States has presented evidence of the following transactions that the United States considers to be significant lost sales in the global VLA market within the meaning of Article 6.3(c) of the SCM Agreement.<sup>746</sup>

**Table 9 – Alleged lost sales in the VLA product market**

Customer	Year	Number of orders	LCA model
Amedeo	2014	20	A380
All Nippon Airways (ANA)	2016	3	A380
Emirates	2016	2	A380
	2018	36 <sup>747</sup>	A380

7.434. We note at the outset that the European Union has asserted that Amedeo cancelled its 2014 order for 20 A380s<sup>748</sup> and that [\*\*\*].<sup>749</sup> If Boeing had won these sales in the counterfactual, most

<sup>744</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1220.

<sup>745</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1052 (quoting Appellate Body Report, *US – Upland Cotton*, para. 426; and citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1218).

<sup>746</sup> We recall that both the original panel, first compliance panel, and the Appellate Body in the original and first compliance proceedings accepted the use of LCA order, rather than delivery, data to evidence the phenomena of lost sales in this dispute. (See Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1153; *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.41, fn 2054; Panel Reports, *EC and certain member States – Large Civil Aircraft*, para. 7.1748; *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, Tables 20-22). We thus accept the use of order data to evidence lost sales in this compliance proceeding.

<sup>747</sup> Consisting of 20 firm orders and 16 options.

<sup>748</sup> European Union's comments on the United States' responses to Panel question No. 37, para. 144, and No. 58, Table at para. 268.

<sup>749</sup> European Union's comments on the United States' response to Panel question No. 58, Table at para. 268. See also Airbus, Status of A380 orders and deliveries, (Exhibit EU-94 (BCI)) (indicating that [\*\*\*]).

likely with 747-8I LCA<sup>750</sup>, we consider that, most likely, the counterfactual 747-8I orders would have been cancelled as well. This is so because the evidence on the record indicates to us, and as has been explained further above, that during these years the overall demand for VLA, generally, was decreasing rather than just demand for the A380, specifically.<sup>751</sup> Moreover, the European Union has submitted evidence purporting to indicate that [\*\*\*] business model has been generally shifting away from VLA.<sup>752</sup> Additionally, the European Union has indicated that the LCA leasing company Amedeo cancelled its order for 20 A380s immediately following Airbus' announcement that it would terminate the A380 programme.<sup>753</sup> This suggests to us that Amedeo was reacting in turn to Airbus' reaction to the weak demand picture for VLA, generally.

7.435. We thus consider that, on this record, we could not find the 2014 Amedeo lost sale, and the [\*\*\*] lost sales, to be "significant" within the meaning of Article 6.3(c). The original panel identified certain factors that make lost sales significant, i.e. strategic importance, learning-curve effects, incumbency, the number of LCA involved in a sale, and the "dollar amounts involved in those sales".<sup>754</sup> The compliance panel considered that "this description regarding the significance of losing LCA sales to a rival LCA producer ... remains, on the whole, an accurate depiction of the significance of losing LCA sales to a rival LCA producer".<sup>755</sup> We see no reason to doubt that this description remains valid currently. It appears unclear to us whether Boeing would have realized appreciable revenues from these cancelled lost sales because the majority of revenues from LCA sales are realized upon delivery, and the United States has put forth no evidence indicating what amounts of money Boeing would have received and retained for such cancelled orders. Moreover, because the 747-8Is sold would never have been produced, we are unconvinced that Boeing would have gleaned significant "learning" effects from their production. Also, no incumbency or commonality advantages would have presumably accrued from these sales because the 747-8Is would never have been delivered to the customers. Finally, we discern no particular reason to conclude that these sales were "strategically important" for Boeing.<sup>756</sup> We therefore do not consider that the evidence on the record supports a finding that such "lost sales" would have been "significant" in the counterfactual. Thus, on this record, we cannot conclude that "significant" benefits either accrued or would be expected to accrue from counterfactual 747-8I sales at present.<sup>757</sup>

7.436. With respect to the All Nippon and Emirates sales in 2016, we note certain discrepancies in the data on the record. The United States has presented certain evidence indicating the occurrence of these two sales.<sup>758</sup> However, we note that an expert report of the European Union, which generally relies on information obtained from the Airbus website, specifically indicates that the All Nippon order actually occurred before 2014. The same expert report, in the same portion, indicates that, as of December 2017 there had been no new orders for the A380 since February 2014 (i.e. since the Amedeo order for 20 A380s).<sup>759</sup> In the face of such conflicting data, we consider that there is no reliable basis on this record upon which to conclude that the ANA and Emirates orders are properly

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<sup>750</sup> We recall that the 747-8I would have been the only other LCA in the VLA product market in the years in which the orders were placed and the A380 and 747-8I are "sufficiently substitutable". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120).

<sup>751</sup> See paragraph 7.352 above.

<sup>752</sup> European Union's comments on the United States' response to question No. 73, para. 349, fn 521 (citing, *inter alia*, [\*\*\*]).

<sup>753</sup> European Union's comments on the United States' response to question No. 37, para. 144.

<sup>754</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1845.

<sup>755</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1798.

<sup>756</sup> We note that these sales would not have represented launch orders for the 747-8I, for instance. We further lack information indicating that winning these sales would have sent important messages to the marketplace about the 747-8I in some way. We therefore note that although [\*\*\*] for VLA, [\*\*\*] would have presumably ordered [\*\*\*], and thus we question the "strategic importance" of winning a further order in 2018.

<sup>757</sup> See also Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, paras. 6.210-6.213 (explaining that the "significance" of LCA lost sales depends on the factual record before the adjudicator).

<sup>758</sup> United States' second written submission, paras. 270-271 (citing *Emirates orders two additional A380 aircraft*, Press Release, Emirates Airlines (13 April 2016) (Exhibit USA-131); and Airbus press release, "ANA Group Selects the A380", (29 January 2018), (Exhibit USA-130)).

<sup>759</sup> PwC A380 LA/MSF Report, (Exhibit EU-17 (HSBI/BCI)), fn 1 to para. 31 (indicating that "{a}lthough Airbus officially announced an A380 order for three aircraft from ... All Nippon Airways (ANA) in January 2016, these orders were in fact previously considered as 'undisclosed' customers within Airbus' official order book. Therefore, 20 firm orders from ... Amedeo in February 2014 have to be considered as the latest orders as of December 2017").

ascribed to 2016 and thus could represent significant lost sales to the US LCA industry. With respect to these two alleged lost sales, therefore, we consider that we lack a reliable evidentiary record upon which to conclude that they properly evidence *present* lost sales in the VLA product market to the US LCA industry.

7.437. We note that the parties have debated and advanced opposing positions with respect to whether certain outstanding A380 deliveries to Emirates, arising from the first compliance panel's "significant" "lost sales" findings<sup>760</sup>, may constitute present significant "lost sales" for the purpose of the current dispute.<sup>761</sup>

7.438. We recall that the Appellate Body has explained that "the mere existence of outstanding deliveries ... relating to {previous} orders found to have resulted in ... significant lost sales ... would not necessarily, by itself, be dispositive as to the existence of ... significant lost sales in {some later period}".<sup>762</sup> As regards what more would need to be shown for a panel to find a continued lost sale in the presence of such outstanding deliveries, the Appellate Body explained that "it would seem that what transpires between LCA orders and their subsequent deliveries would be relevant, particularly as it relates to evidence demonstrating the ongoing existence of ... lost sales"<sup>763</sup>, "depending on the nature and scope of the transaction, there may be elements affecting finalization of the transaction, or concerning follow-on transactions in the form of options or purchase rights, that may be indicative of an ongoing phenomenon of lost sales"<sup>764</sup>, and "there would need to be some indication that subsequent developments following the initial order confirm the ongoing existence of such market phenomena".<sup>765</sup> The continued lost sale must also be found to be "significant" within the meaning of Article 6.3(c).<sup>766</sup>

7.439. In our minds, a key point that emerges from the Appellate Body's guidance in this area is that presently outstanding deliveries in the LCA industry stemming from a previous lost sale are, by themselves, insufficient to establish that a significant lost sale within the meaning of Article 6.3(c) of the SCM Agreement is presently ongoing such that a responding party could have a continued compliance obligation to "remove" that particular lost sale within the meaning of Article 7.8 of the SCM Agreement. Rather, something more must be shown, relating to the "nature, timing, and scope of those underlying transaction"<sup>767</sup>, further indicating that it would be proper to consider the lost sale as presently ongoing. The United States has not, however, directed us to anything on the record indicating that "subsequent developments following the initial {Emirates} order confirm the ongoing existence" of that lost sale, other than the outstanding deliveries themselves. We thus consider that the United States has not been demonstrated that the 2013 Emirates "lost sale" is "ongoing" such that we could find that the European Union has failed to "remove" that particular adverse effect.<sup>768</sup>

7.440. We therefore find that the A380 LA/MSF subsidies are not a genuine and substantial cause of present significant lost sales in the VLA product market.

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<sup>760</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 7.1(d)(xvi). In particular, the parties focus on a sale of 50 A380s to Emirates in 2013 found by the compliance panel to constitute "significant" "lost sales".

<sup>761</sup> United States' response to Panel question No. 73; and European Union's comments on the United States' response to Panel question No. 73.

<sup>762</sup> Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.341.

<sup>763</sup> Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.340.

<sup>764</sup> Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.333.

<sup>765</sup> Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.341.

<sup>766</sup> Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.340.

<sup>767</sup> Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.333.

<sup>768</sup> We note that the Appellate Body, in the first compliance proceeding, found five lost sales in the VLA and twin-aisle markets. We consider that our conclusion above with respect to the 2013 Emirates lost sale would hold with respect to any of the remaining four, as we have been directed to nothing in the record indicating that "subsequent developments following the initial order confirm the ongoing existence of such market phenomena".

### 7.5.6.2.2 Twin-aisle product market

7.441. The United States has presented evidence of the following orders that the United States considers to be significant lost sales, within the meaning of Article 6.3(c) of the SCM Agreement, in the global twin-aisle LCA market:

**Table 10 – Alleged lost sales in the twin-aisle product market<sup>769</sup>**

Customer	Year	Number of orders	Model
Sichuan Airlines	2016	4 <sup>770</sup>	A350XWB-900
Sichuan Airlines	2018	10	A350XWB-900
China Eastern Airlines	2016	20	A350XWB-900
China Southern Airlines	2017	20	A350XWB-900
Philippine Airlines	2016	6	A350XWB-900
Virgin Atlantic Airways	2016	12 <sup>771</sup>	A350XWB-1000
Turkish Airlines	2018	25	A350XWB-900
StarLux Airlines	2018	12	A350XWB-1000
		5	A350XWB-900
Emirates Airlines <sup>772</sup>	2018	30	A350XWB-900

7.442. In considering whether the order data in Table 10 above demonstrates that the US LCA industry is presently experiencing significant lost sales in the global twin-aisle LCA market, we make the following observations. First, all the orders in Table 10 above occurred in 2016 or afterwards, and thus they are relatively recent. Second, the A350XWB competes directly against the Boeing 777 and 787, both of which were available for order and delivery during this time.<sup>773</sup> Third, the record indicates that it would have been difficult for the A330 to capture such sales because its inability to impose strong competitive pressure on the 777 and 787 was one of the reasons why Airbus decided to launch the A350XWB in 2006. Fourth, it would also have been difficult for the A330neo to capture these sales, considering that the A330neo is, by design, a qualitatively different LCA than the A350XWB and is essentially an incrementally improved version of the A330.<sup>774</sup> Fifth, we recall that, in the counterfactual post-2013 period, Airbus would have experienced production difficulties with respect to the A350XWB (i.e. cost overruns and production delays) which would have made the aircraft more difficult to sell. Sixth, we consider it likely that the delivery slots that Airbus could have offered with respect to the A350XWB in the post-2013 period would have been less attractive than those that Boeing would have offered with respect to either the 777 or 787. This is so because these latter two Boeing LCA had been launched and become available for delivery years before 2016. Finally, Airbus would have been competing against a Boeing company with incumbency advantages in the counterfactual post-2013 period.

7.443. We note, furthermore, that although it is clear to us that, in the counterfactual, Airbus could not plausibly have won *all* the sales that it actually did with the A350XWB in the period from 2013 to present day, it is less than clear exactly which counterfactual A350XWB sales Boeing would have

<sup>769</sup> The European Union does not argue that any such orders have been cancelled or changed in any material way.

<sup>770</sup> These four A350XWBs were for lease.

<sup>771</sup> Eight of these were firm orders, while four were for lease.

<sup>772</sup> The European Union asserts that this order is not, in fact, an order but rather a statement by Emirates that it is considering placing an order. (European Union's comments on the United States' response to Panel question No. 73, para. 348). We also note that the United States claims a lost sale to Emirates involving 40 A330neo LCA. In the light of our conclusion that the A380 and A350XWB LA/MSF subsidies are not a genuine and substantial cause of the current market presence of the A330neo, we find that the 40 A330neo sales to Emirates do not constitute significant lost sales within the meaning of Article 6.3(c) of the SCM Agreement.

<sup>773</sup> See paragraph 7.323 above (indicating that Airbus launched the A350XWB because the A340 and A330 could not effectively compete with the 777 and 787); and Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1544.

<sup>774</sup> Airbus A330neo Presentation, slide 20 (Exhibit USA-51) (indicating that the A330neo operates in "combination with A350XWB"). We note that while there appears to be similarities between certain characteristics of the A330neo and A350XWB family of LCA, the two still display differences with respect to seating, maximum take-off weight, and range. (Compare Airbus A330neo Presentation, slide 20 (Exhibit USA-51) (containing technical characteristics of the A330neo) and Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, Table 17 (containing technical characteristics of the A350XWB -800, -900, and -1000)). Moreover, we discern no evidence on the record indicating that the A330neo uses composite materials to materially the degree to which the A350XWB does so.

won. This is so because Airbus' new LCA programme would very likely have won appreciable sales in the present period. Moreover, we lack evidence relating to the specific circumstances of the sales campaigns reflected in Table 10, which gives us limited insight into the customers' decision-making or Boeing's and Airbus' respective positions in those campaigns.

7.444. Notwithstanding these doubts, we take specific note of the Virgin Atlantic sales campaign. In 2016, Virgin Atlantic Airways ordered 12 A350XWB-1000s.<sup>775</sup> Three things about this order are particularly instructive for our assessment. First, all twelve A350XWB-1000s were ordered together in 2016 and according to the Ascend database are scheduled to be delivered in separate years before 2022.<sup>776</sup> This is significant in our view because we earlier concluded that Airbus could not have offered in 2014 the A350XWB for delivery in the counterfactual post-2013 period until 2022, at the earliest. This, of course, implies that any counterfactual A350XWBs ordered in subsequent years would likely have been offered on the basis of delivery positions after 2022, at the earliest.<sup>777</sup> Thus, all twelve delivery positions to which Virgin Atlantic agreed would have been unavailable in the counterfactual. We have difficulty believing that such a consideration would not have weighed on the decision of Virgin Atlantic in this sales campaign.<sup>778</sup> This is particularly so as five scheduled deliveries were set to occur in 2019, and thus would have had to be postponed by multiple years in the counterfactual if Virgin Atlantic had ordered the A350XWB. Second, Virgin Atlantic ordered A350XWB-1000s, which primarily competes against the Boeing 777.<sup>779</sup> We note that the A330neo – Airbus' newest and most advanced A330 variant – is not intended to compete against the 777<sup>780</sup>, and thus Airbus would likely have had to compete in this sales campaign against modern Boeing 777 LCA with older models of its A330 family. Finally, Virgin Atlantic had previously ordered 787s from Boeing (15 787s ordered in 2007, one in 2009, and one in 2014<sup>781</sup>). Thus, because Virgin Atlantic already would have had twin-aisle Boeing LCA in its fleet, Virgin Atlantic could have realized fleet commonality advantages from purchases of additional Boeing LCA. These considerations, taken together, convince us that Airbus would not have won this Virgin Atlantic sale.

7.445. We therefore find that the aggregated "indirect" effects of A380 LA/MSF subsidies and "direct" effects of A350XWB LA/MSF subsidies are a "genuine and substantial" cause of present lost sales to the US LCA industry in the global twin-aisle product market.<sup>782</sup>

## 7.5.7 Conclusions

7.446. Based on the foregoing analysis and findings, we conclude that the European Union has not "take{n} appropriate steps to remove the adverse effects" within the meaning of Article 7.8 of the SCM Agreement. More specifically, we conclude that the A380 and A350XWB LA/MSF subsidies are a genuine and substantial cause of present impedance in the VLA product market and present impedance and lost sales in the twin-aisle LCA product market.

## 8 CONCLUSIONS AND RECOMMENDATIONS

8.1. In the light of the reasoning and findings set out in this Report, the Panel reaches the following conclusions:

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<sup>775</sup> Airbus press release, "Virgin Atlantic Selects the A350 XWB as its Future Flagship", (11 July 2016), (Exhibit USA-143); and Airways, "First Virgin Atlantic A350-1000 Spotted in Toulouse (+photo)", (25 October 2018), (Exhibit USA-144).

<sup>776</sup> Updated Ascend Data, (Exhibit USA-158).

<sup>777</sup> We note that the rate of deliveries of the subsidized A350XWB have gradually increased over time, following delivery of the first subsidized A350XWB eight years after originally ordered. Based on the available data, it appears that Airbus achieved a thus-far peak number of deliveries per calendar year in 2018, 12 years after actual launch. Actual deliveries were as follows: 2014 - one delivery; 2015 - 14 deliveries; 2016 - 49 deliveries; 2017 - 77 deliveries; 2018 - 93 deliveries. (Updated Ascend data, (Exhibit USA-158)).

<sup>778</sup> We earlier noted the importance of delivery positions to LCA customers. (See fn 726 above).

<sup>779</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1307-6.1309, and 6.1365. See also Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, Table 5 (indicating that the closest competing Boeing model *vis-à-vis* the A350XWB-1000 is the 777-300ER).

<sup>780</sup> Airbus A330neo Presentation, (Exhibit USA-51).

<sup>781</sup> Ascend Data, (Exhibit USA-138).

<sup>782</sup> Insofar as Boeing would have won any additional sales, we further find that such sales are "significant", for the same reasons that the original and first compliance panel found identified lost sales to be significant. (Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1798 (explaining factors underlying the "significance" of lost sales in the LCA industry)).

- a. In relation to the European Union's request for a preliminary ruling and arguments concerning the scope of this compliance proceeding, we find that:
- i. the R&TD measures that the United States challenges are not identified, as a matter of fact, in the European Union's panel request; and
  - ii. even assuming, *arguendo*, that the absence of any reference to the challenged R&TD measures in the European Union's panel request does not prevent the United States from raising claims against those measures in this proceeding, the United States is nevertheless precluded from raising its claims because: (1) as regards the United States' claims against the R&TD measures that were the subject of findings in the original proceeding, as well as the Seventh Framework Programme, the United States is precluded from raising those claims because it could have brought them in the first compliance proceeding but failed to do so; and (2) as regards the United States' claims against the Eighth Framework Programme, the United States has failed to establish that the Eighth Framework Programme has "sufficiently close links" with the relevant measures taken to comply and the DSB's recommendations and rulings such that it would be appropriate to characterize the Eighth Framework Programme as a "measure taken to comply".
- b. In relation to whether the European Union and certain member States have complied with the obligation to "withdraw the subsidy", we find that the European Union *has failed to demonstrate* that:
- i. the [\*\*\*] amendment to the German A350XWB LA/MSF loan agreement has withdrawn the German A350XWB LA/MSF subsidy;
  - ii. the full repayment of outstanding principal and interest accrued under the UK A350XWB LA/MSF agreement has withdrawn the UK A350XWB LA/MSF subsidy;
  - iii. the [\*\*\*] amendments to the French, German, Spanish and UK A380 LA/MSF loan agreements have withdrawn the French, German, Spanish and UK A380 LA/MSF subsidies;
  - iv. the alleged amortization of the *ex ante* benefit of the Spanish A380 LA/MSF loan has withdrawn the subsidy;
  - v. Airbus' announcement on 14 February 2019 to wind-down the A380 programme provides "further confirmation" and "an independent basis", on its own, to find that the French, German, Spanish and UK A380 LA/MSF subsidies have been withdrawn; and
  - vi. Airbus' [\*\*\*] agreement with [\*\*\*] to repay the principal and interest accrued under the [\*\*\*] A380 LA/MSF agreement achieves withdrawal of the [\*\*\*] A380 LA/MSF subsidy.
- c. In relation to whether the European Union and certain member States have complied with the obligation to "take appropriate steps to remove the adverse effects", we find that:
- i. With respect to the "product" effects of the A380 and A350XWB LA/MSF subsidies:
    - (1) the A380 LA/MSF subsidies continue to be a "genuine and substantial" cause of the current market presence of the A380 family of Airbus LCA;
    - (2) the A380 and A350XWB LA/MSF subsidies continue to be a "genuine and substantial" cause of Airbus' ability to *deliver* the A350XWB family of Airbus LCA, and Airbus' ability to offer the A350XWB family of LCA on the same terms as it actually did (particularly with respect to delivery positions);
    - (3) the A380 and A350XWB LA/MSF subsidies are not a "genuine and substantial" cause of the current market presence of the A330neo;

- ii. Airbus' 14 February 2019 wind-down announcement does not, on its own, achieve the removal of the *present* adverse effects of the A380 LA/MSF subsidies as they relate to the market presence of the A380. In our view, those effects will persist while Airbus continues to produce and deliver the A380. It follows, correspondingly, that the wind-down announcement cannot also achieve the removal of any *present* adverse effects of the A380 and A350XWB LA/MSF subsidies as they relate to the market presence of the A350XWB;
- iii. With respect to the impact of the "product" effects of the A380 and A350XWB LA/MSF subsidies in the relevant product markets:
  - (1) in the VLA product market, the "product" effects of the LA/MSF subsidies identified in subparagraph (c)(i)(1), above, are a "genuine and substantial" cause of the impedance of the exports of a like product of the United States from 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;
  - (2) in the twin-aisle product market, the "product" effects of the LA/MSF subsidies identified in subparagraph (c)(i)(2), above, are a "genuine and substantial" cause of impedance of the imports of a like product of the United States into the European Union within the meaning of Article 6.3(a) of the SCM Agreement, and are a "genuine and substantial" cause of the impedance of the exports of a like product of the United States from China, Korea, and Singapore 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; and
  - (3) in the twin-aisle product market, the "product" effects of the LA/MSF subsidies identified in subparagraph (c)(i)(2), above, are a "genuine and substantial" cause of significant lost sales to the US LCA industry in the global market for twin-aisle LCA within the meaning of Article 6.3(c) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement.

8.2. By continuing to be in violation of Articles 5(c) and 6.3(a), (b) and (c) of the SCM Agreement, the European Union and certain member States have failed to comply with the DSB recommendations and rulings and, in particular, the obligation under Article 7.8 of the SCM Agreement "to take appropriate steps to remove the adverse effects or ... withdraw the subsidy".

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the SCM Agreement, they have nullified or impaired benefits accruing to the United States under that Agreement.

8.4. We therefore conclude that the European Union and certain member States have failed to implement the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the SCM Agreement. To the extent that the European Union and certain member States have failed to comply with the recommendations and rulings of the DSB in the original dispute and the first compliance proceeding, those recommendations and rulings remain operative.