PUBLIC VERSION

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

(WT/DS316)

FIRST SUBMISSION OF
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"We will give Airbus the means to win the battle against Boeing."
Lionel Jospin[1]

I. INTRODUCTION

1. The pledge that former French Prime Minister Lionel Jospin made to the French Parliament illustrates why the United States is pursuing this dispute. For over thirty years, the governments of France, Germany, the United Kingdom, and Spain (the "Airbus governments") have been giving Airbus the means to "win the battle" against its U.S. competitors in the market for large civil aircraft ("LCA").[2] They have done so systematically and methodically in pursuit of a "European industrial policy" to create the world's largest producer of LCA. And they have succeeded. In less than four decades, Airbus has gone from a zero percent market share to its current position as the world's largest producer.

2. Over the course of this time, two U.S. producers – Lockheed and McDonnell Douglas – have been forced from the market. The sole remaining U.S. producer – Boeing – has seen its market share fall below 50 percent. In the last five years alone, the U.S. share of worldwide deliveries has fallen by nearly 20 points, industry revenues have decreased by 35 percent, and industry earnings have decreased by 25 percent. Tens of thousands of U.S. workers have lost their jobs.

3. If the losses that the United States has suffered were the result of fair competition, the United States would not be pursuing this dispute. The United States values competition and acknowledges Europe's right to pursue its own interests in the LCA sector in a WTO-compatible manner. But the U.S. losses are not the result of fair competition. The Airbus governments created and fuel Airbus's success with massive amounts of WTO-inconsistent subsidies.

4. The primary subsidy that the Airbus governments use is "Launch Aid." Launch Aid is highly preferential financing that the Airbus governments designed and use to offset the enormous costs and extremely high risks that characterize the development of LCA. All of the Launch Aid that the Airbus governments provide to Airbus takes the same form: long-term unsecured loans at zero or below-market rates of interest, with back-loaded repayment schedules that allow Airbus to repay the loans through a levy on each delivery of the financed aircraft. If Airbus fails to sell enough of the aircraft to repay the loan, the outstanding balances are indefinitely extended or forgiven. Repayment of the aid is entirely dependent on the success of the financed aircraft. As one UK scholar has observed, "the distinctive risk-sharing feature of Launch Aid confers Airbus with an advantage over a rival who is constrained to debt and equity

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

[2] For purposes of his dispute, the United States is defining "Large Civil Aircraft" as civil aircraft capable of seating 100 or more passengers and maximum take-off weight ("MTOW") of at least 120,000 lbs.

instruments alone."[3]

5. When the Airbus governments provide Launch Aid to Airbus, they do so with the full knowledge and expectation that Airbus will use the aid to target directly the LCA produced by Boeing.[4] The Airbus governments know this because they maintain a set of formal intergovernmental institutions that they use to oversee Airbus and to work with Airbus to determine whether and when to launch new Airbus aircraft. They then use the system to grant Airbus the Launch Aid it needs to develop the new aircraft and bring it to market.

6. Moreover, Launch Aid is not the only subsidy that the Airbus governments provide. They also provide subsidized loans through the European Investment Bank; spend hundreds of millions of euros to create infrastructure that they provide to Airbus at subsidized rates; provide grants of funds to underwrite Airbus's LCA research and development efforts; make non-commercial equity infusions; and forgive billions of euros in debt. These additional subsidies add to the benefits that Airbus receives from Launch Aid.

7. The subsidies that Airbus has received for the Airbus A380 "superjumbo" aircraft are a case in point. The Airbus governments committed approximately $4,000,000,000 in Launch Aid for the A380. The European Investment Bank agreed to provide an additional Euro 700,000,000 subsidized loan. Hamburg spent approximately Euro 751,000,000 to create an industrial site for the A380 in Hamburg. Toulouse spent approximately Euro 200,000,000 to create a second site at Airbus's facilities in Toulouse. The Welsh Assembly spent £19,500,000 on the Airbus plant in Wales. And the European Commission and the Airbus national and regional governments provided hundreds of millions of euros in grants to help Airbus with its research and development efforts.

8. In 2003, Airbus delivered more LCA than Boeing for the first time, making it the world's largest producer of LCA. Shortly thereafter, in mid-2004, the United States approached Europe to propose the negotiation of a new agreement to prohibit Launch Aid and other subsidies for the development and production of LCA. The U.S. effort was unsuccessful. Instead of agreeing to end subsidies, the Airbus governments announced that they would grant at least $1,700,000,000 in new WTO-inconsistent Launch Aid to further strengthen the Airbus product line with another new aircraft, the Airbus A350.[5] Recent events indicate that they may double or triple the amount they have already committed. Faced with the prospect of continued WTO-inconsistent subsidies with no end, the United States filed this dispute.

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[3] Kim Kaivanto, *Premise and Practice of UK Launch Aid*, Journal of World Trade 40(3) at 495, 517 (2006) (Exhibit US-2).

[4] *See, e.g.,* Letter from Karel Van Miert to Hubert Vedrine, *Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program*, Aid No. N369/98 (Jan. 26, 1999) at 3 (translation at 5) (Exhibit US-3).

[5] Airbus has modified its plans for the A350 several times; it currently describes the aircraft as the A350 XWB. For the sake of simplicity, however, the United States will refer to the aircraft as the A350 throughout this submission.

9. The United States proceeds in this submission as follows:

- First, the United States describes the procedural and factual background of the matter referred to the Panel.

- Second, the United States discusses the Launch Aid program that the Airbus governments created and maintain to support Airbus and demonstrates that the Launch Aid the Airbus governments provide to Airbus are specific subsidies within the meaning of the SCM Agreement.

- Third, the United States demonstrates that the Launch Aid the Airbus governments are providing for the Airbus A380, A340-500/600, and A330-200 aircraft models are prohibited by Articles 3.1 and 3.2 of the SCM Agreement because they are contingent on export performance.

- Fourth, the United States discusses the other financial contributions that the Airbus governments and the European Commission have provided to Airbus and demonstrates that each of them is also a specific subsidy within the meaning of the SCM Agreement.

- Finally, the United States demonstrates that Launch Aid and the other subsidies to Airbus have caused and are threatening to cause adverse effects to the interests of the United States, including injury to the U.S. LCA industry and serious prejudice to the interests of the United States.

II. PROCEDURAL BACKGROUND

A. Consultation Request and Panel Establishment

10. On October 6, 2004, the United States requested consultations with the Airbus governments and with the European Communities ("EC") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("Dispute Settlement Understanding" or "DSU"), Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Articles 4, 7, and 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), with regard to measures affecting trade in large civil aircraft (WT/DS316/1). Pursuant to this request, the United States held consultations with the EC and the Airbus governments on November 4, 2004. These consultations provided some helpful clarifications, but failed to resolve the dispute.

11. On May 31, 2005, the United States requested the establishment of a panel pursuant to Article 6 of the DSU, Article XXIII:2 of GATT 1994, and Articles 4, 7, and 30 of the SCM Agreement (WT/DS316/2). In its request for establishment of a panel, the United States also requested that, upon establishment of a panel, the DSB initiate the procedures provided for in

Annex V of the SCM Agreement, pursuant to paragraph 2 of that Annex. The Dispute Settlement Body ("DSB") considered the U.S. request at its meeting on June 13, 2005, at which the EC objected to the establishment of a panel.

12. On July 20, 2005, the United States renewed its request for the establishment of a panel, as well as its request that, upon establishment of a panel, the DSB initiate the procedures provided under Annex V of the SCM Agreement. The DSB established the Panel at the July 20, 2005 meeting (WT/DSB/M/194), with the following terms of reference:

> To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS316/2, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

13. The EC refused, however, to consent to initiation of the procedures under Annex V of the SCM Agreement.

14. On August 3, 2005, the United States renewed its request that the DSB initiate the procedures provided under Annex V of the SCM Agreement (WT/DSB/M/195). Once again, the EC refused to consent to initiation of the procedures.

15. On August 31, 2005, the United States requested for a third time that the DSB initiate the procedures provided under Annex V of the SCM Agreement (WT/DSB/M/196). For a third time, the EC refused to consent to initiation of the procedures.

16. On September 23, 2005, the United States requested for the fourth time that the DSB initiate the procedures for developing information provided for under Annex V of the SCM Agreement (WT/DSB/M/197). The EC finally allowed the DSB to initiate the procedures, and the DSB designated Mr. Mateo Diego-Fernández ("the Facilitator") as a representative to serve the function of facilitating the information-gathering process, pursuant to paragraph 4 of Annex V of the SCM Agreement.

B. The Annex V Process

17. On October 7, 2005, the Facilitator issued a detailed set of questions to the EC and the United States, as well as third parties, seeking information relevant to determining the existence and amount of the subsidies to Airbus and the adverse effects that those subsidies have caused to the United States. The questions that the Facilitator issued to the EC addressed the intergovernmental institutions and other aspects of the Launch Aid system, all of the Launch Aid that Airbus has received to develop its aircraft models; the infrastructure subsidies that the Airbus governments have provided to Airbus in such locations as Hamburg and Toulouse, the research and development subsidies that the European Commission and the Airbus national and

sub-national governments provide to Airbus, etc.[6] The Facilitator set a deadline of November 18, 2005 for responding to the questions.

18. On October 26, 2005, the EC filed a "request for preliminary rulings" that raised several meritless objections to the U.S. panel request. (The United States discusses the EC's request at length in the U.S. response to the request, submitted to the Panel today.) The EC then relied on the request as an excuse not to provide any response whatsoever to nearly half of the questions contained in the Facilitator's October 7, 2005 questionnaire.[7]

19. On December 9, 2005, the Facilitator issued a set of Annex V "follow-up" questions to the EC and the United States.[8] The parties submitted their responses to the questions on December 22, 2005. Although the parties had specifically agreed in advance to provide an opportunity for such follow-up questions, the EC refused to provide meaningful answers to nearly all of the questions the Facilitator asked.[9]

20. The Facilitator set out a detailed summary of the Annex V process in his report to the Panel, which he issued to the Panel on February 24, 2006.[10]

C. The Second U.S. Consultation and Panel Requests

1. The U.S. Second Consultation and Panel Requests and Request That the Matter in the Second Request Be Referred to the DS316 Panel

21. On January 31, 2006, the United States filed a request for additional consultations in DS316 (WT/DS316/1/Add.1). The United States took this step in part because of the preliminary ruling request that the EC had filed on October 26, 2005. Although none of the EC's objections had merit, the United States indicated its willingness to hold further consultations with the EC in order to address those concerns and thereby simplify matters for the Panel by eliminating – at the outset – any possible basis for the EC's objections. The United States hoped

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[6] *See generally Questions from the Facilitator for the European Communities Pursuant to Annex V of the SCM Agreement* (Oct. 7, 2005) (Exhibit US-4; *see* BCI Set of Exhibits (hereinafter "BCI Annex")).

[7] *See generally Replies to Questions by the Facilitator under Annex V of the SCM Agreement by the European Communities* (Nov. 18, 2005) (Exhibit US-5; *see* BCI Annex).

[8] *Follow-up Questions from the Facilitator to the European Communities* (Dec. 9, 2005) (Exhibit US-6; *see* BCI Annex).

[9] *See generally Replies (Non-Business Confidential Information) to Follow-up Questions by the Facilitator by the European Communities* (Dec. 22, 2005) (Exhibit US-7; *see* BCI Annex); *Replies (Business Confidential Information) to Follow-up Questions by the Facilitator by the European Communities* (Dec. 22, 2005) (Exhibit US-8; *see* BCI Annex).

[10] *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft* (WT/DS316), Procedure under Annex V of the Agreement on Subsidies and Countervailing Measures, Report to the Panel from the Facilitator (Feb. 24, 2006) (Exhibit US-9).

that, in this way, the Panel would be able to focus entirely on the substantive matters at issue.

22. In light of the second U.S. request for consultations, the United States agreed to jointly request with the EC that the Panel set aside its original timetable in this dispute. The original timetable had envisioned a March 16, 2006, U.S. first written submission. On March 1, 2006, the Panel set its timetable aside. The Panel stated that it would, at the request of either party, "fix a revised timetable after consulting the parties to the dispute."

23. On April 10, 2006, the United States filed a second request for the establishment of a panel in this dispute to complete the simplification process described above (WT/DS316/6). In a letter accompanying the request, the United States noted the relationship between its original panel request and the second request and expressed its view that the efficient functioning of the dispute settlement system would be served if the matters contained in the second request were considered by the existing DS316 Panel. The United States requested the DSB to take a decision that the existing Panel would also examine the complaint contained in the second U.S. panel request and that the Panel's terms of reference would be revised accordingly.

2. The EC Refusal to Consent to Refer the Matter in the Second U.S. Panel Request to the DS316 Panel

24. Unfortunately, the EC prevented the DSB from taking the decision that the United States had requested, even though the U.S. request would have greatly simplified matters for the Panel. The EC repeated its refusal at the May 9, 2006, meeting of the DSB when the U.S. request was on the agenda for a second time. Therefore, the DSB established a second, separate panel with respect to the matter contained in the second U.S. panel request (WT/DSB/M/211).

25. On May 12 and June 19, 2006, the parties met with the Secretariat to discuss the composition of the second U.S. panel. As the United States had indicated at the DSB, the U.S. position was that the most efficient and logical approach would be to have the existing DS316 panelists examine the matter referred to the second panel. The parties were unable to reach agreement on panelists. Therefore, on July 7, 2006, the United States requested that the Director-General compose the Panel. The Deputy Director-General announced his decision on July 17, 2006. The Deputy Director General did not name the existing DS316 panelists to the second Panel (WT/DS347/5).

26. On July 25, 2006, the United States and the EC attended the organizational meeting for the DS347 Panel. The United States noted that the situation raised several complex questions and questions with serious systemic implications, including the overlap in the matter to be addressed by the two panels, the potential for duplication of work, compliance issues, and the presence of an Annex V record in DS316 and the absence of such a record in DS347.

3. The EC Refusal to Allow the Annex V Record from the DS316 Dispute to Be Shared with the DS347 Panel

27. On August 7, 2006, the DS347 Panel issued its timetable and working procedures. The Panel also invited the parties to submit by August 24, 2006, either jointly or individually, draft procedures for the protection of confidential information. The EC opposed allowing the Annex V record from the DS316 dispute to be shared with the DS347 Panel.

28. On August 11, 2006, the EC filed a letter with the Facilitator requesting that the Facilitator order the return or destruction of the business confidential information ("BCI") and highly sensitive business information ("HSBI") that the parties had submitted during the Annex V process. The EC argued that the DS316 Panel was "dormant, at best" and that it would not be permissible for the United States to use any of the BCI or HSBI from the DS316 Annex V process in the DS347 proceedings. The EC reiterated its position in its comments on the U.S. proposal for BCI/HSBI procedures in DS347, arguing that "any use of documents obtained in {DS316} for the purposes of {DS347} would, in the absence of agreement between the parties, be a breach of the procedures adopted in DS316."[11]

29. On August 30, 2006, the Facilitator rejected the EC's request to order the return or destruction of the DS316 Annex V record. The Facilitator stated, however, that the BCI/HSBI procedures applicable to the DS316 Annex V process "currently prohibit the United States . . . from so using BCI/HSBI information compiled in the context of DS316 Annex V procedures in any other dispute, including the DS347 case."[12]

4. The Resumption of the DS316 Panel Process

30. On September 4, 2006, the United States filed a letter with the DS316 Panel requesting the Panel to begin the process of developing procedures for the panel process to protect BCI and HSBI ("BCI/HSBI Procedures").[13] Then, on September 18, 2006, the United States requested that the DS316 Panel issue a new timetable for purposes of this dispute. The Panel issued its final BCI/HSBI Procedures on October 19, 2006. The Panel issued its new timetable on October 23, 2006.

31. On the same day that the Panel issued its new timetable, the United States and the EC submitted lists of Representatives and Outside Advisors that they wished to have designated as Approved Persons and HSBI Approved Persons. Although the EC had previously consented to the designation of all of the attorneys on the U.S. list of Outside Advisors as BCI and HSBI

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[11] Letter from the EC to the DS347 Panel, September 1, 2006, at 2. The United States had suggested in its proposal that the scope of the DS347 BCI/HSBI procedures be defined to include any BCI or HSBI obtained during the DS316 Annex V process. *See, e.g.,* U.S. Proposal for BCI/HSBI Procedures, Section I (Scope), para. 1.

[12] Letter from Mateo Diego-Fernández to the United States and the EC, August 30, 2006, at 2.

[13] Letter from the United States to the DS316 Panel, September 4, 2006.

Approved Persons, it filed an objection on October 26, 2006 to the re-designation of each of the individuals it had previously consented to. The Panel rejected the EC's objection on November 3, 2006.

32. The Panel's BCI/HSBI Procedures provide an opportunity for a party to request the other party to indicate those portions of documents containing BCI and HSBI that may be included in a non-BCI version of a submission or a non-HSBI version of an HSBI Appendix. The EC expressed concern about the time it would take a party to respond to such a request, particularly while a party is preparing its own responsive submission. Accordingly, the United States took the time while in the midst of preparing its own written submission to develop an initial request of the EC, which it transmitted to the EC on October 26, 2006.[14]

33. The United States explained in the letter that it had taken this step in the hope that an early identification of the non-BCI and non-HSBI portions of certain EC documents would help the United States to accurately bracket in its first submission, and thereby reduce the time the EC would have to spend reviewing the bracketing of the U.S. first submission while it is preparing its own submission. In order to minimize the burden on the EC as much as possible, the United States limited its request to just 20 documents. The Panel requested the EC to provide the documents by November 3, 2006; if the EC was unable to provide all of the documents by that date, the Panel requested the EC to indicate when it would provide the remaining documents.[15]

34. On November 3, 2006, the EC submitted the first set of documents in response to the Panel's request.[16] Unfortunately, it became evident that the EC had not taken the Panel's request seriously. First, it provided only three of the 20 documents that the United States had requested. The EC bracketed one of the documents, which was only one page in length, as BCI in its entirety; it bracketed a second one, which was only two pages in length, as BCI almost in its entirety; and it designated portions of the third document as BCI, even though Airbus had provided an earlier version of the same document to the United States without designating any of the document as BCI. In addition, the EC stated that it would provide only one additional document in advance of the due date for this submission, and that it would not provide any of the remaining 16 documents until November 17, 2006, two days after the due date for this submission.

35. By refusing to provide the requested documents in advance of the due date for this submission, the EC has forced the United States to use its own best judgment as to which information in the documents is BCI, and which is non-BCI. The United States reserves its right to raise the issue again after it receives the documents on November 17, 2006.

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[14] *See* Letter from the United States to the EC, October 26, 2006.

[15] *See* Fax from the Panel to the parties, October 26, 2006.

[16] Letter from the EC to the Panel, November 3, 2006.

III. FACTUAL BACKGROUND

36. In this section, the United States addresses the factual background to the matters in dispute. The United States will first discuss the background to the formation of Airbus. The United States will then briefly discuss how the Airbus governments have subsidized Airbus and enabled it to become the world's largest producer of LCA.

A. Background on Airbus SAS

37. Before the creation of Airbus, there were three manufacturers of LCA in the United States: Lockheed, McDonnell Douglas, and Boeing. Then, in 1965, three European governments – France, Germany and the United Kingdom – began discussions on an "Airbus" project. On September 26, 1967, they signed an intergovernmental protocol in which they agreed to provide seed money to allow a consortium of European aeronautics companies to establish a joint industrial organization to develop a new aircraft, the Airbus A300, and to enter into discussions with their national airlines to purchase the new aircraft.[17] Soon thereafter, however, various concerns – including a lack of enthusiasm for the A300's design on the part of the British and German national airlines and waning political support in the UK – led the British Government to withdraw from the project.

38. Two years later, on May 29, 1969, the French and German governments formally launched the Airbus A300 program with a French-German intergovernmental agreement to "reinforce European cooperation in the field of aeronautics."[18] The agreement included a commitment to provide Launch Aid to underwrite 100 percent of the costs of developing the A300.[19] Spain subsequently agreed to become a third partner in the Airbus project. The UK rejoined the consortium in 1978.

39. Airbus itself was formed in December 1970. It was organized under French law as a "*Groupement d'intérêt économique*" ("GIE"), a form of commercial partnership established in the mid-1960s that is, in effect, a hybrid between a partnership and a corporation. As a GIE, Airbus had a corporate identity and legal capacity. It was not, however, required to publish accounts, or to pay taxes. It simply pooled the capital contributed by the national Airbus companies, and its results were taken on the books of the companies in proportion to their shares in the enterprise.

40. The four national Airbus companies that constituted the Airbus consortium, directly or

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[17] Roger Béteille, *Le développement de l'avion, stimulation et coopération européenne*, in Airbus, Un Succès Industriel Européen, Institut d'Histoire de l'Industrie, at 38 (Paris, 1995) (Exhibit US-10). At the time, Béteille was the coordinator and technical director of the Airbus programme.

[18] *Accord Entre Le Gouvernement de La République Française et Le Gouvernement de La République Fédérale D'Allemagne Relatiff a La Realisation de L'Airbus A-300-B* (May 29, 1969) ("1969 Launch Aid Agreement") (Exhibit US-11). The agreement refers to Sud-Aviation, the predecessor to Aérospatiale.

[19] *Id*.

indirectly through their Airbus subsidiaries, were Aérospatiale of France (37.9%), BAE of the United Kingdom (20%), Daimler-Benz Aerospace AG of Germany ("DASA") (37.9%), and Construcciones Aeronauticas S.A. ("CASA") of Spain (4.2%). Other member State companies participated as "associate members" of the consortium (*e.g.*, Belgium's Belairbus) or as "risk-sharing" subcontractors.[20]

41. In 2001, Airbus formally became a single integrated company (Airbus SAS) (hereinafter "Airbus"). First, Aérospatiale, DASA, and CASA agreed to merge to create the European Aeronautic Defence and Space Company ("EADS"). The major shareholders of EADS are DaimlerChrysler, the French Lagardere group, the French State, and the government of Spain.[21]

42. Next, Airbus was incorporated as a single company, and EADS and BAE Systems agreed to transfer their respective Airbus-related assets to Airbus, becoming 80 percent and 20 percent owners, respectively, of the company. The national Airbus units were renamed Airbus France SAS ("Airbus France"), Airbus Deutschland GmbH ("Airbus Germany"), Airbus UK Limited ("Airbus UK"), and Airbus España SL ("Airbus Spain").

43. In June 2006, BAE Systems exercised a put option that required EADS to buy BAE's 20 percent interest in Airbus.[22] EADS concluded the purchase on October 13, 2006.[23]

44. For simplicity's sake, the United States uses the term "Airbus" throughout this submission to refer interchangeably to the various Airbus companies.[24] The United States uses individual designations (e.g., Airbus France, EADS, etc.) where necessary to ensure clarity.

B. Background on the Subsidization of Airbus

45. As the United States has already noted, the Airbus governments have systematically and methodically subsidized Airbus in pursuit of a coordinated program to create the world's largest producer of LCA. The single largest subsidy is the Launch Aid they have provided to underwrite the costs of developing the Airbus LCA family, but they provide many other

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[20] The Airbus "associate members" and other Airbus suppliers typically receive Launch Aid and other subsidies to support their participation on Airbus projects. The United States has not included those subsidies in this dispute.

[21] In addition, a Russian state-owned bank purchased a 5 percent interest in EADS in 2006.

[22] Press Release, *EADS received Put Notice regarding BAE Systems' stake in Airbus* (June 7, 2006) (Exhibit US-12).

[23] Press Release, *EADS is 100 percent owner of Airbus*, EADS (Oct. 13, 2006) (Exhibit US-13).

[24] The U.S. panel request defines the term "Airbus companies" to include "Airbus SAS, its predecessor Airbus GIE and current and predecessor affiliated companies, including each person or entity that directly, or indirectly through one or more intermediaries or relationships, controls or controlled, is or was controlled by, or is or was under common control with Airbus SAS or Airbus GIE, such as parent companies, sibling companies and subsidiaries, including Airbus Deutschland GmbH, Airbus España SL, Airbus France S.A.S., Airbus UK Limited, European Defence and Space Company ("EADS"), and BAE Systems."

substantial subsidies as well. For example, the European Investment Bank supplements Launch Aid with additional subsidized loans; the Airbus national and sub-national governments provide subsidized infrastructure, grants to develop infrastructure, and grants to underwrite Airbus's research and development efforts; and certain Airbus governments have provided non-commercial equity infusions and forgiven substantial amounts of Airbus's accumulated government debt.

46. All of these subsidies are inconsistent with the EC's and the Airbus governments' WTO obligations. In addition, the Launch Aid for the A380, the A340-500/600, and the A330-200 aircraft are prohibited subsidies because they are contingent on export performance.

47. In this section, the United States provides a relatively brief chronological discussion of the subsidies to Airbus that are at issue in this dispute. Because of the sheer number of subsidy measures, however, the United States presents the bulk of the factual description of each subsidy at the beginning of the analysis of each measure in the "legal argument" section of this submission.

48. As the United States noted above, the French and German governments launched Airbus in 1969 with an intergovernmental agreement to "reinforce European cooperation in the field of aeronautics."[25] The agreement accomplished this purpose by establishing four intergovernmental institutions, which were designated the Airbus Ministers' Conference (also referred to as the Ministerial Meeting), the Airbus Intergovernmental Committee, the Airbus Executive Committee and the Airbus Executive Agency. For over thirty years, the Airbus governments have used the institutions to oversee Airbus and coordinate the Launch Aid system and their other support for Airbus.

49. The governments also agreed to provide Launch Aid to cover 100 percent of the development costs of the first member of the Airbus family, the A300. When Spain subsequently joined the A300 program, its participation and commitment to provide Launch Aid were memorialized in an additional intergovernmental agreement.

50. Airbus launched the A310, a slightly smaller version of the A300, in 1978. The Airbus governments continued their program of supporting Airbus with grants of Launch Aid by agreeing to cover the bulk of the costs that Airbus would incur to develop the aircraft. They memorialized their commitment in an intergovernmental agreement covering both the A300 and A310. Among other matters, the agreement set out the terms of the additional Launch Aid; in total, the three governments provided approximately $3,000,000,000 in Launch Aid for the A300 and the A310 projects.

51. In 1983, the German government responded to the financial difficulties of the German Airbus company, Deutsche Airbus GmbH ("Deutsche Airbus"), by agreeing to defer indefinitely

[25] 1969 Launch Aid Agreement (Exhibit US-11).

Deutsche Airbus's obligation to make any payments on the Launch Aid and other debts it owed to the German government.[26]

52. In 1984, Airbus launched the A320, an aircraft that Airbus described as "an essential and integral element in {its} objective to develop a family of products."[27] Although the vast majority of the Launch Aid that Airbus had received for the A300 and A310 projects was still outstanding, the Airbus governments agreed to "further reinforce European cooperation within the Airbus consortium" by providing approximately $2,500,000,000 in Launch Aid to underwrite Airbus's A320 development costs.[28] According to government documents, the Launch Aid covered up to 90 percent of the project's development costs.[29] A 1986 report by the French Senate explains that France tried and failed to convince private banks to provide financing for the A320 project on the same terms as the government.[30]

53. In 1985, $6,400,000,000 in negative cash flow on the L-1011 program forced the U.S. producer Lockheed to exit the LCA market.[31]

54. In 1987, only three years after launching the A320, Airbus decided to launch two additional new aircraft models, the A330 and the A340. Airbus held a 15 percent share of the LCA market at the time, and it believed that this "{b}roadening of our family of products will help us towards our objective of capturing at least 30 percent of the world market in the next

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[26] *See* BT-Drs. 11/4375, at 17 (Exhibit US-14).

[27] Airbus CEO Bernard Lathière, quoted in *Airbus Industry; A320 is a reality,* Business Wire (March 2, 1984) (Exhibit US-15).

[28] *See Acuerdo entre los gobiernos de la República Francesca, la República Federal de Alemania, el Reino Unido de Gran Bretaña e Irlanda del Norte, el Reino de España y el Reino de Bélgica, concerniente al Programa Airbus A320 hecho en Bonn el 6 de febrero de 1991,* preamble, *reprinted in* BOE núm. 18 at 1918, 1919 (Jan 21, 1994) ("A320 Launch Aid Agreement") (Exhibit US-16). The agreement takes the same form as the earlier A300 agreement and contains the same core terms and conditions. It provides for the continued operation of the Airbus intergovernmental institutions and refers specifically to the earlier intergovernmental agreements on the A300 and A300/A310. *Id*., Art. 3 (Exhibit US-16).

[29] The 1990 German Federal Budget introduced a standard development aid ceiling for Airbus of 90 percent. *See* Budget Plan 09 (Ministry of Economics), Part 02, Chapter 09, comments to line item 892 91-634 (Exhibit US-17X). For France (75%): Collin (Yvon), Rapport d'Information No 367 (96/97), Mission de contrôle effectuée sur le soutien public à la construction aéronautique ("1997 Senate Report"), at 63, 67 (Exhibit US-18). For Spain (70%): Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (Jan. 13, 1997) (Exhibit US-19).

[30] Fortier (Marcel), Senate Report No 67, Commission des finances, projet de loi de finances pour 1987, tome III Annexe No 21 du 17/11/1986, Equipement, Logement, Amenagement du territoire et transports, IV Transports, 2. Aviation civile, 4. Meteorologie, at 25 (Exhibit US-20).

[31] *See,e.g., The subsidies roll on*, The Economist, at 66 (Feb. 14, 1987) (contrasting Lockheed's exit from the market with Airbus's ability to remain in the market, even though Airbus's sales situation was similar to Lockheed's) (Exhibit US-21).

decade."[32] Airbus needed additional grants of Launch Aid to fund the project, however. At the time, the Airbus companies were under severe financial strain because of the combined costs of producing the A320 (which had not yet had its first flight) and developing the two new models.[33] In addition, as British Aerospace CEO Sir Austin Pearce explained, "financing the project through commercial banks is not feasible . . . because of the risk associated with the program."[34] As one British parliamentarian stated, "the project needs Government cash; it does not want City cash with strings."[35]

55. At the time of the A330/A340 launch, Airbus had repaid none of the A320 Launch Aid and very little of the A300 and A310 Launch Aid. Nevertheless, the Airbus governments continued their Launch Aid program by committing to provide approximately $5,000,000,000 in additional grants of Launch Aid for the A330 and the A340, covering 60 to 90 percent of Airbus's development costs.[36] Lockheed had already exited the market, and Airbus viewed the aid as critical to its efforts to eliminate McDonnell Douglas from the market as well. As one Airbus insider described at the time, Airbus's strategy was:

> to go for the kill with McDonnell Douglas . . . . The A340 won't be a commercially successful airplane, but it can really hurt McDonnell.[37]

56. At approximately the same time as the Airbus governments' agreement to provide the A330/A340 Launch Aid, the European Investment Bank agreed to further subsidize Airbus. In 1988-89, the EIB agreed to provide Euro 448,000,000 in subsidized loans to Aérospatiale, British Aerospace, and CASA to further underwrite the costs of the A320 and A330/A340 programs. In 1990-91, it provided an additional Euro 284,000,000 to British Aerospace for the

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[32] Rick Gladstone, *Airbus chief chides U.S. competitors, says it will claim 30 percent of market,* Associated Press (April 23, 1986) (Exhibit US-22) (quoting Airbus head Jean Pierson).

[33] *See, e.g.,* Stephen Aris, *Close to the Sun* 145 (2004) (Exhibit US-23).

[34] *British Aerospace rejects A330/A340 aid proposal*, Aviation Week & Space Technology (March 30, 1987) (Exhibit US-24).

[35] Statement of Barry Jones, chief opposition spokesman of Wales, quoted in *Parliament: Minister may fight for Airbus*, The Times (London) (Feb. 10, 1987) (Exhibit US-25).

[36] BT-Drs. 12/1080, at 46 (Exhibit US-26); 1997 Senate Report, at 63, 68 (Exhibit US-18); Boletin Oficial de las Cortes Generales, Congreso de los Diputados, Contestaciones del Gobierno, Serie D, Núm. 547, (June 5, 2003), at 153 (Exhibit US-27). The Airbus governments continued their practice of memorializing their commitment to provide the Launch Aid in an intergovernmental agreement. *Acuerdo entre Los Gobiernos de La Republica Francesa, La Republica Federal de Alemania, El Reino Unido de Gran Bretaña e Irlanda del Norte, El Reino de España y El Reino de Belgica Relativo al Programa Airbus A 330/ A 340 (*"A330/A340 Launch Aid Agreement") (Exhibit US-28).

[37] Frank J. Comes, *Widebody Wars: Airbus Decides 'To Go for the Kill'*, Business Week, at 80 (July 6, 1987) (explaining that "Airbus managers, encouraged by a string of recent sales successes and $ 4 billion in new European government funding, are girding for a knock-down-drag-out fight with McDonnell") (Exhibit US-29).

A320 and A330/A340 programs, and Euro 44,000,000 to CASA for the A330/A340 program.[38]

57. The Airbus governments also took other steps to assist Airbus at that time. For example, the financial situation of the German Airbus company, Deutsche Airbus, was particularly dire at the time of the A330/A340 launch. The German government decided to address the issue by constructing an aid package that was designed to induce Daimler-Benz to acquire Messerschmitt-Bölkow-Blohm GmbH ("MBB"), Deutsche Airbus's parent company. The package included several elements that served to "significantly limit any risk to Daimler-Benz."[39]

58. First, the government agreed to continue deferring, until 2001, Deutsche Airbus's obligation to repay the Launch Aid it had already received.[40] Second, the government agreed to an exchange rate guarantee scheme for the Airbus program that would shield the company from risks associated with the fluctuation of the U.S. dollar. Third, the government agreed to provide Deutsche Airbus approximately DM 2,330,000,000 in "long term" government loans ("repayable grants") that Deutsche Airbus could use to repay private loans it had obtained to cover its losses on the Airbus project. The government allowed Deutsche Airbus to defer repayment of the government loans until 2001, it made repayment of the loans contingent on the existence of pre-tax profits, and it linked the amount of the repayments to the amount of such profits, if any. The government also agreed to acquire a 20-percent share in Deutsche Airbus for DM 505,000,000. With these subsidies in hand, Daimler-Benz agreed to acquire MBB.

59. Aérospatiale was also having serious financial problems at the time of the A330/A340 launch and the beginning of A320 production. Its long-term borrowing at the time amounted to FF 8.7 billion, its shareholders' equity stood at only FF 3.1 billion, and its debt-to-equity ratio was a staggering 12.5 to 1.[41] The French government responded with a series of equity infusions: FF 1,250,000,000 in 1987, and the same amount again in 1988. The government-owed bank Credit Lyonnais injected another FF 1,400,000,000 in 1992, and the French government injected a further FF 2,000,000,000 in 1994.[42]

60. Two years after the launch of the A330/A340 program, Airbus launched a derivative version of the A320, which it designated the A321. As the A321 was a relatively low-cost

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[38] The United States discusses the EIB loans in Section IV.C of this submission. The United States provides the amounts in Euros because that is how the EIB values them on its website.

[39] The source of this quote is a report that the German Monopolkommission – a German public body entrusted with the independent analysis of antitrust and merger control issues in Germany – issued when it examined the aid package. *See* Monopolkommission, Zusammenschlussvorhaben der Daimler-Benz AG mit der Messerschmitt-Bölkow-Blohm GmbH, Sondergutachten der Monopolkommission gemäss § 24 Abs. 5 Satz 7 GWB ("Monopolkommission" or "Monopolkommission Report"), paras. 129, 131(Exhibit US-30). The United States discusses the report in more detail in the section of this submission addressing the aid package.

[40] For a summary of the package, Monopolkommission, paras. 130-31 (Exhibit US-30).

[41] Aérospatiale, 1987 Financial Results, at 20 (Exhibit US-32).

[42] The United States discusses the French equity infusions in Section IV.G of this submission.

derivative of the original A320, Airbus was able to develop the aircraft without seeking additional Launch Aid from the Airbus governments. It did, however, receive another Euro 137,000,000 subsidized loan from the European Investment Bank.

61. In 1992, a Tokyo Round Subsidy Code dispute settlement panel found that the exchange rate guarantee scheme that the German government had established as part of the DASA aid package was a prohibited export subsidy.[43] Although Germany agreed to eliminate the scheme, the company demanded compensation. The German government responded by transferring its 20-percent ownership in Deutsche Airbus to MBB (now DASA), without charge.

62. Three years later, in 1995, Airbus launched the A330-200, a derivative of the A330. The French government had provided Launch Aid to cover most of Aérospatiale's development costs for the original A330, and it agreed to provide an additional FF 330,000,000 in Launch Aid for this latest extension of the Airbus family.[44]

63. Two years after that, in 1997, Airbus launched two more new aircraft models in order to "be a player in the market for long-range, high-capacity (over 300 passengers) aircraft, where it has been absent up to now."[45] The new aircraft were the A340-500 and A340-600, two derivatives of the original A340. In keeping with their established practice, the French and Spanish governments provided additional Launch Aid in support of Airbus's strategy. The French government committed to provide FF 2,110,000,000,[46] and Spain committed to provide Ptas 11,348,000,000.[47] Airbus's receipt of the Launch Aid was critical; the European Commission stated at the time that if Aérospatiale "were to finance the development costs of the A340-500/600 solely from its own capital (or through bank loans), it would seriously weaken the financial structure of the company" and that "the reimbursable advance from the French authorities is helping to promote the A340-500/600 program, which could not be implemented

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[43] *See EEC – Airbus*. The United States describes the exchange rate guarantee scheme in Section IV.F of this submission.

[44] *See, e.g.,* 1997 Senate Report, at 67 (Exhibit US-18); Collin (Yvon), Senate Report No 89, commission des finances, projet de loi pour 2000, Tome III, Annexe 25, Equipement, Transport, Logement - Transport Aerien, Meteorologie et Aviation Civile, at 83 (Exhibit US-33).

[45] Letter from Karel Van Miert to Hubert Vedrine, *Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program*, Aid No. N369/98, at 2 (translation at 2) (Jan. 26, 1999) (Exhibit US-3).

[46] *See Protocole d'Accord entre l'Etat et Aerospatiale relatif au programme Airbus A340-500 et A340-600*, Art. 3 ("A340-500/600 Protocol"), DS316-EC-BCI-0000276,-0000277 (Exhibit US-35; see BCI Annex); *see also Convention entre l'Etat et Aerospatiale concernant le développement des Airbus A340-500 et A340-600*, Art. 4.2 ("A340-500/600 Convention"), DS316-EC-BCI-0000289, -0000294 (Exhibit US-36; *see* BCI Annex).

[47] *See* Convenio Marco de Colaboración entre El Ministerio de Industria y Energía y La Empresa Construcciones Aeronáuticas S.A. Relativo a La Financiación de La Participación de Dicha Empresa en el Desarollo del Programma Airbus A 340-500 y A 340-600 ("Spanish A340-500/600 Agreement") at 5 (Segunda), DS316-EC-BCI-0000534, 0000538 (Exhibit US-37; see BCI Annex); *see also* Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Contestaciones del Gobierno, Serie D, Núm. 547, at 253 (June 5, 2003) (in Euros; annual) (Exhibit US-38).

without this government support."[48]

64. In the same year that the Airbus governments funded the launch of the A340-500 and A340-600 with Launch Aid, McDonnell Douglas exited the LCA market by merging with Boeing. Airbus had taken most of McDonnell Douglas's market share, and the company was unable to continue as an independent producer of LCA.

65. In 1998, the German government decided to facilitate the creation of EADS and Airbus SAS by cleaning up DASA's balance sheet. As the United States has already explained, the aid package that the government had created in the late 1980s to induce Daimler-Benz to acquire Deutsche Airbus's parent company, MBB, had allowed Deutsche Airbus to forego any repayment of its government debts until after 2001. By 1998, the total accumulated amount of the debt exceeded DM 9,400,000,000. The German government agreed to allow the company to "settle" this debt with a one time payment of just DM 1,735,000,000, or just over 18 percent of the total.[49] The government forgave the other DM 7,700,000,000, or over 80 percent of the total.[50]

66. In that same year, the French government similarly decided to improve Aérospatiale's balance sheet in advance of the creation of EADS and Airbus SAS. The French government accomplished this objective by transferring its 45.76 percent share in the capital of Dassault Aviation S.A. – worth some FF 5,280,000,000 – to Aérospatiale.[51]

67. In 1999, Airbus received more LCA orders than Boeing for the first time. It did so again in 2001, 2002, 2003, 2004, and 2005.

68. In December 2000, Airbus completed its family of LCA by launching the Airbus A380, a 555-seat, double-decker aircraft. In a press release issued on the date of the launch, Airbus's then-CEO Noël Forgeard "stressed the significance of the programme for the range of products offered by Airbus":

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[48] Letter from Karel Van Miert to Hubert Vedrine, *Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program*, Aid No. N369/98, at 5 (translation at 8) (Exhibit US-3).

[49] *See, e.g.,* DaimlerChrysler's Form 20-F for the fiscal year ended December 31, 1998, which states:

> During 1998 and 1997, DaimlerChrysler Aerospace Airbus GmbH settled these contingent obligations with the Federal Republic of Germany for payments of {Euro} 895 and {Euro} 716, respectively. The 1998 settlement, which resulted in the complete discharge of all remaining obligations to the German Federal Government, related to the Airbus A300/310 and A330/340 series aircraft as well as to financial assistance not related to development, while the 1997 settlement related primarily to the A320 aircraft and derivatives.

DaimlerChrysler, Form 20-F for the fiscal year ended December 31, 1998, Consolidated Statement of Income, Note F-42 (Exhibit US-39).

[50] The United States analyzes the German debt forgiveness in Section IV.E of this submission.

[51] The United States discusses the Dassault share transfer in Section IV.G of this submission.

> With the launch of the A380 we are now closing the final large gap in our product spectrum. We are now able to offer aircraft in all the categories from single-aisle via widebody to megaliner and can therefore fulfil all the wishes our customers may have.[52]

69. The A380 program was Airbus's biggest and riskiest to date; Airbus estimated that the A380 development costs alone would amount to some $10,700,000,000, and others estimated that the total development costs could exceed $15,000,000,000.[53] Airbus executives describe the aircraft as the second half of a "pincer movement" aimed at the Boeing 747:[54]

> We have attacked {Boeing} from below with the A340. Now the idea is to come over the shoulder with a high capacity plane.[55]

70. The Airbus governments enabled this "attack" on Boeing by providing another $4,000,000,000 in Launch Aid to underwrite one third of Airbus's A380 development costs. In addition, Airbus received a Euro 700,000,000 subsidized loan for the A380 from the EIB; approximately Euro 1,000,000,000 in subsidized infrastructure in Hamburg and Toulouse; and a £19,500,000 grant for the A380 from the Welsh Assembly.[56]

71. As the European Commission stated in a press release on the day that Airbus revealed the first A380 to the public, the A380 is truly "the fruit of European state-level co-operation."[57]

72. Nor was that the end of the subsidies to Airbus. During the next five years, the Spanish national and regional governments provided approximately Euro 220,000,000 in grants to Airbus production sites in Spain.[58] The European Commission and the Airbus governments provided additional hundreds of millions of euros in grants to help fund Airbus's research and

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[52] *A380 launch official – EADS welcomes the decision of Airbus supervisory board*, EADS (Dec. 19, 2000) (Exhibit US-445).

[53] *See, e.g.,* Kevin Done, *UK Backing for Airbus 'superjumbo'*, FT.com (Financial Times) (Mar. 13, 2000) (explaining that the chairman of BAE Systems estimated total costs of £10 billion, and the chairman of DASA estimated the total costs as €12 billion) (Exhibit US-40); Mark Odell, *How the Market has Changed*, FT.com (Financial Times) (Mar. 13, 2000) (explaining that total development costs were estimated as somewhere between $10 and $15 billion). (Exhibit US-41).

[54] Matthew Lynn, Birds of Prey at 207 (quoting Airbus head of strategy Adam Brown) (Exhibit US-42).

[55] *Id*. at 208 (quoting Airbus head Bernard Ziegler) (Exhibit US-42).

[56] The United States discusses the A380 Launch Aid in Section IV.A.f of this submission, the EIB loan in Section IV.C, and the French, German, and UK infrastructure subsidies in Section IV.D.

[57] Press Release, *Europe launches Airbus A380,* European Commission, Research, Aeronautics, News & Features (Jan. 19, 2005) (the release also noted that "France, Britain, Germany and Spain have all invested heavily in the 10-year, €10-billion-plus A380 programme") (Exhibit US-43).

[58] *See* Section IV.D.6 of this submission.

development efforts.[59] The European Commission's 7th Framework Program alone has allocated Euro 2,500,000,000 to research in the aeronautics and air transport sector.

73. Finally, the Airbus governments have continued to support Airbus's commercial strategy with their Launch Aid program, most recently by agreeing to provide at least $1,700,000,000 for the newest update to the Airbus family, the A350. The original target of the A350 was the Boeing 787. Airbus has since announced that it is also "positioning {the A350} program to be a 777-200ER killer."[60] Recent events suggest that the Airbus governments will double or even triple the amount of Launch Aid they have already agreed to provide for the A350.[61]

C. Background on the Adverse Effects to the Interests of the United States

74. The subsidies have achieved their intended effects. Two U.S. producers, Lockheed and McDonnell Douglas, have been forced to exit the market. In 2003, Airbus delivered more new LCA than Boeing for the first time, becoming the world's largest producer of LCA. It has repeated its success each year since that time, and it continues to retain its status as the world's largest producer today.

75. From 2001 to 2005, Airbus increased its share of the global LCA market by 19 percentage points, from 38 percent to 57 percent.[62] During this period, Airbus increased its market share in the U.S. market by 18 percentage points (from 30 percent to 48 percent), in the EC market by 9 percentage points (from 58 percent to 67 percent), and in other markets by 20 percentage points (from 36 percent to 56 percent).[63]

76. Several Airbus victories over Boeing in major contested sales campaigns at individual airlines account for a large share of its market share gains in recent years. For example, when easyJet decided in 2002 to switch its all-Boeing fleet for an all-Airbus fleet, its chairman publicly stated that the price difference between Airbus and Boeing "was so substantial we would have been in breach of our fiduciary duty; it would have been an offence to buy Boeing."[64] As a result, easyJet ordered 120 Airbus aircraft in a single transaction that accounted

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[59] *See* Section IV.H of this submission.

[60] Robert Wall, Michael Mecham and Andy Nativi, *Counterattack; Airbus fights back. The manufacturer redefines A350, eyes 100-plus orders at Paris air show*, Aviation Week & Space Technology (May 23, 2005) (quoting Airbus A350 program manager Olivier Andries) (Exhibit US-140).

[61] The United States discusses the A350 in Section IV.A.g of this submission.

[62] Airclaims CASE database, data query on August 14, 2006.

[63] *Id.*

[64] Stelios Haji-Ioannou (chairman of easyJet), quoted in Kevin Done, *Airbus Beats Boeing in War over Big Order*, Fin. Times, Oct. 15, 2002, at 21 (Exhibit US-407).

for more than 20 percent of all LCA ordered in the world during 2002.[65]

77. Under pressure from Airbus, prices obtained by Boeing for the aircraft that it did sell during the period declined significantly. For example, a major Boeing customer reported that it had obtained additional price concessions from Boeing on outstanding orders "significantly below" the original contract price in the new "favourable market conditions" for major LCA purchasers.[66] Overall, Boeing prices generally declined from 2001 to 2005 as it lost significant market share to Airbus.[67]

78. Dr. Gary Dorman of NERA Economic Consulting has modeled the way that Launch Aid distorts launch decisions and thus distorts the competition in the LCA industry to the benefit of Airbus and the detriment of Boeing.[68] Dr. Dorman shows how Launch Aid shifts the risks of LCA development from Airbus to the Airbus governments, distorting both the product lineup that Airbus can offer and the price at which it offers it.

79. The loss of market share and decline in LCA prices in the period 2001 to 2005 have taken their toll on the financial health of Boeing, the only remaining U.S. competitor to Airbus. During this period, Boeing worldwide sales have fallen 45 percent by volume and 35 percent by value. Boeing's operating income has fallen by 25 percent and thousands of U.S. workers have lost their jobs.[69]

IV. LEGAL ARGUMENT

80. In this section, the United States demonstrates that the EC and the Airbus governments have provided massive amounts of WTO-inconsistent subsidies to Airbus.

81. The United States begins with the approximately $15,000,000,000 in Launch Aid that the Airbus governments have provided to Airbus to underwrite the development of its family of LCA. The United States first discusses the regime that the Airbus governments maintain to oversee Airbus and coordinate their provision of Launch Aid. The United States then discusses the benefits that Launch Aid confers on Airbus and the specific nature of the endeavor to Airbus. The United States then demonstrates that each of the grants of Launch Aid that Airbus has received is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.

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[65] Airclaims CASE database, data query on August 14, 2006. The United States discusses numerous additional examples of sales campaigns won by Airbus in Section IV.I.3.b and Section IV.I.4.c of this submission.

[66] Ryanair Holdings plc, Notice of Extraordinary General Meeting: *Proposed Purchase of up to 140 Boeing "Next Generation" 737-800 Aircraft* at 7-8 (Apr. 22, 2005) (Exhibit US-427).

[67] *See* Exhibit US-444 (BCI Annex).

[68] Gary Dorman, *The Effect of Launch Aid on the Economics of Commercial Airplane Programs* (Oct. 2006) (hereafter, Dorman Report) (Exhibit US-70; see BCI Appendix). The United States discusses Dr. Dorman's economic model and analysis in Section IV.I.4.e.i of this submission.

[69] See Table 4 in Section IV.I.3.c of this submission.

The United States then demonstrates that the Airbus governments have already committed to provide additional Launch Aid for the Airbus A350.

82. Next, the United States demonstrates that the Launch Aid that Airbus has received for the A380, the A340-500/600, and the A330-200 aircraft models is prohibited by Articles 3.1(a) and 3.2 of the SCM Agreement because it is contingent upon export performance.

83. The United States then demonstrates that the other measures at issue in this dispute are also specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.

- First, the United States demonstrates that the European Investment Bank has provided several subsidized loans to Airbus.

- Second, the United States demonstrates that Airbus has received substantial infrastructure subsidies from national and regional governments in Germany, France, the UK, and Spain.

- Third, the United States demonstrates that the German government subsidized Airbus by forgiving approximately DM 7,700,000,000 in accumulated government debt.

- Fourth, the United States demonstrates that the German government subsidized Airbus by injecting Euro 258,000,000 in equity into the firm, and then giving the shares it received to Airbus, without compensation.

- Fifth, the United States demonstrates that the French government subsidized Airbus by making a series of non-commercial equity infusions into the French Airbus company, Aérospatiale.

- Sixth, the United States demonstrates that the European Commission, the Airbus governments, and certain regional Airbus governments subsidize Airbus by providing it with hundreds of millions of euros in grants and loans to underwrite its research and development efforts.

84. Finally, the United States demonstrates that the Launch Aid and other challenged subsidies are inconsistent with Articles 5(a), 5(c), 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement because they are causing or threatening to cause adverse effects to the interests of the United States.

A. The French, German, UK, and Spanish Governments Have Provided Massive Subsidies to Airbus in the Form of Launch Aid

85. At the ceremonial unveiling of the first A380 to the public, French President Jacques Chirac described the aircraft as a "great European success story" that "demonstrates the success of European industrial policy and embodies the vision of European integration."[70] He was also describing the history of the Airbus enterprise. For over thirty years, the Airbus governments have maintained a formal and institutionalized "European industrial policy" toward Airbus. A core part of that policy has been the systematic and coordinated provision of massive subsidies to Airbus that it has used to develop a family of LCA targeted at its U.S. competitors.

86. The single largest category of subsidy, and the subsidy that has contributed the most to Airbus becoming the world's largest civil aircraft producer, is Launch Aid.

87. Launch Aid is a form of highly preferential financing that the Airbus governments designed and use to offset the enormous costs and extremely high risks that characterize the development of LCA. All of the Launch Aid that the Airbus governments have provided to Airbus has taken the same form: long-term unsecured loans at zero or below-market rates of interest, with back-loaded repayment schedules that allow Airbus to repay the loans through a levy on each delivery of the financed aircraft.[71] If Airbus fails to sell enough of the aircraft to repay the loan, the outstanding balances are indefinitely extended or forgiven.[72] Repayment of the aid is entirely dependent on the success of the financed aircraft.

88. By providing Launch Aid on a back-loaded and success-dependent basis, the Airbus governments assume a substantial portion of the commercial and financial risks of developing new models of LCA. Unlike commercial lenders, however, they do not charge Airbus for assuming these risks. Instead, they provide the aid either interest-free or at interest rates that are substantially below the rates that commercial lenders would demand for financing with similarly advantageous characteristics.

89. The Airbus governments have provided Launch Aid in a systematic and coordinated way since Airbus's inception in order to enable Airbus to develop a full family of LCA to compete effectively against U.S. producers of LCA. The face amount of the Launch Aid is approximately

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[70] Airbus Press Release, *Heads of State Help Celebrate the A380* (Jan. 18, 2005) (Exhibit US-44).

[71] The United States discusses the "back-loaded" aspect of the repayment schedules at greater length below.

[72] An EADS financial document states that:

> Under IAS or U.S. GAAP, refundable advances {*i.e.*, Launch Aid} would continue to be treated as a liability until such time as all conditions that might lead to repayment had been eliminated. At such time, the advances would be recorded as income.

EADS Offering Memorandum, at 56 (emphasis added) (Exhibit US-LAU-131).

$15,000,000,000; if the governments had required Airbus to pay commercial rates of interest, its total debt would have been many billions higher. They financed 100 percent of the development costs of the first member of the Airbus family, the A300, and between 70 and 90 percent of the costs of the second aircraft in the family, the A310. They underwrote 75 percent of the costs of developing the A320, and 60 to 90 percent of the costs for the A330 and the A340. They provided approximately $4,000,000,000 in Launch Aid to enable Airbus to complete the family with the double-decker A380.[73] And the four Airbus governments have agreed to continue their support for Airbus's commercial strategy by providing at least $1,700,000,000 in additional Launch Aid for the Airbus A350,[74] even though Airbus has not yet repaid any of the $4,000,000,000 in Launch Aid that it received for the A380 and will repay almost none of the Launch Aid that it received almost a decade ago for its most recent previous models, the A340-500 and A340-600.[75]

90. In this section, the United States will first describe how the Airbus governments developed and maintain their program of supporting Airbus with Launch Aid. The United States will then demonstrate that the Airbus governments' Launch Aid program is a specific subsidy to Airbus. The United States will then demonstrate that every grant of Launch Aid that the Airbus governments have provided to Airbus to develop its family of LCA has been a specific subsidy to Airbus. Finally, the United States will discuss recent events in the LCA market that show that the Airbus governments will continue providing Launch Aid to Airbus in the future.[76]

1. The Airbus Governments Have Supported Airbus with Launch Aid For Over 30 Years and Continue to Do So

91. As the United States noted above, the Airbus governments have provided Launch Aid to Airbus in a systematic way for over thirty years. They have done so deliberately and methodically in furtherance of a "European industrial policy" that has succeeded in creating a European national champion to the detriment of LCA manufactured in the United States.

92. The Airbus governments have provided between 33 and 100 percent of the financing that

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[73] The United States converted euros and pounds to U.S. dollars using October 17, 2006 exchange rates.

[74] The EC has refused to provide any information on the amount of Launch Aid that the four Airbus governments have provided for the A350; the United States is basing the $1.7 billion figure on information from public sources. The United States discusses the A350 Launch Aid in more detail in Section IV.A.g below.

[75] Airbus will not repay the A340-500/600 Launch Aid because the A350 will render the A340-500/600 – which Airbus only began delivering to customers in 2002-03 – largely obsolete. *See, e.g.,* James Regan and Tim Hepher, *Airbus eyes model range revamp to battle Boeing*, Reuters (May 17, 2006) (reporting Airbus CEO Forgeard's comment that the A350 would eat into demand for some existing A330 and A340 models and that some of the models might be rendered obsolete) (Exhibit US-LAU-146).

[76] The EC and the Airbus governments also use other terms to describe Launch Aid, such as launch investment, repayable launch investment, development support in the form of royalty-based financing, *avances remboursables*, *Rückzahlbare Zuwendungen*, *Entwicklungsbeihilfen*, *Zuschüsse zur Entwicklung von zivilen Flugzeugen*, *anticipo reembolsable*, and *prestamo reembolsable*.

Airbus has needed to develop its LCA family. Every time that Airbus asks for further grants of Launch Aid under the Launch Aid regime, the Airbus governments provide it. As former French Prime Minister Lionel Jospin stated in a March 2000 speech before the French Parliament, their purpose in providing the aid is to "give Airbus the means to win the battle against Boeing."[77]

93. The roots of the Airbus governments' Launch Aid program can be traced to 1969, when the governments of France and Germany entered into an agreement to "reinforce European cooperation in the field of aeronautics."[78] Under the terms of the agreement, the two governments agreed to provide up to FF 2,050,000,000 (DM 1.65 billion) in Launch Aid to underwrite the costs of developing the first Airbus aircraft, the A300-B.[79]

94. The 1969 agreement was only the first of a number of agreements in which the Airbus governments have memorialized their program to support Airbus with Launch Aid.[80] In addition to the 1969 agreement, there were at least four additional agreements relating to the A300 and A310 and their derivatives,[81] an agreement relating to the A320 (between France, Germany, the UK, Spain and Belgium),[82] an agreement relating to the A330/340,[83] and a joint decision by the

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[77] *Jospin pledges to aid Airbus in fight against Boeing*, Reuters (March 8, 2000) (quoting Jospin) (Exhibit US-1).

[78] Agreement Between the Government of the Republic of France and the Government of the Federal Republic of Germany Concerning the Realization of the Airbus A-300-B, at preamble (1969) ("1969 agreement") (Exhibit US-11). The agreement refers to Sud-Aviation, the predecessor to Aérospatiale.

[79] *Id.*, Art. 6.

[80] The EC and the Airbus governments refused the Annex V Facilitator's request for copies of the intergovernmental agreements. *See Questions for the European Communities Pursuant to Annex V of the SCM Agreement* (Oct. 7, 2005), Q18 (Exhibit US-4; see BCI Annex); *Replies to Questions by the Facilitator under Annex V of the SCM Agreement by the European Communities* (Nov. 18, 2005), Q18 (Exhibit US-5). The United States obtained copies of the 1969 agreement and the A320 and A330/A340 agreements from public sources.

[81] They include the Agreement between the Governments of the Kingdom of the Netherlands, the Federal Republic of Germany, and the French Republic concerning the realization of the Airbus A300B (1970); the Agreement of the 23rd of December 1971 between the Governments of the Spanish State, the French Republic, the Federal Republic of Germany, and the Kingdom of the Netherlands concerning the realization of the Airbus A300B; the Agreement between the Governments of the Federal Republic of Germany, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and Spain concerning the program Airbus (1981); and the Agreement between the Governments of the Kingdom of Belgium, the Federal Republic of Germany, Spain, the French Republic, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland concerning the program Airbus (1982). *See* Agreement between the Governments of the French Republic, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Kingdom of Belgium concerning the program Airbus A320, Art. 2 ("A320 Launch Aid Agreement") (Exhibit US-16).

[82] A320 Launch Aid Agreement (Exhibit US-16).

[83] Agreement between the Governments of the French Republic, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Kingdom of Belgium concerning the program Airbus A330/A340 of 25/26 April, 1994 ("A330/340 Launch Aid Agreement") (Exhibit US-28).

Airbus governments to provide Launch Aid for the A380.[84] Most recently, the Airbus governments made legally-binding commitments to provide Launch Aid for the A350.[85]

95. The Airbus governments have also created and maintain a set of formal intergovernmental institutions that they use to oversee Airbus and to work with it to determine whether and when to launch new Airbus aircraft.[86] The core intergovernmental institutions are the Airbus Intergovernmental Committee, the Airbus Executive Committee, and the Airbus Executive Agency, which the governments established in 1969 and which have been in continuous operation ever since.[87] Other institutions include the Airbus Ministers Conference and the Permanent Working Group for Sales Financing. An **[ ]** that sets out the relationship between Airbus and these institutions is attached to this submission.[88]

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[84] Press Release, *Accord pour le Financement de l'Airbus A380*, French Ministry of Transports (March 15, 2002) (explaining that the French agreement with Airbus France was "*la concrétisation, pour la France, de la décision prise à la fin de l'année 2000 par les différents pays européens concernés de soutenir ce programme au prorata des participations de leurs industries respectives au développement du nouvel avion*") (Exhibit US-45). Although the Annex V Facilitator asked the EC and the Airbus governments to provide a copy of the decision, they denied its existence. They did not attempt to resolve the discrepancy between their assertion and the French Transport Ministry's press release. *See Questions for the European Communities Pursuant to Annex V of the SCM Agreement* (Oct. 7, 2005), Q23(b) (Exhibit US-4; see BCI Annex); *Replies to Questions by the Facilitator under Annex V of the SCM Agreement by the European Communities* (Nov. 18, 2005), Q23(b) (Exhibit US-5). The EC did agree to provide a copy of an agreement between the Airbus governments and Airbus, however. *See* Airbus A380 Agreement, DS316-EC-BCI-0000597 (Exhibit US-122; see BCI Annex).

[85] *See, e.g.,* Robert Wall, *Airbus Gets Go-Ahead for A350*, Aviation Week & Space Technology (Oct. 9, 2005) (reporting that "{a}ll four 'Airbus governments' – Britain, France, Germany and Spain – have set aside funds for such loans and expressed backing for the project in writing") (Exhibit US-47); Bruno Trevidic, *The CEO of Airbus confirms the launch of the A350 in the beginning of October*, Les Echos (Sept. 15, 2005) ("*Nous avons obtenu un accord de principe des quatre pays à nos demandes d'avances remboursables, a-t-il assuré*") (Exhibit US-442); *Airbus says Government Aid Pledges are Legally Binding*, Associated Press (Oct. 7, 2005) (reporting Airbus CEO Humbert's confirmation that Airbus "has received 'legally binding' pledges of government aid to develop its new A350 plane") (Exhibit US-48).

[86] For example, on June 15, 1999, the Airbus Ministers approved the launch of the Airbus A380. *See* Barry James, *Ministers Clear Airbus's Superjumbo Plan*, International Herald Tribune (June 15, 1999) (Exhibit US-55).

[87] The Annex V Facilitator asked the EC to provide information and documents explaining:

> the role and history of the Airbus Ministers' Conference, the Intergovernmental Committee and its sub-committees, the Executive Agency Airbus, and any other institutions involved in the co-ordination or implementation of the financing of aircraft development and production by Airbus, including the legal basis of each institution and an explanation of the interrelationship among these institutions.

Questions for the European Communities Pursuant to Annex V of the SCM Agreement (Oct. 7, 2005), Q27 (Exhibit US-4; see BCI Annex). With the exception of the **[ ]** discussed in the next footnote, the EC refused to provide any of the requested information.

[88] *See* **[ ]**, DS316-EC-BCI-0006130 (Exhibit US-49). The **[ ]** is the sole piece of information that the EC was willing to provide in response to the Annex V Facilitator's request for information and documents pertaining to the role and history of the four Airbus institutions. It is entirely unclear to

(continued...)

96. In addition to the intergovernmental institutions, the Airbus governments also maintain dedicated bureaucracies at the national level. These bureaucracies perform the administrative tasks involved in maintaining the Launch Aid system and coordinating the provision of Launch Aid to Airbus.

97. In France, a special unit in the *Direction des Programmes Aéronautiques Civils* oversees Airbus and the Launch Aid system. The so-called "transport aircraft of more than 100 seats" unit participates in the Airbus intergovernmental institutions and administers the provision of Launch Aid to Airbus for the company's new projects.[89]

98. The UK Launch Aid system is administered by the "aerospace team" located within DTI's Aerospace and Defence Unit, which is "responsible for relations with civil aerospace companies, and launch investment."[90]

99. In Germany, the entity that is responsible for administering the Launch Aid system is the office of the Coordinator for the Aerospace Industry and for Aeronautics Research, an office within the Federal Ministry of Economics and Technology.[91]

100. In Spain, the Ministry of Science and Technology is responsible for administering the "system of reimbursable advances." It also "participates in the Council of Ministers of the four countries, the {Airbus} Executive Committee and the other bodies that manage and coordinate the system."[92]

101. As the reference to Spain confirms, the national Airbus bureaucracies work with the intergovernmental institutions to "manage and coordinate" the Launch Aid system. The Airbus governments also conclude agreements with Airbus to facilitate their coordination of the system.

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[88] (...continued)
the United States why the EC has designated the document as BCI.

[89] Arreté du 3 mars 2005 "portant organisation des mission et sous-directions de la direction des programmes aéronautiques et de la coopération de la direction générale de l'aviation civile", JO April 10, 2005, 489a, 496 (Exhibit US-50); Arreté du 11 septembre 2002 "portant organisation des missions et des sous-directions des programmes aéronautiques civils de la direction générale de l'aviation civile", JO December 5, 2002, 2-2, 1439 (Exhibit US-51).

[90] DTI, Aerospace and Defence (Exhibit US-52). "Launch investment" is the euphemism that the UK uses for Launch Aid. The UK began referring to "Launch Investment" instead of "Launch Aid" in the 1990s, presumably to downplay the "aid" aspects of the scheme.

[91] German Ministry of Economics and Technology, Dr. Wolf Günther, Special Representative of the Co-ordinator, Lage und Perspektiven der deutsche Luft- und Raumfahrt, at 7(Exhibit US-34).

[92] Cuadernos CDTI, July 1993, at 91 (the original Spanish text reads "*El Estado espanol, al igual que los otros tres Estados miembros, financia parcialmente los gastos de desarrollo de los distintos aviones Airbus mediante el sistema de anicipos reembolsables. La dirección, gestión, seuimiento y control del programa, a nivel gubernamental, la realiza el MICYT, que, as su vez, participa en el Consejo de Ministros de los cuatros países, el Comité Ejecutivo y los restantes órganos de dirección y coordinación del sistema*.") (Exhibit US-54).

Quite revealing of the pattern, an agreement pertaining to the A380 requires Airbus to **[**

][93] The information, which Airbus agreed to provide for current and future programs, includes **[**

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102. The European Commission and the Airbus governments have each confirmed the integrated nature of the Launch Aid program that they use to ensure the success of the Airbus enterprise. For example, on the same day that President Chirac described the A380 as a "success of European industrial policy,"[95] British Prime Minister Blair described the aircraft as "the result of unprecedented co-operation between the four countries . . . ."[96] And on the day after the ceremony, the European Commission stated that "for the EU, the A380 represents the fruit of European state-level co-operation."[97] Indeed, the former UK Secretary of Trade and Industry has stated that the provision of Launch Aid:

> reflects our approach to industrial policy. We are not standing to one side and leaving everything to the market . . . .[98]

103. It is also clear that the Airbus governments will continue to work together to provide Launch Aid to Airbus. For example, a European Commission report on the future of the European aerospace industry stated in October 2003 that member States will retain the "crucial responsibility" of "providing support in terms of R&D programmes, repayable launch aid and contributions to ESA programmes . . . ."[99] In May 2005, the European Commission defended the prospect of Launch Aid for the new Airbus A350 because Launch Aid is "part of the commercial

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[93] A380 Launch Aid Agreement, Recitals, at 3, DS316-EC-BCI-00000597 (Exhibit US-122; see BCI Annex).

[94] *Id*., e.g., Art. 3.2 (emphasis added). The intergovernmental agreements typically require Airbus to complete "framework agreements" with the Airbus Executive Agency. The EC refused to provide the Annex V Facilitator with copies of any of the framework agreements, however. *See Questions for the European Communities Pursuant to Annex V of the SCM Agreement* (Oct. 7, 2005), Q27(b)-(c) (Exhibit US-4; see BCI Annex); *Replies to Questions by the Facilitator under Annex V of the SCM Agreement by the European Communities* (Nov. 18, 2005), Q27(b)-(c) (Exhibit US-5).

[95] Pierre Sparaco and Robert Wall, *Proof of Concept; The unveiling was auspicious, but time will tell if the 'pride of Europe,' Airbus' A380, will live up to the manufacturer's huge ambitions*, Aerospace Week & Space Technology, at 20 (Jan. 24, 2005) (Exhibit US-58).

[96] Airbus Press Release, *Heads of State Help Celebrate the A380* (Jan. 18, 2005) (Exhibit US-44).

[97] Press Release, *Europe launches Airbus A380,* European Commission, Research, Aeronautics, News & Features (Jan. 19, 2000) (Exhibit US-43).

[98] Jamie Macaskill, *The Superjumbo: It'll Create 200 Scots Jobs Will Seat 1000 Travellers and Have a Gym and Casino*, The Daily Record, at 7 (Mar. 14, 2000) (Exhibit US-64).

[99] European Commission, *A Coherent Framework for Aerospace – a Response to the STAR 21 Report*, COM (2003) 600 final, at 12 (Oct. 13, 2003) (emphasis added) (Exhibit US-59).

landscape of aircraft development" in Europe.[100] That same month, the French Transport Minister stated that "{t}he French state has given its financial support to the A380 programme and we expect to continue in this vein . . . ."[101]

104. Similarly, in June 2006, an EADS spokesman stated that "Launch aid is the only available system right now."[102] In July 2006, the Airbus ministers "reaffirmed their agreement to support Airbus to continue to innovate and to develop programmes in the context of international competition."[103] And on November 14, 2006, the French Prime Minister Dominique de Villepin said the role of the State in EADS (and thus Airbus) is "to defend a strategic long term vision, which is guarantor of jobs and economic dynamism of the company. I can ensure you that the State will fully play its part."[104] The financial market standing of Airbus's parent company EADS hinges on these plans. As the Moody's commercial rating service explained in 2003:

> EADS's A3 long-term debt rating reflects the leading worldwide market positions held by several of its businesses, as well as the company's strong balance sheet, which should remain solid during the current severe downcycle in the commercial aircraft market. <u>The rating also considers the expectation for continuing government support, which is primarily in the form of refundable advances for up to 1/3 of the development cost of each new aircraft program on the Airbus level</u>.[105]

105. Finally, the Airbus governments' "legally binding" commitments to provide at least $1,700,000,000 in Launch Aid for the Airbus A350 confirm that they will continue their program

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[100] *See, e.g., EU backs new Airbus aid request, despite US opposition*, Agence France Presse (May 19, 2005) (Exhibit US-60).

[101] *France keen to maintain financial support for Airbus – de Robien*, AFX (May 24, 2005) (Exhibit US-61).

[102] Katrin Bennhold, *Airbus looks likely to seek state assistance*, International Herald Tribune (June 19, 2006) (Exhibit US-62).

[103] Communiqué text, Airbus Ministerial meeting at Farnborough International (July 17, 2006) (Exhibit US-63).

[104] Gil Bousquet and Jean-Pierre Bédéï, *Interview: de Villepin: "I will remain vigilant"*, La Dépêche du Midi (Nov. 14, 2006).

[105] Press Release, *Moody's Assigns A3 Rating to New Euro Mtn Program of European Aeronautic Defence and Space Company EADS N.V.*, Moody's Investor Service (Feb. 6, 2003) (emphasis added) (Exhibit US-56). Moody's made similar observations in 2001 and 2002. For example, a March 15, 2002 press release stated that Moody's rating for EADS:

> "reflects the forecast that Government support in the form of refundable advances will continue for the development programs of Airbus for up to 1/3 of the development cost of each new aircraft program; thus offsetting some of the pressure on the company's cash flows over the near-term."

Press Release, *Moody's Downgrades Issuer Rating of European Aeronautic Defense and Space Company Eads N.V. to A3 from A2*, Moody's Investor Service (Mar. 15, 2002) (Exhibit US-57).

to support Airbus with Launch Aid.[106]

106. In light of the Airbus governments' consistent and systematic approach to their support of Airbus for over three decades, the institutional structures and bureaucracies they have created to maintain and provide this support, and their statements and actions concerning this support, the specific content of their Launch Aid program and the future conduct it will entail is clear. The Airbus governments will continue to use Launch Aid to facilitate Airbus's commercial strategy, without regard to their WTO obligations or the effects of the subsidies on the United States.

2. Launch Aid is a Subsidy Within the Meaning of Article 1 of the SCM Agreement

107. In the previous section, the United States demonstrated that the Airbus governments have developed and maintain a system to support Airbus through the provision of Launch Aid. In this section, the United States will demonstrate that Launch Aid is a subsidy within the meaning of Article 1 of the SCM Agreement. The United States will begin by demonstrating that Launch Aid involves a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement. The United States will then demonstrate that Launch Aid confers a benefit that is specific to Airbus within the meaning of the SCM Agreement.

a. Launch Aid Constitutes a Financial Contribution to Airbus

108. Under Article 1.1 of the SCM Agreement, a subsidy shall be "deemed to exist" if there is a "financial contribution by a government or any public body within the territory of a Member," and a "benefit is thereby conferred." Thus, the first element for demonstrating the existence of a subsidy is a financial contribution.

109. Article 1.1(a)(1)(i) of the SCM Agreement states that "there is a financial contribution" by a government where "a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion)" or "potential direct transfers of funds or liabilities (e.g. loan guarantees)." The Airbus governments' Launch Aid program is a government practice that involves the direct transfer of funds or potential direct transfer of funds in the sense of Article 1.1(a)(1)(i) – namely, success-dependent loans.[107] Therefore, "there is a financial contribution"

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[106] *See, e.g., Airbus says government aid pledges are 'legally binding'*, Associated Press (Oct. 7, 2005) (Exhibit US-48).

[107] The panel in the *Canada – Aircraft* dispute examined success-dependent loans provided under the *Technology Partnerships Canada* ("TPC") program; the panel was in "no doubt" that the TPC loans – which are nearly identical in form to Airbus Launch Aid – constituted financial contributions within the meaning of Article 1.1 of the SCM Agreement because they were "direct transfers of funds" in the sense of Article 1.1(a)(1)(i). *Canada – Aircraft (Panel)*, para. 9.306.

within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[108]

b. Launch Aid Confers a Benefit on Airbus

110. The second element for demonstrating the existence of a subsidy under Article 1.1 of the SCM Agreement is the conferral of a "benefit." As the Appellate Body stated in the *Canada Aircraft* dispute, "the ordinary meaning of 'benefit' clearly encompasses some form of advantage."[109] Moreover, the Appellate Body has found that the proper basis for measuring the existence of such an advantage is the market:

> In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favorable than those available to the recipient in the market.[110]

Therefore, a financial contribution to a recipient on terms better than those available in the market confers a benefit on the recipient, and thus constitutes a subsidy within the meaning of Article 1.1 of the SCM Agreement.

111. As the United States will demonstrate in the remainder of this section, the Airbus governments have designed the Launch Aid system to benefit Airbus by providing the funds it needs to develop new models of LCA, carefully tailored to address the extremely high costs and risks of LCA development, at interest rates that are substantially below what the market would demand for financing with similar characteristics. The United States first discusses the economics of the LCA industry and the particular risks inherent in LCA development that Launch Aid is designed to redress. The United States will then discuss the ways in which the Airbus governments have designed Launch Aid to insulate Airbus from those risks. The United States will then discuss the reasons why the financing confers a benefit within the meaning of the SCM Agreement.

i. The development of LCA is risky and expensive

112. In order to understand the benefit that Airbus receives from Launch Aid, it is necessary to appreciate the particular risks inherent in developing LCA, which Launch Aid is designed to offset. As industry expert Gary Dorman explains more fully in a report attached to this

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[108] The United States discusses individual Launch Aid loans, on a country-specific and model-specific basis, in Section IV.A.3 of this submission.

[109] *Canada – Aircraft (AB)*, para. 153.

[110] *Canada – Aircraft (AB)*, para. 157 (emphasis added). *See also US – Lead Bars (AB)*, para. 68 (stating that "{t}he question whether a "financial contribution" confers a "benefit" depends, therefore, on whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.")

submission ("the Dorman Report"), developing new models of LCA is both extremely risky and extraordinarily expensive.[111] The development programs require huge up-front investments (as much as $10,000,000,000 or more) to fund the development work that must be completed before deliveries can begin. The decision to launch the program and incur these non-recurring costs must be made years before any aircraft are produced, at a time when the success of the program is uncertain.[112] Once this investment has been made, very little can be recovered in the event the program fails for technical or commercial reasons.

113. There are many uncertainties at the time of commitment to launch an LCA program. Unit sales are unknown, since few customers place firm orders until a substantial amount of up-front investment has already been spent. Even if orders are forthcoming, external factors can cause postponed deliveries or cancellations. It is also difficult to predict the prices that various customers will pay for the aircraft over the life of the program.

114. In addition to an uncertain revenue stream, manufacturing costs can be difficult to predict years in advance of actual production. These costs may be higher than anticipated if unexpected difficulties arise in the production process, suppliers are less capable than expected, or labor and material costs change.[113] Reduced sales volumes can also contribute to higher unit costs (as well as lower revenues) due to limited economies of scale and delays in learning curve cost improvements.

115. Since the initial development investment is essentially a sunk cost and is incurred well before revenues are received, the size of these non-recurring costs is a key element affecting an aircraft program's risk and expected profitability. If a program is successful, the up-front investment is eventually recovered with margins earned on each aircraft delivery. Given the typical magnitude of program non-recurring costs, however, hundreds of sales are usually required before a program reaches its break-even point. If a program fails to reach break-even sales, the remainder of the non-recurring costs must instead be written off as a loss.[114]

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[111] Gary J. Dorman, *The Effect of Launch Aid on the Economics of Commercial Airplane Programs* (Nov. 6, 2006) ("Dorman Report") (Exhibit US-70; see BCI Annex).

[112] For example, Airbus launched the $15,000,000,000 A380 program on December 19, 2000. It does not expect to make its first delivery until the fourth quarter of 2007.

[113] For example, the Airbus A380 project has experienced significant cost overruns, due largely to problems with wiring and weight. *See, e.g.,* Press Release, *EADS and Airbus finalise A380 review*, EADS (Oct. 3, 2006) (reporting that production delays would lead to Euro 2.8 billion in additional costs) (Exhibit US-66); David Gauthier-Villars, *Airbus Faces $1.93 billion in Overruns–Parent EADS Discloses Added Costs for Jumbo Jet,* The Asian Wall Street Journal (Dec. 16, 2004) (reporting that the cost overruns of Euro 1.45 billion were a consequence of work to reduce the A380's weight and increase its efficiency) (Exhibit US-67).

[114] The McDonnell Douglas MD11 is an example of an aircraft program that failed commercially. Total deliveries over the lifetime of the project were 200 aircraft, far short of the number required to achieve a profit on the program. McDonnell Douglas ultimately took a $1.8 billion write off because its MD11 sales were well below its initial target of 301 aircraft.

ii. Repayment of Launch Aid is success-dependent

116. As the foregoing discussion illustrates, a principal risk of LCA development involves the investment of billions of dollars in a project many years before revenues are received, and long before the success of the program is known. If the project fails, those investments are irretrievably lost. The Airbus governments have carefully designed Launch Aid to shift much of this risk from Airbus to themselves.

117. One of the principal ways in which they achieve this objective is by allowing Airbus to repay the aid through "levies" on each delivery of the financed product. The governments establish this levy as a fixed amount per aircraft over a specified number of deliveries, which the government sets in advance. For example, a government providing Euro 1 billion for a particular new aircraft model might require Airbus to repay the financing, plus the return on the financing, if any, via levies on the first 400 deliveries of the aircraft in question.[115] The Launch Aid is unsecured, and the government has no recourse to obtain repayment if the expected sales fail to materialize. Repayment is entirely dependent on the success of the particular LCA model to which the funding applies.[116]

118. A French Senate Report issued in 1997 discusses the "success-dependent" nature of Launch Aid:

> Advances are only repaid if the development and manufacturing phases of the project that benefits from the advances are commercially successful. In case of failure, as a rule, no repayment is foreseen.[117]

119. The same report also explains how Launch Aid shifts the risk of LCA development from the LCA producer to the public:

> The role of reimbursable advances is to "make public" the related risks. Advances provided to companies need only be repaid when programs are successful. In case of failure, the public funds are lost, and the advance transforms into a grant, a kind of insurance for the company against industrial risk.[118]

120. Similarly, a German government official acknowledged that:

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[115] The figures the United States is using in this example are purely notional. **[ ]**

[116] In Section IV.A.3, the United States demonstrates that all of the Launch Aid that Airbus has received has shared these characteristics.

[117] 1997 French Senate Report, at 64 (in the original French, "les avances ne sont remboursées que si le développement et l'industrialisation du projet qui en bénéficie débouchent sur un success commercial. En cas d'échec, il n'est, par convention, prévu aucun remboursement") (emphasis added) (Exhibit US-18).

[118] *Id.* at 71 (emphasis added) (Exhibit US-18).

> The grant recipient's repayment obligations do not depend on the budget year. Instead, they are:
>
> > a) contingent on the success of the program (in terms of number of units) . . . .[119]

121. A company that receives financing on a "success-dependent" basis enjoys the obvious benefit of no down-side risk. When Airbus launches a new aircraft program, it knows from the outset that it is the government – and not itself – that is assuming the risk that the project will not generate enough sales to repay the government funds. If actual sales are less than expected, Airbus has no obligation to repay the government money. As one UK scholar has observed, "the distinctive risk-sharing feature of Launch Aid confers Airbus with an advantage over a rival who is constrained to debt and equity instruments alone."[120]

122. An **[**

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The document then confirms this point three paragraphs later, stating that **[**

].[122]

123. The Dorman Report sets out the results of an econometric model that quantifies the effect of Launch Aid on the profitability of LCA programs. It demonstrates the extent to which the success-dependent nature of Launch Aid alters the risk/reward trade off faced by an aircraft manufacturer by transforming net present value losses for an aircraft program in scenarios in which fewer than the forecast number of deliveries are achieved, into net present value profits for the same program. It also demonstrates that, even in cases where the program remains loss-making, Launch Aid significantly reduces the magnitude of the net present value loss suffered as

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[119] Bt. Drs. 13/8409, response to Question 22 (Exhibit US-31).

[120] Kim Kaivanto, *Premise and Practice of UK Launch Aid*, Journal of World Trade 40(3) at 495, 517 (2006) (Exhibit US-2)

[121] **[** **]** (Sept. 30, 2005) (emphasis added), DS316-EC-BCI-0003781, 3950 (Exhibit US-68; see BCI Annex). An EADS financial document states that:

> Under IAS or U.S. GAAP, refundable advances {*i.e.*, Launch Aid} would continue to be treated as a liability until such time as all conditions that might lead to repayment had been eliminated. At such time, the advances would be recorded as income.

EADS Offering Memorandum, at 56 (emphasis added) (Exhibit US-69).

[122] **[** **]** (Sept. 30, 2005) (partial emphasis added), DS316-EC-BCI-0003781, 3951 (Exhibit US-68; see BCI Annex).

a consequence of the failed program.[123]

124. In the words of the UK scholar cited above, "Launch Aid commits European governments to absorbing much of any possible losses, so even if Airbus is risk averse, it has little incentive not to adopt a risky, aggressive strategy."[124]

iii. Launch Aid repayment is back-loaded

125. In addition to assuming Airbus's risk of project failure, the Airbus governments further assume Airbus's risks by back-loading the repayment obligations. This back-loading has the following attributes:

126. First, levy-based repayment terms are inherently back-loaded. One inevitable consequence of tying repayment to deliveries is that repayments only begin once deliveries begin. For the ordinary LCA program, this normally means there will be at least a five-year lag between disbursement of the aid to Airbus and the first repayments (in the case of the A380, the lag will be closer to ten years). In testimony before the Parliamentary Committee on Welsh Affairs in February 2004, the Senior Vice President for Marketing for Airbus UK explained how this "grace period" benefits Airbus during the extremely costly development phase of its LCA programs:

> {R}epayable launch investment is absolutely vital for the launch of these programmes. These programmes take about five years from launch to get into the marketplace and then have a lifespan of about 30 to 40 years. For the first five years of the programme you have all the cost and basically no income, so it is absolutely vital to support these programmes.[125]

127. Second, the Airbus governments further back-load the repayment schedules by allowing Airbus to make relatively small levy payments on early deliveries and progressively larger payments only on later deliveries. For example, the Launch Aid that **[**

].[126] This back-loading further minimizes the debt service on Airbus in the

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[123] Dorman Report, at, e.g., at 7 (Exhibit US-70; see BCI Annex).

[124] Kim Kaivanto, *Premise and Practice of UK Launch Aid*, Journal of World Trade 40(3) at 495, 498 (2006) (Exhibit US-2).

[125] The United Kingdom Parliament, Committee on Welsh Affairs, *Welsh Affairs – Minutes of Evidence*, Examination of Witnesses, Testimony of Brian Fleet, Senior Vice-President, Manufacturing, Airbus UK, response to Question 157 by the Chairman (Feb. 11, 2004) (emphasis added) (Exhibit US-71).

[126] **[** **]**. The French Senate has described the benefit of this aspect of Launch Aid as follows:

> Normally, reimbursement is linked to sales of a certain product. The reimbursement amounts are

(continued...)

early years of its LCA programs when costs are still high and revenues from first deliveries – typically highly discounted – are relatively low. On the other hand, the Airbus governments assume additional risk; since Airbus is allowed to repay the bulk of the Launch Aid on later deliveries, the governments will incur disproportionate losses (and Airbus disproportionate gains) if sales fall short of expectations. The less successful the program, the greater the benefit to Airbus.

128. Third, in some cases, the Airbus governments allow Airbus to forego levies entirely on an initial tranche of deliveries. For example, **[**

].[127] By allowing Airbus to deliver a certain number of aircraft "free of charge," the Airbus governments further assume the risk that Airbus will not repay the aid in full (because Airbus must sell that many additional aircraft at the "back end" to make full repayment). In addition, by relieving Airbus of the need to service debt on its early deliveries, the Airbus governments facilitate aggressive pricing on those deliveries, helping Airbus to gain market acceptance for the new model.

129. Finally, the advantages that are inherent in the back-loaded nature of Launch Aid are magnified in cases where the expected delivery schedule slips. The A380 project is a case in point.

130. The Airbus governments committed Launch Aid for the A380 in 2000 and began disbursing the aid in 2001. Repayment is tied to deliveries, so the earliest that Airbus will have to start repaying the aid is when deliveries begin.

131. When Airbus launched the aircraft, it expected to begin deliveries in 2006 and to deliver a total of 109 A380s by the end of 2009. After several delays, however, the current schedule provides for no deliveries in 2006, only one delivery in 2007, and only 39 total deliveries by the end of 2009 – a shortfall of 70 deliveries when compared to the original schedule.[128]

132. This 70-delivery shortfall translates to over Euro **[ ]** that Airbus should have paid to **[ ]** in 2006 – 2009 that it will get to keep at least until 2010-2011.[129]

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[126] (...continued)
calculated as a percentage of the amounts of the advances that often varies depending on the amount of total sales. Thus, the amounts repaid develop progressively, which is a benefit to the manufacturers.

1997 French Senate Report, at 63 (emphasis added) (Exhibit US-18)

[127] **[ ]**.

[128] *See, e.g.,* Andreas Sperl, Airbus Chief Financial Officer, *A380 Financial Update*, EADS, Global Investor Forum, at 2, slide 4 (Oct. 2006) (Exhibit US-74).

[129] The **[**

(continued...)

133. Moreover, **[ ]**. Therefore, as a result of the delivery delays, **[ ]**, approximately **[ ]** years after Airbus received the first disbursements.

134. A French Senate Report describes this aspect of Launch Aid in the following way:

> {T}he system of reimbursement of the advanced payments is particularly attractive for its beneficiaries because of the way in which reimbursement is structured. The government that provided the loans in fact takes over the opportunity costs of the advances during a variable period, the duration of which mainly depends on the commercial success of the project and its timetable. The level of this benefit, which would not be conferred by a bank loan or the capital markets, also depends on the cost level of alternative external financing.[130]

135. As the Dorman Report demonstrates, the net present value of an aircraft program supported by Launch Aid rises as Launch Aid repayments are increasingly back-loaded (both in terms of minimum numbers of deliveries before repayment obligations commence, and in terms of the "progressivity" of the repayment schedule).[131] In other words, the further repayment is pushed out in time, the greater the commercial and financial benefit to Airbus.

136. As the United States explains in the next section, the Airbus governments do not charge Airbus a commercial rate of interest for this benefit, let alone for any of the other preferential features of Launch Aid, including its success-dependent terms.

iv. The Airbus governments provide Launch Aid to Airbus interest-free or at below-market interest rates that do not reflect its preferential features

137. In the immediately preceding sections of this submission, the United States discussed some of the ways in which the Airbus governments have designed Launch Aid to shift the risks of LCA development from Airbus to themselves. In this section, the United States will demonstrate that Launch Aid confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement because the Airbus governments do not require Airbus to pay a commercial rate of interest that reflects the substantial risks that the governments assume on its behalf.

138. At the time of setting the interest rate for a particular loan, a commercial investor will look at a variety of factors, including the current level of interest rates in the market (*e.g.*, based

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[129] (...continued)
]. Multiplying these per-aircraft amounts by 70 aircraft equals **[ ]**.

[130] 1997 French Senate Report, at 64 (emphasis added) (Exhibit US-18).

[131] *See* Dorman Report, e.g., at 6 (Exhibit US-70; see BCI Annex).

on government bond rates), the probability of borrower default (creditworthiness of debtor, collateral), and the current market's "price of risk." In the case of loans whose repayment is tied to the success of a particular project, project-specific risk will also be factored into the overall "risk premium" that a commercial investor will apply to the loan.[132] These factors are particularly important in the LCA sector because of the enormous up-front investments, tremendous uncertainty, and long payback periods that characterize LCA projects, which the United States has already discussed.[133]

139. The interest rates that the Airbus governments charge for Launch Aid (when they charge interest at all) reflect none of these considerations.

140. First, the publicly available information indicates that in some cases, the Airbus governments have provided Launch Aid to Airbus interest-free.[134] It goes without saying that an interest-free loan confers a benefit on its recipient.

141. Second, even the Launch Aid contracts that purport to include an interest component do not actually require Airbus to pay interest. Since the financing is success-dependent, the Airbus governments actually provide the aid without requiring any return, even of principal. The interest rate is merely a "potential" return. The terms of the Launch Aid that the French government provided to Airbus for the A380 are typical and serve to illustrate this point.[135]

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[132] *See*, *e.g.*, Brealey & Myers, *Principles of Corporate Finance*, McGraw-Hill/Irwin, 7th ed., at 222 ("The true cost of capital depends on the use to which it is put . . . . If the project has a high risk {an investor} needs a higher prospective return than if the project has a low risk. . . . It is clearly silly to suggest that {the investor} should demand the same rate of return from a very safe project than {sic} from a very risky one") (Exhibit US-76); *id*. at 223 ("The true cost of capital depends on project risk, not on the company undertaking the project . . . .") (Exhibit US-76); Finnerty, *Project Finance: Asset-Based Financial Engineering*, at 52 ("Lenders will generally not lend funds to a project if their loans would be exposed to business or economic risks. Lenders are typically willing to bear some financial risk but they will insist on being compensated for bearing such risk.") (Exhibit US-76).

[133] As EADS explained in its 2005 financial statements,

> The business environment in many of EADS' principal operating business segments is characterised by extensive research and development costs requiring significant upfront investment. Business plans underlying such investment contemplate a long payback period before this investment is recouped. There can be no assurances that the commercial, technical and market assumptions underlying such business plans will be met, and consequently, the payback period or returns contemplated therein achieved.

EADS Financial Statements and Corporate Governance (2005), Registration Document – Part 1, Risk Factors, Major Research and Development Programmes, at 12 (emphasis added) (Exhibit US-77).

[134] The United States discusses this evidence in Section IV.A.3 below.

[135] Confirmation of the terms and conditions of the Airbus governments' Launch Aid contracts can be found in the contracts themselves. The United States has attached the Launch Aid contracts for the A330-200, the A340-500/600, and the A380 to this submission as Exhibits US-78 through US-79, and US-35 (see BCI Annex). The United States also sets out the key details of each of the contracts in Section IV.A.3 of this submission.

(continued...)

142. The French government provided Euro 1,213,400,000 in Launch Aid for the A380, with repayment via per-plane levies on the first **[ ]** deliveries.[136] If Airbus sells that number of A380s, the government will realize a return of **[ ]** percent.[137] It is these facts that allow the French government to describe its Launch Aid as interest-bearing loans.

143. However, as the United States has already noted, full repayment of the Launch Aid is entirely dependent on Airbus selling **[ ]** A380s. If Airbus sells fewer than **[ ]** A380s, the French government will receive a return of less than **[ ]** percent. If Airbus sells **[ ]** A380s, the French government will receive no return at all (it will take that many deliveries just to recoup the principal amount of the loan, unadjusted for inflation). And if Airbus sells fewer than [ ] A380s, the French government will not even recover its principal investment.[138]

144. Therefore, it is something of a misnomer to describe Launch Aid as an interest-bearing loan. Former head of DG-Trade Mogens Peter Carl acknowledged this fact when he described the repayment provisions in Airbus Launch Aid contracts as "merely predictions, not an outright obligation."[139]

145. Furthermore, the **[ ]** percent return that the French government will only realize if Airbus succeeds in selling **[ ]** A380s **[ ]**,[140] which is substantially below the rate that a commercial lender would demand for financing with characteristics similar to Launch Aid. As with all of the other Launch Aid that Airbus has received from the Airbus governments, the French government charges Airbus no risk premium to compensate for the fact that repayment is back-loaded and entirely success-dependent. To

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[135] (...continued)
The United States is not able to provide copies of the Launch Aid contracts for the earlier Airbus models, because the EC and the Airbus governments rejected the Annex V Facilitator's request to provide them. However, the United States has gathered publicly available details of the contracts; they are set out in Section IV.A.3.

[136] French A380 Launch Aid Protocol, Arts. 3.1 and 6.2, DS316-EC-BCI-0000249, -251 and -252/253 (Exhibit US-75; see BCI Annex)

[137] *See, e.g.*, French A380 Launch Aid Protocol, Art. 4.1, DS316-EC-BCI-0000249, -252 (Exhibit US-75; see BCI Annex).

[138] If Airbus sells more than **[ ]** A380s, it will owe a [ ] royalty on that portion of the value of each delivery after the [ ] that is attributed to Airbus France. However, the royalty obligation **[ ]**. French A380 Launch Aid Protocole, Arts. 7.1-7.3, DS316-EC-BCI-0000249 (Exhibit US-75; see BCI Annex). Thus, France assumes 100 percent of the downside risk that it will not be repaid, but **[ ]**, substantially below what a commercial lender would demand.

[139] Carl was the lead EC official on the aircraft portfolio until 2005, and he provided this description of Airbus Launch Aid repayment provisions to a journalist writing a book on the history of the Boeing/Airbus dispute. *See* Stephen Aris, *Close to the Sun*, at 170 (quoting Carl) (Exhibit US-23).

[140] **[ ]**. *See* David M. Ellis et al., *Economic Assessment of the Benefits of Launch Aid* (Nov. 10, 2006) at exhibit 3 ("Ellis Report") (Exhibit US-80; see BCI Annex).

paraphrase Brazil in the *Canada-Aircraft* dispute, France takes an equity investor's risk for a secured creditor's rate of return, which it will only receive if Airbus sells at least **[ ]** A380s.[141]

146. Finally, as the United States noted above, commercial ratings agencies take the existence of the Launch Aid system into account when determining the debt rating assigned to Airbus's parent company EADS. As the Moody's commercial rating service explained in 2003:

> EADS's A3 long-term debt rating reflects the leading worldwide market positions held by several of its businesses, as well as the company's strong balance sheet, which should remain solid during the current severe downcycle in the commercial aircraft market. The rating also considers the expectation for continuing government support, which is primarily in the form of refundable advances for up to 1/3 of the development cost of each new aircraft program on the Airbus level.[142]

Thus, in addition to the benefits Airbus receives from the below market interest rates that Launch Aid carries, Airbus receives an additional benefit from the reduced capital costs that result from the financial markets' valuation of the Launch Aid regime.

147. As the United States will discuss further below, an expert report prepared by economist David M. Ellis of National Economic Research Associates, Inc. (the "Ellis Report") compares the "potential returns" that the Airbus governments have accepted on the Launch Aid they provide to Airbus with the actual returns that the commercial market would demand for financing with similarly advantageous characteristics. The Ellis Report concludes that Launch Aid borrowing rates are consistently between **[ ]** basis points[143] below the rate that a commercial investor would demand for comparable project-specific and success-dependent loans, thus conferring a substantial benefit on Airbus.[144] The European Commission reached a similar conclusion in 1997 when it found that the 6 percent interest rate on Launch Aid that Spain provided to CASA for a new regional aircraft program was at least 1400 basis points "too low."[145]

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[141] *Canada – Aircraft (Panel)*, para. 6.180. In the panel's view, the TPC financing at issue in that case – which was virtually identical in form to Launch Aid – was "similar to equity investments in that, as with equity investments, TPC contributions will only be repaid if the funded projects are commercially successful." *Id*. at n. 619 (finding the 15 to 20 percent return on equity that commercial investors demand to be "useful corroboration" of the commercial rates that Brazil had submitted).

[142] Press Release, *Moody's Assigns A3 Rating to New Euro Mtn Program of European Aeronautic Defence and Space Company EADS N.V.,* Moody's Investor Service (Feb. 6, 2003) (emphasis added) (Exhibit US-56).

[143] A basis point is one hundredth of a percentage point (0.01%).

[144] Ellis Report, generally and at 31 (conclusions) (Exhibit US-80; see BCI Annex). The Ellis Report discusses further evidence supporting its conclusions in the HSBI Appendix to the report.

[145] European Commission, Decision 97/807/EC of 30 April 1997, OJ (1997) L 331/10, *Aid granted by Spain to the Aerospace Company Construcciones Aeronáuticas, SA* (Casa), Section V, Assessment (Exhibit US-81). The United States discusses this decision in more detail in Section IV.A.2.b.vii.

v. The WTO has already found that financing with terms and conditions equivalent to Airbus Launch Aid confers a benefit

148. In the *Canada – Aircraft* subsidy dispute, the panel examined financing that was virtually identical to Launch Aid and concluded that the financing conferred a benefit on the recipient, and thus constituted a subsidy within the meaning of the SCM Agreement.

149. The measure at issue was financing that Canada provided under the Technology Partnerships Canada ("TPC") program to support the development by the Canadian aircraft manufacturer, Bombardier, of new models of regional jet aircraft. The financing took the form of an up-front provision of funds to Bombardier to underwrite the costs of developing a new aircraft model, with repayment via levies on sales. If sales of the financed aircraft were less than expected, some or all of the money was forgiven. Canada sought to obtain a return on the financing equal to its own cost of funds, and it did not demand any risk premium to compensate, *inter alia*, for the fact that the financing was unsecured, with repayment dependent entirely on sales. The panel found that Canada's statement that the government sought to ensure a return on its financing equivalent to its cost of funds was "an admission by Canada that TPC generally, as a matter of policy, does not seek a commercial rate of return on its contributions."[146]

150. The same is true for the Launch Aid that the Airbus governments provide to Airbus. As the United States has already explained, none of the Airbus governments requires Airbus to provide <u>any</u> return, even of principal, on the Launch Aid the governments provide, and even the potential return on Launch Aid contracts (when the rate is not zero) is **[ ]**. The Airbus governments charge Airbus no risk premium to compensate for the fact that the Launch Aid is unsecured, or for the fact that repayment is success-dependent, or for the extended period during which neither principal nor interest is due.

151. Therefore, for the same reasons that the *Canada – Aircraft* panel found that TPC financing conferred a benefit on Bombardier, the Launch Aid that the Airbus governments provide to Airbus confers a benefit on Airbus.

vi. The Airbus governments and Airbus concede that Launch Aid confers a benefit on Airbus

152. In addition to the information the United States has already set forth, another indication that Launch Aid confers a benefit on Airbus can be found in **[ ]**. To be specific, an **[**

[146] *Canada – Aircraft (Panel)*, para. 9.313-315.

][147]

153. Airbus officials have also publicly acknowledged that Launch Aid confers a benefit. For example, Airbus chief commercial officer John Leahy stated in June 2005 that Launch Aid would improve the revenue projections for the A350.[148] And former EADS co-CEO Noël Forgeard was even more direct, stating in September 2005 that if Airbus produced the A350 without Launch Aid, its profitability would be "destroyed."[149]

154. European government officials also acknowledge that their Launch Aid system confers a benefit on Airbus. For example, a 1997 French Senate Report states:

> One of the essential advantages of this system is that, when an industrial program fails, the State does not require repayment. Reimbursable advances function as a sort of insurance against the risk of failure.[150]

155. A UK government document makes a similar point, explaining that Launch Aid:

> enables the company and the Government to share the typically very high level of risk in aerospace projects . . . .[151]

156. An official in the UK Department of Trade and Industry has also explained that Launch Aid helps Airbus:

> to produce products, get products to market, which either they would not have got so quickly or in such volume.[152]

157. Thus, both the Airbus governments and Airbus concede that launch aid confers a benefit on Airbus.

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[147] **[** **]** (Sept. 30, 2005) (emphasis added), DS316-EC-BCI-0003781, 4005 (Exhibit US-68). The **[** **]** referred to in the document are the **[** **]**.

[148] Robert Wall, *A350 Faces Busy Time Until Industrial Launch*, Aviation Week & Space Technology (June 20, 2005) (Exhibit US-83).

[149] Kevin Done and Peter Spiegel, *EADS firm on launch aid for the A350*, Financial Times (Sept. 14, 2005) (Exhibit US-84).

[150] de Courson (Charles), Rapport No. 1110, Commission des Finances, Projet de Loi de Finances pour 2004, Annexe No. 24, Equipement, Transports, Logement, Tourisme et Mer: Transports Aériens, at 38-39 (Exhibit US-85).

[151] *See* Description of "Launch Investment" on the DTI website (Jan. 21, 2004) (Exhibit US-86).

[152] House of Commons Trade and Industry Committee, The UK Aerospace Industry, Fifteenth Report of Session 2004-05, Volume II, Oral and Written Evidence, Testimony by Mr. John Alty, Director, Business Relations, Department of Trade and Industry (Mar. 22, 2005), at EV 35 (Exhibit US-87).

vii. EC state aid decisions confirm that Launch Aid confers a benefit on Airbus

158. Finally, the EC's treatment of Launch Aid under its state aid regime also demonstrates that Launch Aid confers a benefit on Airbus.

159. The European Commission is responsible for administering the regime, and it applies a definition of "state aid" that is quite similar to the definition of "subsidy" under the SCM Agreement:

> Any advantage granted by the state or through state resources is considered to be state aid where:
>
> - it confers an economic advantage on the recipient;
> - it is granted selectively to certain firms or to the production of certain goods;
> - it could distort competition; and
> - it affects trade between Member States."[153]

160. A requirement to show that a measure confers an "economic advantage on the recipient" is virtually identical to the SCM Agreement's requirement that a financial contribution must confer a "benefit" on the recipient, particularly given the definition of "benefit" that has been applied in subsidy disputes.[154] Therefore, a finding that a particular measure – or type of measure – is state aid is tantamount to an admission by the Commission that the measure is also a subsidy within the meaning of the SCM Agreement.

161. In light of this fact, it is quite significant that the Commission has examined the provision of Launch Aid under its state aid rules and concluded that the financing confers an economic advantage – a benefit – on the recipient.

162. For example, in 1997, the Commission examined Launch Aid that Spain provided to CASA to support the development of a new 70/80 seat turboprop aircraft. The Commission found that the financing was not commercial because repayment of the loan was dependent on sales, and the expected return was too low:

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[153] *See Rules Applicable to State Aid: Introduction*, http://europa.eu.int/scadplus/leg/en/lvb/l26103.htm (emphasis added) (Exhibit US-88). This rule is based on Article 87(1) of the EC Treaty, which states that, "*{s}ave as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.*"

[154] The Appellate Body has stated that "the ordinary meaning of 'benefit' clearly encompasses some form of advantage." *Canada – Aircraft (AB)*, para. 153.

> Regarding the risk of the project, it has to be pointed out that, as the repayment of the loan was subject to the commercial success of the aircraft (it depends on the number of aircraft sold), the likelihood of repayment would be reduced . . . .
>
> The expected return on the project must also be taken into account. The Spanish authorities have not provided any evidence that the loan would yield any prospect of a return commensurate with the risk. On the contrary, the calculation by the Spanish authorities of the rate of return on the loan for the Spanish Government gave, under certain assumptions regarding the interest rate and the payback, a return of less than 6 %. This must be considered as too low, especially when the risk-free, long-term (ten-year) borrowing rate was above 12% in 1992 and 1993. Adding a commensurate risk premium would definitely put the return at above 20%.[155]

163. As a result of these facts, the Commission found that the Launch Aid was "not granted therefore under conditions similar to those obtaining on the private market."[156] The terms and conditions of the aid were virtually identical to the terms and conditions of the Launch Aid that Spain and the other Airbus governments have provided to Airbus.[157]

c. The Launch Aid Program Is Specific to Airbus

164. As the United States has explained above, the Airbus governments conceived and maintain their Launch Aid program for the specific benefit of Airbus. They have used the program in a systematic and methodical way since its very inception to provide Airbus the means to develop a full family of LCA to compete against U.S. producers in the LCA market. The Launch Aid subsidies that Airbus has received have always been, and remain, specific to Airbus within the meaning of Article 2 of the SCM agreement. Given that the Launch Aid program is a specific subsidy that, for the reasons described below, causes adverse effects to the interests of the United States, the United States requests that the Panel find that the Launch Aid program is inconsistent with Articles 5(a), 5(c), 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement.

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[155] European Commission, Decision 97/807/EC of 30 April 1997, OJ (1997) L 331/10, *Aid granted by Spain to the Aerospace Company Construcciones Aeronáuticas, SA* (Casa), Section V, Assessment (Exhibit US-81).

[156] *Id.*

[157] In addition to the CASA finding, the Commission has also examined other instances of Launch Aid to the Airbus companies. For example, the Commission reviewed the Launch Aid that France provided to Aérospatiale for the development of the A330-200. Although the text of this decision is not publicly available, the press release states that the Commission found the aid to constitute state aid, and thus that it conferred an "economic advantage" on Aérospatiale. *See The Commission Approves a French R&D Scheme for the Aeronautics Sector*, IP/96/665 (July 18, 1996) (Exhibit US-89). Similarly, the Commission reviewed the Launch Aid that France provided to Aérospatiale for the A340-500/600 and concluded that Aérospatiale would not have been capable of financing the project commercially. *See* Letter from Karel Van Miert to Hubert Vedrine, *Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program*, Aid No. N369/98, at 5 (translation at 7-8) (Jan. 26, 1999) (Exhibit US-3). The United States has not been able to locate any other publicly available information setting out the EC's analyses of Airbus Launch Aid under state aid rules, and the EC refused the Annex V Facilitator's request to provide the relevant documents.

3. Every Grant of Launch Aid That Airbus Has Received to Develop Its LCA Family Is a Specific Subsidy to Airbus Within the Meaning of Articles 1 and 2 of the SCM Agreement

165. The Airbus governments have provided or committed to provide Launch Aid for every major model of the Airbus LCA family – the A300, A310, A320, A330, A340, A380, and A350 – and for the three major derivative models of its family, the A330-200, A340-500, and A340-600. In this section, the United States demonstrates that each grant of Launch Aid constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement because it involves a financial contribution that confers a benefit on the recipient and is specific. The purpose of this demonstration is not only to show that each grant of Launch Aid is a specific subsidy in its own right, but also to show that the terms and conditions of Launch Aid are always the same in all material respects.

166. In Section IV.B of this submission, the United States will further demonstrate that the Launch Aid that the Airbus governments provided to Airbus for the A380, A340-500/600, and A330-200 models is prohibited under Articles 3.1(a) and 3.2 of the SCM Agreement because it is contingent upon export performance.

167. During the Annex V process, the Facilitator asked the EC to provide copies of the Launch Aid contracts between the Airbus governments and their respective Airbus companies for each of the Airbus LCA programs at issue. The EC and the Airbus governments refused, however, to provide any information at all, including the Launch Aid contracts, regarding the A300, A310, A320, A330, and A340 programs.[158]

168. The EC's refusal to provide the information the Panel needs to evaluate these programs has forced the United States to rely entirely on public sources of information for purposes of this submission. As the Panel will see, however, the public information we have assembled establishes a *prima facie* case that each provision of Launch Aid is a financial contribution that confers a benefit on Airbus and is specific. The Launch Aid contracts the EC was willing to provide (for the A330-200, the A340-500/600, and the A380) confirms this conclusion.[159]

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[158] *See, e.g.*, EC Responses to Questions 18-20, from the Facilitator (Exhibit US-5).

[159] Obviously, the Launch Aid contracts themselves are the best evidence of their contents. The Panel may, therefore, wish to use its authority under Article 13 of the DSU to request copies of the contracts from the EC. Alternatively, paragraph 7 of Annex V of the SCM Agreement states that the Panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process. The logical inference to be drawn from the EC's refusal to provide the Launch Aid contracts is that the contracts would demonstrate that each grant of Launch Aid is a subsidy within the meaning of the SCM Agreement.

a. Launch Aid for the A300 and A310 Is a Specific Subsidy

169. On May 29, 1969, the French and German governments launched the first Airbus aircraft, the Airbus A300, with a French-German intergovernmental agreement that committed the governments to provide Launch Aid for 100 percent of the program's development costs. In the words of Roger Béteille, then coordinator and Technical Director of the Airbus project, the launch "{o}pened the door to a European return to a strong position on the worldwide market for commercial aircraft."[160]

170. Spain subsequently joined the A300 program; its participation and commitment to provide Launch Aid were institutionalized in an additional intergovernmental agreement.[161] The A300 went into production and was subsequently certified in 1974.

171. Airbus launched the A310, a slightly smaller version of the A300, in 1978. Once again the Airbus governments accompanied the launch with an intergovernmental agreement, this time covering both the A300 and A310. Among other things, the agreement set out the terms of the additional Launch Aid that the Airbus governments committed to provide for the project.[162]

172. In total, the governments of Germany, France and Spain provided some $3,000,000,000 in Launch Aid for the A300 and the A310.[163] Launch Aid covered 100 percent of development costs for the A300, and between 70 and 90 percent of the costs for the A310.[164]

i The A300/A310 Launch Aid constitutes a financial contribution

173. The Launch Aid for the A300 and the A310 constitutes financial contributions, as it involves direct transfers of funds or potential direct transfers of funds within the meaning of

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[160] Airbus, Un Succès Industriel Européen, Institut d'Histoire de l'Industrie, at 44 (Paris, 1995) (in the original French, "ouvrit la voie au retour en force de l'Europe sur le marché mondial des avions commerciaux") (Exhibit US-90).

[161] 1969 Launch Aid Agreement (Exhibit US-11).

[162] Monopolkommission Report, at 68, para 112, referring to the additional agreement with Spain and the A300/A310 agreement (Exhibit US-30).

[163] The UK joined the Airbus consortium in 1978 and thus did not provide Launch Aid at the inception of the A300/A310 program. However, the UK government paid a $50 million "entry premium" for British Aerospace to join the Airbus consortium, thus effectively paying off part of the A300/310 sunk costs. *See, e.g.*, Fortier (Marcel), Senate Report, Rapport No. 74, at 24-25 (Exhibit US-91).

[164] *See* ITC Hearing, Inv-No. 332-332, *Global Competitiveness of U.S. Advanced Technology Manufacturing Industries: Large Civil Aircraft*, testimony of Michel Dechelotte, Director of International Affairs, Airbus G.I.E., at 208 (Apr. 15, 1993), lines 11, 12 and 20-23 ("ITC Hearing") (Exhibit US-46); 1997 Sénat Report, at 63, 68 (Exhibit US-18); Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (Jan. 13, 1997) (Exhibit US-19).

Article 1.1(a)(1)(i) of the SCM Agreement.[165]

174. First, the 1969 intergovernmental agreement on the A300 provides explicitly for the provision of up-front capital to be repaid from sales of the product concerned, *i.e.*, a loan to be repaid through levies or, as the EC calls it, a "reimbursable advance."[166] Second, the actual disbursements by the French, German, and Spanish governments demonstrate that the governments transferred Launch Aid funds – and thus financial contributions – to Airbus for both the A300 and the A310.

175. With respect to Germany, federal budget documents demonstrate that the German federal government began providing Launch Aid financing for the A300 in 1967.[167] Later, Germany also provided Launch Aid for the development of the A310.[168] German Launch Aid contributions for both models totaled DM 2,400,000,000.[169] The German government provided all of the financing in the form of loans with levy-based (success-dependent) repayment terms.[170]

176. With respect to France, a report by the French Senate demonstrates that between 1967 and 1980, the French government provided a total of FF 6,200,000,000 in Launch Aid for the A300 and the A310. This sum included FF 3,000,000,000 for the A300, and FF 3,200,000,000 for the A310.[171] Like the German Launch Aid, the French Launch Aid took the form of a loan

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[165] The panel in the *Canada – Aircraft* dispute was in "no doubt" that the TPC subsidies at issue in that case – which are nearly identical in form to Airbus Launch Aid – constituted financial contributions within the meaning of Article 1.1 of the SCM Agreement. *Canada – Aircraft (Panel)*, para. 9.306.

[166] 1969 Launch Aid Agreement, Arts. 6-8 (Exhibit US-11).

[167] Federal Budget 1967, Budget Plan 09 (Economics Ministry), Part 02, Line Item 617 and comments; Federal Budget 1968, Budget Plan 09, Part 02, Line Item 570 and comments; Federal Budget 1969, Budget Plan 09, Part 02, Line Items 862 01 and 892 04 and comments; Federal Budget 1970, Budget Plan 09, Part 02, Line Items 862 41 and 892 41 (and comments) and subsequent budgets through Federal Budget 1973; Federal Budget 1974, Budget Plan 09, Part 02, Line Item 892 41 and comments to Line Items 662 41 to 892 41 through 1976; Federal Budget 1977, Budget Plan 09, Part 02, Chapter 02, Line Item 892 41-634 and comments to Line Items 662 41 to 892 41; Federal Budget 1978, Budget Plan 09, Part 02, Chapter 03, Line Item 892 41-634 and comments to Line Items 662 41 to 892 41; Federal Budget 1979, Budget Plan 09, Part 02, Chapter 03, Line Item 892 41-634 and comments to Line Items 662 41 to 892 41; Federal Budget 1980, Budget Plan 09, Part 02, Chapter 09, Line Item 892 91-634 and comments to Chapter 03 (Exhibits US-17A through US-17N).

[168] See Federal Budget 1980, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 892 91 - 634, comment to title group 09, stating that the German government began to support the development of the A310 in 1979 (Exhibit US-17N). The aircraft was first marketed in 1983.

[169] See Monopolkommission, at 71, para 118, table 11 (Exhibit US-30).

[170] They are described in the Federal budgets as "Darlehen" or "bedingt rückzahlbare Darlehen" (advances/loans or conditionally repayable advances/loans). See Federal Budget items cited in footnote 167. The 1967 through 1971 budgets state explicitly that the German Launch Aid guidelines provide for forgiveness of Launch Aid if the project is unsuccessful. The EC refused to provide the Launch Aid guidelines requested by the Facilitator during the Annex V process. *See* Reply to Question 26 by the Facilitator under Annex V of the SCM Agreement by the European Communities (Nov. 18, 2005) (Exhibit US-5; see BCI Annex).

[171] 1997 Senate Report, at 67 (Exhibit US-18).

repayable through levies on deliveries.[172]

177. With respect to Spain, documents from the Spanish Ministry of Science and Technology show that the Spanish government provided approximately Ptas 11,600,000,000 in Launch Aid to CASA for the A300/310 program – Ptas. 3,800,000,000 for the A300, and Ptas. 7,800,000,000 for the A310.[173] Once again the aid took the form of a loan repayable through levies on each delivery of the financed aircraft.[174]

ii. The A300 and A310 Launch Aid confers a benefit

178. As the United States discussed above, the Launch Aid that the Airbus governments provide to Airbus confers a benefit to Airbus because it is provided at interest rates that are substantially below the rates that commercial lenders would charge for financing with the same characteristics.

179. Repayment of the Launch Aid that Germany, France, and Spain provided for the A300 and A310 is via levies on future deliveries of the financed aircraft. The 1969 Agreement relating to the A300 specifically provides for levy-based repayment,[175] and a back-loaded repayment schedule with graduated repayments due on later deliveries.[176] A French Senate Report states that Airbus needed to deliver 300 to 360 aircraft to repay the French A300 Launch Aid, and some 800 aircraft to repay the French A300 and A310 Launch Aid combined.[177] In Spain, repayments are also based on levies, with no obligation to repay the Launch Aid until the company had recouped the 30 percent of costs that it had financed itself.[178]

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[172] *Id.* at 63, 67.

[173] Airbus, Cuadernos CDTI, Centro para el Desarollo Tecnológico Industrial (CDTI) (prepared by the State Secretariat of Industry, Ministry of Science and Technology), July 1993 (at 91, *et seq.*) (Exhibit US-54).

[174] The Spanish government describes the Launch Aid as "anticipos reembolsables" or "repayable advances." *See*, *e.g.*, Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (January 13, 1997) (Exhibit US-19).

[175] *See* 1969 agreement, Chapter III, Art. 7 (Exhibit US-11). The agreement also provided for suspension of the levy repayments if the Intergovernmental Committee "considers that they significantly compromise the sales possibilities of the Airbus A300B." *Id.*, Art. 7.

[176] 1969 agreement, Chapter III, Art. 7 (Exhibit US-11).

[177] Pams (Gaston), Senate Report, Avis No 42, Tome XII, at 45 (Exhibit US-92); *see also* Fortier (Marcel), Senate Report No. 99, Commission des Finances, Projet de Loi de Finances pour 1975, Annexe 29 Tome III, Transports III, Aviation Civile, at 29 (Exhibit US-93); Fortier (Marcel), Senate Report No. 50, Commission des Finances, Projet de Loi de Finances pour 1980, Annexe 28, Transports, Aviation Civile, at 22-23 (Exhibit US-370).

[178] Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (Jan. 13, 1997) (explaining that "{t}he {repayment} obligations, which are based on payments by Airbus based on the sale of aircraft of the particular program, only come into existence once CASA has recovered 30% {of the development costs}, which it carried) (the original Spanish states "*(Y) su devolución, prevista con los abonos de Airbus al producirse la venta de aviones del programa respective, sólo obliga a CASA une vez que ésta se haya reintegrado del 30% restante, cuya financiación queda a su cargo*") (Exhibit US-19).

180. Repayment of the A300/A310 Launch Aid, like that of all other Launch Aid, is thus success-dependent and back-loaded. As a result, the Airbus governments were not even guaranteed that Airbus would repay the principal of the loan. Nevertheless, the French, German, and Spanish governments granted the A300 and A310 Launch Aid on an interest-free basis. The 1969 agreement indicates that the A300 Launch Aid provided by Germany and France was interest free. The agreement speaks of repayment of the amounts disbursed to Airbus, *i.e.*, the principal; there is no reference to interest.[179]

181. In addition, Michel Dechelotte, former director of international affairs at Airbus, confirmed in a hearing before the U.S. International Trade Commission that the interest rate on the German A300 and A310 Launch Aid was zero percent.[180] German Federal Budget documents and a 1983 German parliamentary document also confirm this fact.[181]

182. A Spanish government report confirms that all of the Launch Aid that Spain provided to Airbus before 1997 was granted on an interest-free basis.[182]

183. Publicly available information also suggests that the interest rate on the French A310 Launch Aid was zero. By 1997, almost two decades after France had committed Launch Aid for the A310, and almost three decades after it had committed Launch Aid for the A300, Airbus had repaid approximately FF 5,600,000,000. It still owed approximately FF 500,000,000, which was approximately equal to the difference between the amount it had already repaid and the amount it

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[179] 1969 agreement, Art. 7 (Exhibit US-11).

[180] ITC Hearing, at 140-41 (Exhibit US-46).

[181] *See* the consistent references to "zinslose" or "unverzinsliche" (interest free) loans in the early German Federal Budgets. Federal Budget 1967, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 617; Federal Budget 1968, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 570; Federal Budget 1969, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 862 01-634; Federal Budget 1970, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 862 41-634; Federal Budget 1971, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 862 41; Federal Budget 1972, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 862 41; and Federal Budget 1973, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 862 41(Exhibits US-17A through US-17G). *See also* Remarks made by the Greens about a 1983 interest-free repayment moratorium in a parliamentary question, BT-Drs. 11/4375, at 17-18 (Exhibit US-14).

Moreover, the German government concedes that the A300/A310 Launch Aid was a subsidy because it included the aid in its bi-annual "subsidy report" (*Subventionsbericht*) in which it lists all subsidies (defined as "financial aid", which includes Launch Aid, and favourable tax treatment) granted by the German government. Bundesregierung, Fünfter Subventionsbericht (1973-76), BT-Drs. 7/4203, at 107, Finanzhilfe ("financial support") no. 62 and all subsequent Subventionsberichte through to the Sechzehnter Subventionsbericht (1995-1998), BR-Drs. 13/8420, at 110, Finanzhilfe ("financial support") no. 58 (Exhibits US-53A through US-53O).

[182] Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (Jan. 13, 1997) (referring to "{t}his financing, consisting in the provision of interest free reimbursable advances . . . .) (in the original Spanish, "Esta financiación, consistente en la entrega de anticipos reintegrables sin interés . . . .") (Exhibit US-19).

had originally received from the French government. If the Launch Aid had carried an interest rate above zero, Airbus's repayment shortfall would have been considerably higher.[183] Moreover, both the earlier A300 Launch Aid, as well as the German and Spanish A300/A310 Launch Aid, carried zero percent rates of interest. In light of these facts, the logical inference is that the interest rate for the French A310 Launch Aid was also zero.

184. In the *Canada – Aircraft* dispute, the panel found that the Launch Aid that Canada provided to its regional jet manufacturer "neither seeks nor earns a commercial rate of return," which the panel viewed as dispositive in determining the existence of a subsidy.[184] The fact that the governments of Germany, France and Spain did not seek any return at all on the Launch Aid they provided for the A300 and A310 is equally dispositive.

185. The Ellis Report also confirms that the French, German, and Spanish Launch Aid for the A300 and A310 confers a benefit, concluding that the rate a commercial investor would demand for a comparable project-specific and success-dependent loan would be between **[ ]** and **[ ]** percent.[185]

iii. The A300/A310 Launch Aid is specific

186. The French, German, and Spanish Launch Aid for the A300/A310 is specific within the meaning of Article 2 of the SCM Agreement. The governments provided the aid pursuant to a set of intergovernmental agreements, as well as one or more framework agreements that the Airbus Executive Agency concluded with Airbus, providing specifically and exclusively for Launch Aid to Airbus.[186]

187. In addition, German federal budgets referred to the A300 and the A310 as the "most significant" beneficiaries of German Launch Aid and demonstrate in any event that all such aid

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[183] *See* 1997 Senate Report at 71, noting that Airbus had repaid FF 3,056,290,000 for the FF 3,000,000,000 it had received in A300 Launch Aid, and FF 2,618,480,000 of the FF 3,200,000,000 it had received in A310 Launch Aid, and that it still owed FF 561,800,000. In other words, Airbus's total repayments plus its outstanding balance due equaled approximately FF 6,200,000,000 – the face amount of the principal it originally received.

[184] *Canada – Aircraft (Panel)*, paras. 9.313-15 (finding that loans under the *Technology Partnerships Canada* program were subsidies because the TPC program, "as a matter of policy, does not seek a commercial rate of return on its contributions").

[185] *See* Ellis Report at 27 (Exhibit US-80; see BCI Annex). The Ellis Report rates are particularly conservative on these early Airbus models because Airbus was not yet established in the marketplace, and the risk of the entire endeavor was that much higher.

[186] *See, e.g.,* 1969 agreement (Exhibit US-11). The 1969 agreement also required the completion of a framework contract between Airbus and the Airbus Executive Agency. *Id*., Art. 2. The EC refused the Annex V Facilitator's request for a copy of the Framework Agreement. *See* Question 27(c) from the Facilitator to the EC (Exhibit US-4; see BCI Annex); EC Response to Question 27(c) from the Facilitator (Exhibit US-5; see BCI Annex).

concerns the aeronautics industry.[187] French government documents identify Airbus and the aeronautics industry as the recipients of Launch Aid.[188] Spanish government documents identify the "Airbus program" as a distinct subsidy program under the management of the General Directorate for Technological Policy.[189]

188. Finally, each individual grant of Launch Aid is made pursuant to a specific contract between the Airbus government and its relevant Airbus company.

b. Launch Aid for the A320 Is a Specific Subsidy

189. Airbus launched the A320 in 1984. At that point, Airbus had barely begun repaying the Launch Aid that it had received for the A300 and the A310. Nevertheless, the Airbus governments continued their practice of underwriting Airbus's development costs by committing approximately $2,500,000,000 for the project.[190] The Launch Aid covered 90 percent of the development costs of the A320 and, in the case of France, between 60 and 66 percent of the additional development costs of the A320 derivatives.[191]

i. The A320 Launch Aid constitutes a financial contribution

190. The Launch Aid for the A320 constitutes financial contributions, as it involves direct transfers of funds or potential direct transfers of funds within the meaning of Article 1.1(a)(1)(i)

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[187] *See, e.g.*, Federal Budget 1980, Budget Plan 09 (Economics Ministry), Part 02, Chapter 98, Line Item 662 91 - 634, comment to title group 09, singling out the Airbus A300 and A310 as the main beneficiaries of German Launch Aid and the A300 and A310 itself as "das bedeutendste Vorhaben" or "most important commitment" (Exhibit US-17N).

[188] *See, e.g.*, 1969 French Senate Report (Exhibit US-94); 1975 French Senate Report (Exhibit US-95).

[189] *See, e.g.*, Airbus, Cuadernos CDTI, Centro para el Desarollo Tecnológico Industrial (CDTI) (prepared by the State Secretariat of Industry, Ministry of Science and Technology), July 1993, at 91, et seq. (Exhibit US-54); Balance del Segundo Año del Ministerio de Ciencia y Technología, June 2002, at 29 (Exhibit US-96).

[190] The Airbus governments memorialized their agreement to provide Launch Aid for the A320 in the A320 Launch Aid Agreement (Exhibit US-16). The preamble of the agreement notes that the governments wanted to "further reinforce European cooperation within the Airbus consortium." The agreement takes the same form as the earlier A300 agreement and contains the same core terms and conditions. It provides for the continued operation of the Airbus intergovernmental institutions and refers specifically to the earlier intergovernmental agreements on the A300 and A300/A310. *Id*., Art. 3 (Exhibit US-16).

[191] The 1990 German Federal Budget introduced a standard development aid ceiling for Airbus of 90 percent. *See* Budget Plan 09 (Ministry of Economics), Part 02, Chapter 09, comments to line item 892 91-634 (Exhibit US-17X). See also the German government's statement in BT-Drs. 12/1080, at 46 (Exhibit US-26). For France: 1997 Senate Report, at 62, 67 (Exhibit US-18). For Spain: Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (Jan. 13, 1997) (Exhibit US-19).

of the SCM Agreement.[192] The A320 Launch Aid agreement confirms this fact, stipulating that the four Airbus governments would provide the Launch Aid to Airbus in the form of up-front capital to be repaid through levies on sales.[193]

191. The German Federal Government provided Euro 770,000,000 (DM 1,500,000,000) in Launch Aid for the A320 between 1983 to 1990 in the form of "Darlehen" (advance/loan) or "bedingt rückzahlbare Darlehen" (conditionally repayable advance/loan).[194]

192. The French government provided approximately FF 4,100,000,000 in Launch Aid for the A320 in the form of "avances remboursables," *i.e.*, loans to be repaid through levies on future aircraft sales.[195]

193. The Spanish government provided Ptas. 10,800,000,000 in Launch Aid for the A320,[196] also in the form of reimbursable advances ("anticipos reembolsables").[197]

194. The UK government provided approximately £250,000,000 in Launch Aid for the A320.[198] Like the Launch Aid provided by the other Airbus governments, UK Launch Aid takes the form of loans, with repayment via levies on sales.

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[192] The panel in the *Canada – Aircraft* dispute was in "no doubt" that the TPC subsidies at issue in that case – which are nearly identical in form to Airbus Launch Aid – constituted financial contributions within the meaning of Article 1.1 of the SCM Agreement. *Canada – Aircraft (Panel)*, para. 9.306.

[193] Although the EC refused the Facilitator's request for a copy of the agreement, the United States was able to locate a Spanish-language copy. It describes the financial contributions as "aportaciones" (provisions) that will be "reembolsables" (reimbursed), *i.e.*, reimbursable advances. A320 Launch Aid Agreement, Arts. 5, 8 (Exhibit US-16).

[194] See BT-Drs. 12/1080, at 46 (Exhibit US-26), indicating that development costs of the A320 were estimated at DM 1.679 billion from 1983 to 1990, of which 90 percent were covered by development aid. *See also* Monopolkommission, at 71, para. 118, table 11, indicating that Germany agreed to provide DM 1.3 billion, of which it disbursed DM 1.2 billion by the end of 1988 (Exhibit US-30).

[195] To be precise, FF 4,133.30 million. See 1997 Sénat Report, at 68 (Exhibit US-18).

[196] Airbus, Cuadernos CDTI, Centro para el Desarollo Tecnológico Industrial (CDTI) (prepared by the State Secretariat of Industry, Ministry of Science and Technology), at 91, *et seq.* (July 1993) (hereinafter "Cuadernos CDTI") (Exhibit US-54); Balance del Segundo Año del Ministerio de Ciencia y Technología, at 29 (June 2002) (Exhibit US-96).

[197] Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (Jan. 13, 1997) (Exhibit US-19).

[198] House of Lords written answers for Feb. 25, 1997 and March 19, 1997 (question to Mr. Greg Knight) (Exhibits US-97 and US-98); Memorandum submitted by the Department of Trade and Industry, Appendix 1, Annex 2 (Exhibit US-99).

ii. The A320 Launch Aid confers a benefit

195. The A320 Launch Aid has the same characteristics as the A300/A310 Launch Aid – back-loaded and success-dependent repayment terms and zero or below-market rates of interest – and thus confers a benefit on Airbus.

196. Specifically, the A320 intergovernmental agreement provides for repayment of Launch Aid through levies on deliveries of the financed aircraft. The publicly available information on the terms and conditions of each government's provision of Launch Aid is consistent with this scheme. For example, the German A320 Launch Aid is listed in the government's biannual "subsidy reports" (*Subventionsberichte*) as "conditionally repayable subsidies."[199] A UK parliamentary document confirms that the UK A320 Launch Aid is success-dependent.[200] French Senate Reports and other documents confirm that France provides for repayment of its Launch Aid through levies.[201] Spanish government documents indicate that, in Spain, repayment is not only levy-based but only begins once CASA has recouped the 30 percent of costs that it had financed itself.[202] Thus, repayment of the A320 Launch Aid, like all other Launch Aid, is back-loaded and success-dependent.

197. The Airbus governments do not, however, charge Airbus interest rates commensurate with these advantageous terms. Instead, interest is at zero or well below market.

198. In the case of Spain, budget reports confirm that the Launch Aid is interest free.[203] The

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[199] *See* Bundesregierung, Neunter Subventionsbericht (1981-84), BT-Drs. 10/352, at 135, Finanzhilfe ("financial support") no. 70 (referring to "the measures for promoting the development of civilian aircraft (conditionally repayable grants) . . . .") (Exhibit US-53E); Bundesregierung, Zehnter Subventionsbericht (1983-86), BT-Drs. 10/3821, at 129, Finanzhilfe ("financial support") no. 61 (explaining that "{t}he funding takes place through conditionally repayable grants for development expenses. Repayment is normally based on the number of sales achieved") (Exhibit US-53F). The report specifically refers to the A300, A310 and A320. See BT-Drs. 13/6910 where the government describes all launch aid to be c"onditionally repayable, i.e., depending on the success of sales" (at 11) (Exhibit US-82). See also BT-Drs. 13/8409 at 14 (Exhibit US-31).

[200] *See*, *e.g.*, House of Commons, Hansard Written Answers for 15 January 1998, Answer from Mr. Battle to a question from Mr. Cousins (column 270) (setting out all projects with outstanding Launch Aid (including the A320), "together with amounts received by the Government in the form of levy payments for years 1995-96 and 1996-97") (Exhibit US-100).

[201] *See, e.g.,* 1997 Senate Report, at 63-65 (Exhibit US-18). A French official also confirmed this fact in testimony before the U.S. Senate. *See* Staff Report, *Major Issues in United States – European Community Trade*, Committee on Energy and Commerce, U.S. House of Representatives, Comm. Print 100-1, 100th Cong., 1st Sess. 9 (1987) (citing Michel Lagorce, Director of Civil Aeronautic Programs of the Direction General de l'Aviation Civile) (Exhibit US-101).

[202] Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (Jan. 13, 1997) (Exhibit US-19).

[203] Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, (January 13, 1997), at 122 ("This financing, consisting in the provision of interest free reimbursable advances . . . .") (in the original Spanish, "Esta financiación, consistente en la entrega de anticipos

(continued...)

Spanish aid is therefore by definition below-market. The Ellis Report confirms this fact, concluding that the rate a commercial investor would demand for a comparable project-specific and success-dependent loan would be at least **[ ]** percent.[204]

199. In the case of Germany, a report by the German Monopolkommission notes that the repayment of Airbus's debt to the German government (including launch aid for the A320) was to be deferred far into the future which would result in "a significant interest subsidy."[205] In fact, the report notes that Airbus would only owe full repayment "if profits develop extremely favorably." The Monopolkommission thus acknowledged that the German Launch Aid for the A320 was provided at below-market interest rates and confers a benefit – an "interest subsidy" – on Airbus. In addition, as the United States noted above, the German government conceded that the A320 Launch Aid is a subsidy when it listed the aid (like all of its Airbus Launch Aid) in its biannual "subsidy report" (*Subventionsbericht*) in which it catalogues all subsidies granted by the German government.[206]

200. The A320 "debt settlement" that the German government agreed with Deutsche Airbus further confirms that the German interest rate was zero, or at least well below-market.[207] In 1997, Airbus paid just DM 1.4 billion to "settle" the DM 1.5 billion in A320 Launch Aid that the German government had disbursed to Airbus between 1983 and 1990. It had repaid virtually none of the Launch Aid prior to that time. According to the Ellis Report, however, a commercial investor would demand an interest rate of at least **[ ]** percent for a comparable project-specific and success-dependent loan. Thus, if the German government charged a commercial rate of interest on its A320 Launch Aid, the accumulated outstanding amount that Airbus Germany would have had to pay in 1997 to "settle" the debt would have been substantially higher than DM 1.5 billion.[208]

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[203] (...continued)
reintegrables sin interés . . . .") (Exhibit US-19).

[204] Ellis Report at 27 (Exhibit US-80; see BCI Annex).

[205] Monopolkommission at 75-76, para. 132 (Exhibit US-30). The Monopolkommission made the comment in a report examining the aid package that Germany provided to Deutsche Airbus in 1989. The United States discusses this package at length in Section IV.F of this submission. One aspect of the package was a deferral of Deutsche Airbus's Launch Aid repayment obligations, including for the A320, until 2001. The 1989 deferral followed an earlier deferral that the German government had agreed in 1983.

[206] Bundesregierung, Fünfter Subventionsbericht (1973-76), BT-Drs. 7/4203, at 107, Finanzhilfe ("financial support") no. 62 and all subsequent Subventionsberichte ("subsidies reports") through to the Sechzehnter Subventionsbericht (1995-1998), BR-Drs. 13/8420, at 110, Finanzhilfe ("financial support") no. 58 (Exhibits US-53A through US-53L).

[207] The United States discusses the debt settlement in detail in Section IV.E of this submission.

[208] The following hypothetical may help to illustrate this point: Assume for the sake of argument that an annual interest rate of 2 percent was applied to the German A320 Launch Aid beginning in 1990 (rather than in 1983, when the disbursement of the aid actually began). Adding the interest that would have accumulated between 1990 and 1997 (the time of the 1997 "settlement") to the outstanding principal results in a total indebtedness of DM 1.76 billion, which is approximately DM 360 million more than Airbus actually paid to "settle" the debt.

201. Publicly available information also indicates that the French Launch Aid for the A320 confers a benefit. For example, a discussion of Launch Aid in a 1997 French Senate Report states that:

> the reimbursable advances can only be seen as a form of true public support for civil aeronautics construction. . . . They are not . . . free loans. However, they certainly constitute a support provided by the State to civil aeronautics projects.

202. The report then states that the cost of Launch Aid to the French government depends on the government's cost of borrowing, and that "the benefit, which bank financing or bonds would not offer, depends also on the level of return on alternative external financing."[209] In other words, the report acknowledges that the financing confers a benefit and that the magnitude of the benefit depends on the interest rate a commercial lender would charge for equivalent financing. In addition, another French Senate Report explains that France tried and failed to convince private banks to provide financing for the A320 project on the same terms as the government Launch Aid.[210]

203. The Ellis Report confirms that the Launch Aid France granted for the A320 confers a benefit, concluding that the rate a commercial investor would demand for a comparable project-specific and success-dependent loan would be at least **[ ]** percent.[211]

204. With respect to the UK, the UK government explicitly conditions its grants of Launch Aid on a demonstration by the applicant that commercial financing for the project is unavailable.[212] When a government provides financing that the market is unwilling to provide, a benefit on the recipient is necessarily conferred. In addition, the Ellis Report has used publicly available information on disbursements and repayments of UK Launch Aid to determine that the

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[209] 1997 Senate Report, at 64 (Exhibit US-18).

[210] Marcel Fortier, Commission des finances, projet de loi de finances pour 1987, Rapport No 67, tome III Annexe No 21 du 17/11/1986, Equipement, Logement, Amenagement du territoire et transports, IV Transports, 2. Aviation civile, 4. Meteorologie, at 25 (Exhibit US-20).

[211] Ellis Report at 27 (Exhibit US-80; see BCI Annex).

[212] For example, a March 2002 publication of the office of the Prime Minister stated that an applicant seeking Launch Aid in the UK must demonstrate that commercial financing is not available for the project in question:

> Applicants have to submit a business case setting out . . . why the investment is needed – and cannot be funded via the capital markets. . . . DTI officials then undertake a detailed assessment of the company's business case. This covers claims that the project cannot be funded by alternative means; the technical viability; the market; and the wider benefits of the project to the economy beyond the company itself . . . .

Lending Support: Modernising the Government's Use of Loans, A Performance and Innovation Unit Report, March 2002, at 128 (emphasis added) (Exhibit US-102).

effective interest rate on the A320 aid was approximately 4.65 percent. A commercial investor would have demanded an interest rate of at least **[ ]** percent for a comparable project-specific and success-dependent loan.[213]

205. Finally, as the United States noted in Section IV.A.2.b.iv above, one consequence of providing Launch Aid on an unsecured, success-dependent basis is that the Airbus governments are not guaranteed any return, even of principal. The Airbus governments charge Airbus no risk premium to compensate for the risk they assume on Airbus's behalf.

iii. The A320 Launch Aid is specific

206. The A320 Launch Aid is also specific within the meaning of Article 2 of the SCM Agreement.

207. First, the A320 intergovernmental agreement provides exclusively for aid to Airbus.[214] The agreement also provides for a framework agreement to be concluded between the Airbus Executive Agency and Airbus to implement the intergovernmental agreement and the Launch Aid financing – again, an agreement pertaining only to Airbus.[215]

208. Furthermore, in Germany, federal budgets single out Airbus as the "most significant" project funded from a budget that is itself solely dedicated to aeronautics funding.[216] Other German government documents as well as the Monopolkommission report also single out Airbus and the aeronautics industry as the only recipients of such aid.[217]

209. French government documents relating to A320 Launch Aid likewise confirm that the aid is specific within the meaning of Article 2 of the SCM Agreement, singling out Airbus and the aeronautics industry as the recipients of Launch Aid.[218] Spanish government documents confirm the specificity of the Spanish grants of A320 Launch Aid by referring to a distinct "Airbus

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[213] *See* Ellis Report at 27 (Exhibit US-80; see BCI Annex).

[214] A320 Launch Aid Agreement (Exhibit US-16).

[215] *Id.*, Art. 4 (Exhibit US-16).

[216] *See, e.g.*, Federal Budget 1980, Budget Plan 09 (Economics Ministry), Part 02, Chapter 98, Line Item 662 91 - 634, comment to title group 09, singling out the Airbus A300 and A310 as the main beneficiaries of German Launch Aid (Exhibit US-17N).

[217] See, e.g., Monopolkommission, at 71, para 118, table 11 (Exhibit US-30).

[218] *See, e.g.*, Legrand (Bernard), Senate Report, Avis No. 98, Commission des Affaires Economiques, projet de loi de finances pour 1986 (Exhibit US-103); Fortier (Marcel), Senate Report No. 67, Projet de loi de finances pour 1987, at 10 (Exhibit US-104); Fortier (Marcel), Senate Report No. 93, Commission des Finances, Projet de Loi de Finances pour 1988 (Exhibit US-105).

program" and to distinct Airbus aircraft models.[219] The UK government has repeatedly acknowledged that UK Launch Aid is only available for projects in the aerospace sector.[220]

210. Finally, each individual provision of Launch Aid is made pursuant to a specific contract between the Airbus government and its relevant Airbus company.

c. Launch Aid for the A330 and A340 Is a Specific Subsidy

211. In 1987, only three years after launching the A320, Airbus announced its intention to launch two additional new aircraft models, the A330 and the A340. Each of the Airbus companies made clear at the time that they lacked the financial resources to develop the aircraft and that the project would only be able to move forward if the Airbus governments agreed to provide the necessary financing:

> From the Airbus point of view the problem with the A330/A340 was not so much competition from the Americans, but the ever-pressing question of finding the money to launch it. The A320 was not due to take to the air until early in the following year and although the order book was looking very healthy, the partners were feeling the strain. In May 1986 *Flight* magazine reported Aérospatiale as saying that it had insufficient cash flow to fund the production of the A320 and the development of the A330/A340 program simultaneously, and British Aerospace announced that without 100 percent government aid for the new planes, it would have to withdraw from the consortium. At the same time, Deutsche Airbus was complaining of a severe cash crisis, as, it said, funding the A320 had soaked up all of its financial resources.[221]

212. Furthermore, at the time that it requested the Launch Aid for the A330/A340 project, Airbus had repaid only an estimated $360 million of the $3 billion that it had received for the

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[219] The relevant document states that:

> The intergovernmental agreements referred to above reflect the agreement between the Member States on the financing of their companies' participation; and, through separate agreements of the Spanish Council of Ministers and contracts entered into by the government of Spain with CASA, the state has assumed responsibility to finance to that company the distinct Airbus models.

Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (Jan. 13, 1997) (in the original Spanish, "Los acuerdos intergubernamentales aludidos establecían el compromiso de los Estados miembros en la financiación de la participación de sus industriales respectivos; y, par distintos acuerdos del Consejo de Ministros de España y contratos pactados por el Gobierno español con CASA, el Estado ha venido asumiendo el facilitar a esta Sociedad a financiación de los distintos modelos de Airbus") (Exhibit US-19).

[220] *See, e.g.,* Department of Trade and Industry web site, *Aerospace and Defence Industries*, *Launch Investment*, at para. 1 (explaining that "{l}aunch investment is a risk-sharing Government investment in the design and development of specific civil aerospace projects in the UK. . . . Launch investment is available only to the aerospace sector and stems from the provisions of the Civil Aviation Act 1982.") (Exhibit US-106).

[221] Stephen Aris, *Close to the Sun* 145 (2004) (Exhibit US-23).

A300 and A310 and none of the aid it had received for the A320.[222]

213. Nevertheless, the Airbus governments agreed to provide Launch Aid for the A330/A340. They memorialized their commitment to provide the aid in another intergovernmental agreement;[223] the aid covered between 60 and 90 percent of development costs.[224]

i. The A330/A340 Launch Aid constitutes a financial contribution

214. The Launch Aid for the A330/A340 constitutes financial contributions, as it involves direct transfers of funds or potential direct transfers of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[225] The A330/A340 Launch Aid agreement confirms this fact, stipulating that the four Airbus governments would provide "contributions to the costs of development" or "national contributions" that were to be "reimbursed . . . with the proceeds of the aircraft sales."[226]

215. The German Federal Government provided approximately DM 3,000,000,000 in Launch Aid for the A330 and A340 between 1987 and 1996 in the form of "Darlehen" (advance/loan) or "bendingt rückzahlbare Darlehen" (conditionally repayable advances/loans).[227]

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[222] Airbus had repaid a little over $300 million of the French Launch Aid and may have repaid some of the Spanish Launch Aid for the A300 and A310. Exhibit US-107 sets out French A300/A310 repayment data and provides underlying evidence. The United States converted the data at the December 31, 2005 exchange rate. Deliveries of the A320, and thus Launch Aid repayment, had not yet begun. In addition, as the United States explains in Section IV.E of this submission, repayments of German Launch Aid prior to 1989 were negligible.

[223] A330/A340 Launch Aid Agreement (Exhibit US-28). The A330/A340 agreement contains obligations that are virtually identical to those in the A320 agreement. *See id.*, Preamble, Chapters I (General Considerations), II (Organization), III (Development). In addition, Article 5.1 of the agreement states that each Airbus government's obligation to "take all necessary measures" to ensure that its respective Airbus company would complete its part of the A330/A340 program "shall be deemed to be complied with by means of concession of reimbursable advance payments" (i.e., Launch Aid) to its respective Airbus company in the amount set out in the agreement (namely, FF 7,800,000,000 for France, DM 2,996,000,000 for Germany, £ 450,000,000 for the UK, and Pta. 29,356,000,000 for Spain (plus BRF 1,908,000,000 for Belgium)). *Id.*, Chapter III, Art. 5.1 (emphasis added).

[224] *See* Airbus, News & Information, Frequently Asked Questions, *How was the original A300 program funded* and *How much launch aid was provided*, downloaded from Airbus website on September 17, 1999 (Exhibit US-108); BT-Drs. 12/1080, at 46 (Exhibit US-26); 1997 Senate Report, at 63, 68 (Exhibit US-18); Boletin Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Num. 34, at 122 (Jan. 13, 1997) (Exhibit US-19).

[225] The panel in the *Canada – Aircraft* dispute was in "no doubt" that the TPC subsidies at issue in that case – which are nearly identical in form to Airbus Launch Aid – constituted financial contributions within the meaning of Article 1.1 of the SCM Agreement. *Canada – Aircraft (Panel)*, para. 9.306.

[226] A330/A340 Launch Aid Agreement, Arts. 6, 8 (Exhibit US-28).

[227] Federal Budget 1987, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 892 91-634, comment to Chapter 09 through Federal Budget 1996 (Exhibits US-17U through US-17DD). See BT-Drs. 12/1080, at 46 (Exhibit US-26); Monopolkommission, para 118 (Exhibit US-30); Bundesregierung, 12th Subsidy

(continued...)

216. Beginning in 1987, France provided financial contributions of approximately FF 7,800,000,000 for the A330 and A340 in the form of a reimbursable loan ("avance remboursable").[228]

217. Between 1987 and 1995, the Spanish government provided approximately Ptas. 29,000,000,000 in financial contributions for the A330 and the A340 in the form of a reimbursable loan ("anticipos reembolsables").[229]

218. Starting in 1988, the UK government provided £447,000,000 in Launch Aid for the A330 and the A340.[230]

ii. The A330/A340 Launch Aid confers a benefit

219. The A330/A340 Launch Aid also confers a benefit on Airbus. Like all Launch Aid that the Airbus governments provide, repayment of the aid is success-dependent and back-loaded, at below-market rates of interest.

220. First, the A330/A340 intergovernmental agreement confirms that the Launch Aid was success-dependent and back-loaded, as it specifically provides for repayment through levies on deliveries of the financed aircraft.[231] Publicly available information for each of the Airbus governments also confirms this fact.

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[227] (...continued)
Report (1987-1990), at 108, Finanzhilfe 63, and all subsequent Subsidy reports until the 16th (1995-1998) (Exhibits US-91H through -91L).

[228] See 1997 Senate Report, at 67 (Exhibit US-18); Collin (Yvon), Senate Report No. 89, Commission des Finances, Projet de Loi de Finances pour 2000, Tome III, Annexe No. 25, Équipment, Transport et Logement: III. - Transports: Transport Aérien et Météorologie et Aviation Civile, at 83, for the last actual disbursement of FF142 million in 1997 (Exhibit US-33).

[229] Boletin Oficial de las Cortes Generales, Congreso de los Diputados, Contestaciones del Gobierno, Serie D, Núm. 547, at 153 (June 5, 2003) (Exhibit US-27). The document states the amounts in Euro, totaling Euro 176.433 million, although the EC did not use the euro as a means of payment at the time of disbursement. The United States assumes that Spain used the bound exchange rate of 1 Euro = Ptas. 166.386 when it made the conversion into Euros and we have used this rate to convert the amounts back into pesetas to ensure consistency.

[230] *See, e.g.,* House of Lords written answers for Feb. 25, 1997 (Exhibit US-97); *Britain Plans Airbus Aid*, N.Y. Times, at D16 (May 15, 1987) (Exhibit US-110); *British Agree on Launch Aid for A330/A340*, Aviation Week & Space Technology, at 33 (May 18, 1987) (explaining that "{t}he British government and British Aerospace last week reached agreement on a launch aid package of 450 million pounds sterling ($756 million) to permit the manufacturer to take part in the proposed Airbus Industrie A330/A340 program. The money . . . will be provided during the early stages of the A330/A340 development and will cover all British Aerospace's cash flow requirements on the program through approximately 1990.") (Exhibit US-111).

[231] A330/A340 Launch Aid Agreement, Art. 8 (stating that repayment of A330/340 Launch Aid was based on "the product of the aircraft sales") (Exhibit US-28).

221. For example, UK parliamentary reports demonstrate that repayment of the UK Launch Aid is based on levies on each delivery of the financed aircraft.[232] Spanish government documents confirm that, in addition to being levy-based, repayment of Spanish Launch Aid is due only after CASA has recouped the 30 percent of the costs it had financed itself.[233] The German government "subsidy report" (*Subventionsberichte*) confirms that repayment of the German aid is conditional on the commercial success of the financed aircraft.[234] A French government official confirmed publicly that the French A330/A340 Launch Aid is repayable through per-plane levies on the first 700 deliveries.[235]

222. Second, the publicly available evidence indicates that the Airbus governments' willingness to assume Airbus's risks by providing the Launch Aid on a success-dependent and back-loaded basis is not reflected in the interest rates they charge.

223. With respect to Spain, budget reports confirm that the Launch Aid is provided on an interest-free basis.[236] Interest-free loans confer a benefit by definition. The Ellis Report also confirms that the Spanish Launch Aid for the A330 and A340 confers a benefit, concluding that the rate a commercial investor would demand for a comparable project-specific and success-dependent loan would be at least **[ ]** percent.[237]

224. The interest rate on the French A330/A340 Launch Aid is disclosed in the French government's project appraisal for the A340-500/600.[238] Although the United States will only discuss the details in the HSBI Appendix to this submission, the rate is below what a commercial lender would charge for financing with the same characteristics. The HSBI Appendix to the

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[232] *See*, *e.g.*, House of Commons, Hansard Written Answers for 15 January 1998, Answer from Mr. Battle to a question from Mr. Cousins (column 270) (setting out all projects with outstanding Launch Aid (including the A330/A340), "together with amounts received by the Government in the form of levy payments for years 1995-96 and 1996-97") (Exhibit US-100). *See also* House of Commons, Hansard Written Answers for 5 March 1997, Answer of Mr. Knights to a question from Mr. Ingram, at 2-3 (Exhibit US-109).

[233] Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (Jan. 13, 1997) (Exhibit US-19).

[234] *See* Bundesregierung, Elfter Subventionsbericht (1985-88), BT-Drs. 11/1338, at 104, 105, Finanzhilfe ("financial support") no. 61 (Exhibit US-53H). *See also* the German government's statement in BT-Drs. 13/6910 at 10 (Exhibit US-82).

[235] Staff Report, *Major Issues in United States – European Community Trade*, Committee on Energy and Commerce, U.S. House of Representatives, Comm. Print 100-1, 100th Cong., 1st Sess. 9 (1987) (citing Michel Lagorce, Director of Civil Aeronautic Programs of the Direction General de l'Aviation Civile) (Exhibit US-101); *see also* A330/A340 Launch Aid Agreement, Chapter III, Art. 5.1 (committing the Airbus governments to provide reimbursable advances in support of the A330/A340 project) (Exhibit US-28).

[236] Spanish government budget documents show that Spain provided its Launch Aid interest-free until 1998. Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (Jan. 13, 1997) (Exhibit US-19).

[237] Ellis Report at 27 (Exhibit US-80; see BCI Annex).

[238] *See* DS316-EC-HSBI-0001143.

Ellis Report confirms this point, concluding that the rate a commercial investor would demand for a comparable project-specific and success-dependent loan would be at least **[HSBI]** percent.[239]

225. With respect to Germany, the publicly available information indicates that the German Launch Aid interest rate is either zero or nominal. The German government conceded this fact when it listed the aid in its biannual "subsidy report" (*Subventionsbericht*), which lists all subsidies provided by the Federal Government.[240] In addition, as the United States has previously noted, the Monopolkommission stated that the German government's agreement to postpone Deutsche Airbus's repayment obligations would lead to "a significant interest subsidy," thus indicating that the interest rate on the loan is below-market.[241]

226. The Ellis Report also confirms that the German Launch Aid confers a benefit, concluding that the rate a commercial investor would demand for a comparable project-specific and success-dependent loan would be at least **[ ]** percent.[242]

227. The United States noted above that the UK government conditions the provision of Launch Aid on a demonstration by the applicant that commercial financing is unavailable. When a government provides financing that the market is unwilling to provide, a benefit is necessarily conferred on the recipient. In addition, the Ellis Report has used publicly available information on disbursements and repayments of UK Launch Aid to determine that the effective interest rate on the A330/A340 aid is approximately 4.35 percent. A commercial investor would demand an interest rate of at least **[ ]** percent for a comparable project-specific and success-dependent loan.[243]

228. Finally, as the United States noted in Section IV.A.2.b.iv above, one consequence of providing Launch Aid on an unsecured, success-dependent basis is that the Airbus governments are not guaranteed any return, even of principal. The Airbus governments charge Airbus no risk premium to compensate for the risk they assume on Airbus's behalf.

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[239] Although the interest rate is plainly not HSBI (the EC designated all of the Launch Aid contracts that it was willing to provide to the Facilitator as BCI, not HSBI), the United States is treating it as HSBI for purposes of this submission because the EC has refused to provide a copy of the project appraisal identifying non-HSBI and non-BCI in time for the United States to reflect the designations in this submission. The United States identifies the rate in the HSBI Appendix to this submission. *See also* Ellis Report, HSBI Appendix.

[240] Bundesregierung, Fünfter Subventionsbericht (1973-76), BT-Drs. 7/4203, at 107, Finanzhilfe ("financial support") no. 62 and all subsequent subsidies reports through to the Sechzehnter Subventionsbericht (1995-1998), BR-Drs. 13/8420, at 110, Finanzhilfe ("financial support") no. 58 (Exhibits US-53A through US-53L).

[241] Monopolkommission at 75-77, para. 132 (Exhibit US-30). The United States discusses the German government's postponement of Deutsche Airbus's repayment obligations in more detail in Section IV.E of this submission.

[242] *See* Ellis Report at 27 (Exhibit US-80; see BCI Annex).

[243] *See* Ellis Report at 27 (Exhibit US-80; see BCI Annex).

iii. The A330/A340 Launch Aid is specific

229. The Launch Aid for the A330/A340 is also specific within the meaning of Article 2 of the SCM Agreement.

230. First, the intergovernmental agreement that provides for the Launch Aid relates specifically and exclusively to Airbus.[244] The intergovernmental agreement also provides for the conclusion of a framework agreement between the Airbus Executive Agency and Airbus to implement the intergovernmental agreement that also pertains exclusively to Airbus.[245]

231. In addition, contemporaneous German federal budget documents specifically refer to Launch Aid to Airbus as the most important or largest ("bedeutendste") project to receive funding from the German government.[246]

232. French government documents also single out Airbus as the main recipient of Launch Aid and demonstrate that Launch Aid is limited to the aeronautics sector.[247] Spanish government documents refer to a specific Airbus subsidy program and indicate that Launch Aid is specifically intended for CASA/Airbus and the civil aircraft industry.[248] The UK government has repeatedly stated that UK Launch Aid is only available to companies in the aerospace sector.[249]

233. Finally, each individual grant of Launch Aid is made pursuant to a specific contract

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[244] A330/A340 Launch Aid agreement (Exhibit US-28).

[245] *Id.*, Art. 4 (Exhibit US-28). The EC refused the Facilitator's request for a copy of the Framework Agreement between the Airbus governments and Airbus. *See* Question 27(b) from the Facilitator to the EC (Exhibit US-4; see BCI Annex); EC Response to Question 27(b) (Exhibit US-5; see BCI Annex).

[246] See, *e.g.*, Federal Budget 1987, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 892 91-634, comment to Chapter 09 (Exhibit US-17U); *see also* Federal Budget 1996, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 892 91-634, comment to Chapter 09, where the language had changed to "(d)ie Förderung erfolgt schwerpunktmässig im Airbus-Programm . . . ." ("the main focus of the support is the Airbus program") (Exhibit US-17DD).

[247] *See, e.g.*, Fortier (Marcel), Senate Report No. 93, Commission des Finances, Projet de Loi de Finances pour 1988 (Exhibit US-105); Fortier (Marcel), Senate Report No. 88, Commission des Finances, Projet de Loi de Finances pour 1989 (Exhibit US-112); Fortier (Marcel), Senate Report No. 59, Commission des Finances, Projet de Loi de Finances pour 1990 (Exhibit US-113).

[248] Boletin Oficial de las Cortes Generales, Congreso de los Diputados, Contestaciones del Gobierno, Serie D, Núm. 547, at 153 (June 5, 2003) (Exhibit US-27); Boletín de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (January 13, 1997) (Exhibit US-19); Boletín de las Cortes Generales, Congreso de los Diputados, Contestaciones del Gobierno Serie D, Núm. 547, (June 5, 2003), at 255 (Exhibit US-38).

[249] *See, e.g.,* Department of Trade and Industry web site, *Aerospace and Defence Industries*, *Launch Investment*, at para. 1 (explaining that "{l}aunch investment is a risk-sharing Government investment in the design and development of specific civil aerospace projects in the UK. . . . Launch investment is available only to the aerospace sector and stems from the provisions of the Civil Aviation Act 1982") (Exhibit US-106).

between the Airbus government and its respective Airbus company.

d. The French Launch Aid for the A330-200 Is a Specific Subsidy

234. In 1995, Airbus further expanded its LCA family by launching the A330-200, a derivative of the A330. The French government had provided Launch Aid to cover 60 percent of Aérospatiale's development costs for the original A330, and it agreed to provide an additional FF 330,000,000 in Launch Aid for the A330-200.[250]

235. The EC provided a copy of the A330-200 Launch Aid contract to the Annex V Facilitator. Therefore, the United States has based its subsidy analysis of the A330-200 Launch Aid on the terms and conditions of the contract itself. The contract – like all of the other Launch Aid contracts that the United States discusses in the remainder of this section – demonstrates that the French A330-200 Launch Aid is a subsidy within the meaning of Article 1 of the SCM Agreement.

236. First, the French Launch Aid for the A330-200 constitutes a financial contribution, as it is, as always, an "avance remboursable," a direct transfer of funds or potential direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[251]

237. Second, the French Launch Aid for the A330-200 confers a benefit on Airbus. As with all previous grants of French Launch Aid, the A330-200 Launch Aid is success-dependent, with project-specific repayment via per-plane levies on the first **[ ]** deliveries.[252] The repayment schedule is **[ ]**.[253] The financing is unsecured, so the French government is not guaranteed any return, even of principal.

238. Instead of a guaranteed return, the contract provides for a potential return of **[HSBI]** percent, which the government would only realize if Airbus sells **[ ]** aircraft.[254] The **[HSBI]**

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[250] *See, e.g.,* 1997 Senate Report, at 67 (Exhibit US-18); Collin (Yvon), Senate Report No. 89, supra, at 83, 84 (Exhibit US-33); *The Commission Approves a French R&D Scheme for the Aeronautics Sector*, IP/96/665 (July 18, 1996) (valuing the Launch Aid as ECU 51 million) (Exhibit US-89).

[251] *Convention entre l'Etat et Airbus France concernant le développement de l'Airbus A330-200* ("A330-200 Convention") and Protocole relatif au financement part l'Etat du Programme Airbus A330-200 ("A330-200 Convention and Protocole"), Art. 4.2 and Annexe A, Art. 3, DS316-EC-BCI-0000316, -0000318 and -322 (Exhibit US-78; see BCI Annex). (Note that several pages are missing in the Convention as provided by the EC).

[252] *See, e.g.,* A330-200 Convention and Protocole, Annexe A, Art. 6.2, DS316-EC-BCI-0000323 (Exhibit US-78; see BCI Annex).

[253] *See id*.

[254] *See id.* The A330-200 contract does not specifically identify the potential return. The French government's project appraisal does identify the return, however. Although the figure is plainly not HSBI, the United States is treating it as HSBI for purposes of this submission because the EC has refused to provide a copy of

(continued...)

percent return **[ ]**.[255] The French government is charging Airbus no risk premium to compensate for the risks it assumes on Airbus's behalf.[256]

239. The Ellis Report confirms that French Launch Aid for the A330-200 confers a benefit, concluding that the rate a commercial investor would demand for a comparable project-specific and success-dependent loan would be at least **[ ]** percent.[257]

240. The EC itself has also confirmed that the A330-200 Launch Aid confers a benefit. It concluded that the aid is "state aid . . . in the form of a repayable advance of ECU 51 million."[258] As the United States discussed in Section IV.A.2.b.vii, a measure is not "state aid" within the meaning of EU state aid rules unless it "confers an economic advantage on the recipient." Therefore, the Commission's finding that the A330-200 Launch Aid is state aid is tantamount to a finding that the Launch Aid confers a benefit on Airbus, and thus constitutes a subsidy.

241. Finally, the A330-200 Launch Aid is specific to Airbus and/or the aeronautics sector within the meaning of Article 2 of the SCM Agreement, because France provided the aid under a contract negotiated directly with Aérospatiale under a special R&D scheme for the aeronautics sector.[259]

242. In addition, as the United States demonstrates in Section IV.B below, the Launch Aid for the A330-200 is contingent upon export performance within the meaning of Article 3 of the SCM Agreement. Under the terms of Article 2.3 of the SCM Agreement, export subsidies are "deemed" specific.

e. The French and Spanish Launch Aid for the A340-500 and A340-600 Is a Specific Subsidy

243. In 1997, Airbus further expanded its LCA family by launching the A340-500 and the A340-600, two derivatives of the original A340, in order to "be a player in the market for long-

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[254] (...continued)
the project appraisal identifying non-HSBI and non-BCI in time for the United States to reflect the designations in this submission. As the United States explains in the HSBI Appendix, the return is below the rate a commercial lender would have demanded for financing with similar characteristics.

[255] **[ ]**

[256] The French A330-200 contract provides that Airbus France will owe a **[ ]** percent royalty on that portion of the value of each delivery after the **[ ]** that is attributed to Airbus France. French A330-200 Convention and Protocole, Annexe A, Art. 6.2, DS316-EC-BCI-0000316, -0000323 (Exhibit US-78). The United States addresses this issue in the HSBI Appendix.

[257] *See* Ellis Report at 27 (Exhibit US-80; see BCI Annex).

[258] *The Commission Approves a French R&D Scheme for the Aeronautics Sector*, IP/96/665 (July 18, 1996) (Exhibit US-89).

[259] *Id.*

range, high-capacity (over 300 passengers) aircraft, where {Airbus} has been absent up to now."[260] As the European Commission stated when it analyzed the Launch Aid under its own state aid rules, the purpose of the A340-500/600 program was to give Airbus products that it could use to target the Boeing 777 and the Boeing 747.[261] The Commission explained that "should the program succeed, the European transport sector will have an expanded product line in the long-range, high-capacity aircraft sector, thus enhancing its competitive position."[262]

i. The French Launch Aid is a specific subsidy

244. France agreed to provide approximately FF 2,110,000,000 in Launch Aid for the A340-500 and A340-600.[263] The French Launch Aid for the A340-500/600 constitutes a financial contribution, as it is in the form of an "avance remboursable," a direct transfer of funds or potential direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[264]

245. The French Launch Aid for the A340-500/600 also confers a benefit on Airbus. As with all previous instances of French Launch Aid, the A340-500/600 Launch Aid is success-dependent, with project-specific repayment via per-plane levies on the first **[ ]** deliveries.[265] The repayment schedule **[ ]**[266] Therefore, it will take **[ ]** deliveries for the French government to even recover the FF 2.1 billion in principal, much less realize any return on its money. The financing is, as always, unsecured, so the French government is not guaranteed any return, even of principal.

246. Instead of a guaranteed return, the contract provides for a potential return of **[ ]** percent, which the government will only realize if Airbus sells **[ ]** aircraft.[267] The **[ ]** percent return is **[**

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[260] Letter from Karel Van Miert to Hubert Vedrine, *Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program*, Aid No. N369/98, at 2 (translation at 2) (Jan. 26, 1999) (Exhibit US-3).

[261] *Id.* at 3 (5 in the English translation).

[262] *Id.* at 6 (10 in the English translation).

[263] *See, e.g., id.* at 1 (2 in the English translation) (Jan. 26, 1999) (Exhibit US-3). The precise amount is **[ ]**. *See Protocole d'Accord entre l'Etat et Aerospatiale relatif au programmes Airbus A340-500 et A340-600*, Art. 3 ("A340-500/600 Protocole"), DS316-EC-BCI-0000276 (Exhibit US-35; see BCI Annex); *see also Convention entre l'Etat et Aerospatiale concernant le développement des Airbus A340-500 et A340-600*, Art. 4.2 ("A340-500/600 Convention"), DS316-EC-BCI-0000289 (Exhibit US-36; see BCI Annex).

[264] *See id*. In addition, as the United States has repeatedly noted, the panel in the *Canada Aircraft* dispute had no doubt that Launch Aid-type financing constituted a financial contribution. *Canada – Aircraft (Panel)*, para. 9.306.

[265] *See, e.g.,* A340-500/600 Protocole, Art. 6.2 (Exhibit US-35; see BCI Annex).

[266] *See id*.

[267] A340-500/600 Protocole, Art. 6.2 (Exhibit US-35; see BCI Annex).

].[268] The French government is charging Airbus no risk premium to compensate for the risks it assumes on Airbus's behalf.[269]

247. To put these risks in perspective, as of October 2006, Airbus has delivered only 24 A340-500s and 64 A340-600s.[270] Thus, nearly ten years after the program's launch, the French government has recouped only **[ ]** percent of the principal on the loan, and no interest. Moreover, the Airbus A350 will likely render the A340-600 obsolete,[271] so Airbus will never repay the majority of the A340-500/600 Launch Aid.[272] The Panel should keep these statistics in mind when it considers the fact that the Airbus governments are providing Launch Aid for the A380 – a much riskier program – on the same unsecured, success-dependent terms as the A340-500/600 Launch Aid.

248. The Ellis Report confirms that French Launch Aid for the A340-500 and -600 confers a benefit on Airbus, concluding that the rate a commercial investor would demand for a comparable project-specific and success-dependent loan would be at least **[ ]** percent.[273]

249. In addition, the European Commission analyzed the French Launch Aid for the A340-500/600 under EU state aid rules, and the Commission's analysis demonstrates conclusively that the aid is on non-commercial terms. The Commission found that without the Launch Aid, the project would not have moved forward at all:

> Aérospatiale could not finance the costs connected with the development of the Airbus A340-500/600 itself or with the help of bank loans. {...} Accordingly, if {Aérospatiale} were to finance the development costs of the A340-500/600 solely from its own capital (or through bank loans), it would seriously weaken the financial structure of the company. The fact that aeronautical projects extend over very long periods of time and that any investment made in the A340-500/600 could be paid back, should the program be successful, only in the very long term, make the risk that much more unacceptable.

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[268] **[** **]**. See Ellis Report, Exhibit 3 (Exhibit US-80).

[269] The French A340-500/600 Protocole provides that Airbus France will owe a **[** **]** on that portion of the value of each delivery after the **[ ]** that is attributed to Airbus France. French A340-500/600 Protocole, DS316-EC-BCI-0000276, Art. 7 (Exhibit US-35; see BCI Annex). The United States addresses this issue in more detail in the HSBI Appendix. See also Ellis Report, HSBI Appendix.

[270] The United States took these delivery figures from the Airbus website on October 15, 2006.

[271] *See, e.g.*, James Regan and Tim Hepher, *Airbus eyes model range revamp to battle Boeing*, Reuters (May 17, 2006) (reporting Airbus CEO Forgeard's comment that the A350 would eat into demand for some existing A330 and A340 models and that some of the models might be rendered obsolete) (Exhibit US-114).

[272] As the United States has previously noted, **[**

]. **[**

] (Sept. 30, 2005) (partial emphasis added), DS316-EC-BCI-0003781, 3951 (Exhibit US-68; see BCI Annex).

[273] *See* Ellis Report at 27 (Exhibit US-80; see BCI Annex).

> The Commission therefore believes that the reimbursable advance reported by the French authorities helps to encourage Aérospatiale to undertake the development work required by the A340-500/600 program by making the risk that the program represents acceptable.
>
> Through Aérospatiale, the entire A340-500/600 program has been made possible thanks to the measure reported by the French authorities. Indeed, in view of the industrial structure of Airbus Industrie and the configuration of the European aeronautics sector, this program cannot be contemplated without the participation of Aérospatiale. Consequently, the reimbursable advance from the French authorities is helping to promote the A340-500/600 program, which could not be implemented without this government support."[274]

250. The United States discusses additional evidence demonstrating that the French A340-500/600 Launch Aid is a subsidy in the HSBI Appendix.[275]

251. Finally, the A340-500/600 Launch Aid is specific within the meaning of Article 2 of the SCM Agreement because France provided the aid under a contract negotiated specifically with Aérospatiale, and because France provides Launch Aid only to the aeronautics sector.

252. In addition, as the United States demonstrates in Section IV.B below, the French Launch Aid for the A340-500/600 is contingent upon export performance within the meaning of Article 3 of the SCM Agreement. Under the terms of Article 2.3 of the SCM Agreement, export subsidies are "deemed" specific.

ii. The Spanish Launch Aid is a specific subsidy

253. Like France, Spain agreed to provide Launch Aid for the A340-500 and A340-600 to supplement the aid it had already given for the A340. In total, Spain granted some Ptas 11,348,000,000 for the A340-500/600 project, which it contributed between 1998 and 2002.[276]

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[274] Letter from Karel Van Miert to Hubert Vedrine, *Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program*, Aid No. N369/98, at 5 (translation at 7-8) (Jan. 26, 1999) (Exhibit US-3). The bracketed ellipsis denotes text that was redacted from the public version of the letter. The EC refused the Facilitator's request to provide the business confidential version of the Commission's analysis (as well as the Commission's analyses of all other Airbus Launch Aid under state aid rules). *See* Question 33 from the Facilitator to the EC (Exhibit US-4; see BCI Annex); EC Response to Question 33 (Exhibit US-5; see BCI Annex); Follow-up to Question 33 from the Facilitator to the EC (Exhibit US-6); EC Reply to Follow-up to Question 33 (Exhibit US-7).

[275] HSBI Appendix, Art. IV.

[276] *See* Spanish A340-500/600 Agreement at 5 ("Segunda"), DS316-EC-BCI-0000534 (Exhibit US-37; see BCI Annex); *see also* Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Contestaciones del Gobierno, Serie D, Núm. 547, at 253 (June 5, 2003) (Exhibit US-38), noting the amount in Euros.

254. The Spanish Launch Aid constitutes a financial contribution, as it is in the form of a repayable advance ("anticipos reembolsables"), a direct transfer of funds or potential direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[277]

255. The Launch Aid also provides a benefit to Airbus. Like the French Launch Aid for the A340-500/600, repayment of the Spanish Launch Aid is success-dependent, with **[ ]**, per-plane levies.[278] The contract indicates that CASA has at least **[ ]** years to repay the financing (if it repays it at all), and that CASA did not need to begin repaying the financing until **[ ]** years after it received the money.[279] The financing is unsecured, so the Spanish government is not guaranteed any return, even of principal.

256. Like the other Airbus governments, Spain is charging CASA an interest rate that does not reflect the advantageous characteristics of Launch Aid, including its back-loaded, success-dependent repayment terms. Instead of a guaranteed return, the contract provides for a potential return equal to the **[ ]**.[280] The Spanish government is charging Airbus no risk premium to compensate for the risks it assumes on Airbus's behalf.

257. The Ellis Report confirms that Spain's Launch Aid for the A340-500/600 confers a benefit, concluding that the rate a commercial investor would demand for a comparable project-specific and success-dependent loan would be at least **[ ]** percent.[281]

258. The Spanish A340-500/600 Launch Aid is also specific within the meaning of Article 2 of the SCM Agreement, because Spain is providing the aid under a contract negotiated specifically with CASA, and because Spain only provides Launch Aid to the aeronautics sector.

259. In addition, as the United States demonstrates in Section IV.B below, the Spanish Launch Aid for the A340-500/600 is contingent upon export performance within the meaning of Article 3 of the SCM Agreement. Under the terms of Article 2.3 of the SCM Agreement, export subsidies are "deemed" specific.

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[277] *Id.*

[278] *See, e.g.,* Spanish A340-500/600 Agreement at 3 ("Octavo") and 6 ("Quinta"), DS316-EC-BCI-0000534 (Exhibit US-37; see BCI Annex).

[279] Spanish A340-500/600 Agreement at 6 ("Quinta"), DS316-EC-BCI-0000534 (Exhibit US-37; see BCI Annex). The EC and Spain refused to provide the repayment schedule for the Launch Aid, so it is not possible to determine in more detail **[ ]** under the contract.

[280] *Id.*

[281] *See* Ellis Report at 27 (Exhibit US-80; see BCI Annex).

f. Launch Aid for the A380 Is a Specific Subsidy

260. In December 2000, Airbus launched the A380, a 555-seat, double-decker aircraft. The consensus within the aviation industry at the time was that the A380 was an extremely risky project. As a former head of Deutsche Airbus and board member of DASA explained: "I think everybody knows that {it} is extremely high risk from every point of view: technically, airframewise, enginewise, moneywise, certificationwise."[282]

261. A significant part of the project's risk stems from its enormous cost: Airbus estimated that the development costs alone would amount to some $10.7 billion,[283] and others estimated that the total project costs could exceed $15 billion.[284] Furthermore, as the United States has already explained, the vast majority of these costs must be incurred up front, years before the manufacturer is in a position to begin deliveries and receive payment from customers.[285]

262. The project's risk is also due to basic disagreements about the size of the potential market for the aircraft. Airbus believes that increasing congestion at "hub" airports worldwide will lead to substantial demand for an aircraft larger than any currently flying. The A380 is Airbus's response to that belief.

263. Boeing, by contrast, has argued that smaller, extremely long-range aircraft would make it economically feasible for airlines to increase point-to-point service and to bypass hubs altogether. In Boeing's view, the demand for A380-sized aircraft is much smaller than Airbus predicts.

264. Despite the "extremely high risk" of the A380 project, the Airbus governments continued their practice of supporting Airbus with Launch Aid by providing approximately $4,000,000,000.

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[282] *See* Stephen Aris, *Close to the Sun* at 182 (2004) (quoting from a September 2001 interview with Hartmut Mehdorn) (Exhibit US-23).

[283] *See*, *e.g.*, *Airbus A380 Development Costs Over Budget by $1.9 Bln*, Bloomberg (Dec. 15, 2004) (the article also notes that by December 2004 it was becoming clear that Airbus would exceed this $10.7 billion budget by at least $1.9 billion) (Exhibit US-115).

[284] *See, e.g.,* Kevin Done, *UK Backing for Airbus 'superjumbo'*, Financial Times (Mar. 13, 2000) (explaining that the chairman of BAE Systems estimated total costs of £10 billion, and the chairman of DASA estimated the total costs as Euro 12 billion) (Exhibit US-40); Mark Odell, *How the Market has Changed*, Financial Times (Mar. 13, 2000) (explaining that total development costs were estimated as somewhere between $10 and $15 billion) (Exhibit US-41).

[285] *See* Section II.A.2.b.ii above.

i. The French Launch Aid for the A380 is a specific subsidy

265. France agreed to provide Euro 1,213,400,000 in Launch Aid for the A380,[286] covering some 33 percent of Airbus France's development costs for the aircraft.

266. The French Launch Aid for the A380 constitutes a financial contribution, as it is in the form of an "avance remboursable" or repayable advance, *i.e.*, a direct transfer of funds or a potential direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[287]

267. The French Launch Aid also confers a benefit on Airbus. As with all previous instances of French Launch Aid, France is providing the A380 Launch Aid on a success-dependent basis, with project-specific repayment via per-plane levies on the first **[ ]** deliveries.[288] The repayment schedule is **[ ]**[289] The financing is, as always, unsecured, so the French government is not guaranteed any return, even of principal.

268. Instead of a guaranteed return, the contract provides for a potential return of **[ ]** percent, which the government will only realize if Airbus sells **[ ]** aircraft.[290] The **[ ]** percent return is **[ ]**.[291] As always, the French government is charging Airbus no risk premium to compensate for the risks it assumes on Airbus's behalf.[292]

269. In addition, the French government **[ ]**. For example, in a 1998 submission to the European Commission, the engine manufacturers Pratt & Whitney and General Electric

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[286] *See* French A380 Launch Aid Convention, Art. 2, DS316-EC-BCI-0000265 (Exhibit US-116; see BCI Annex).

[287] *Id.*

[288] *See, e.g.,* French A380 Launch Aid Protocole, Art. 6.2 (Exhibit US-75; see BCI Annex).

[289] *See id*. As a result of the back-loading, it will take **[ ]** deliveries for the French government to even recover the Euro **[ ]** billion in principal, much less realize <u>any</u> return on its money.

[290] French A380 Launch Aid Protocole, Art. 6.2 (Exhibit US-116; see BCI Annex).

[291] **[ ]**. *See* Ellis Report at exhibit 3 (Exhibit US-80; see BCI Annex).

[292] The French A380 Protocole provides that Airbus France will owe a **[ ]** on that portion of the value of each delivery after the **[ ]** that is attributed to Airbus France. However, the **[ ]**. French A380 Launch Aid Protocol, Arts. 7.1-7.3 (Exhibit US-75; see BCI Annex). Thus, although the French government is assuming 100 percent of the downside risk that the project will fail and that Airbus France will not repay the Launch Aid, it **[ ]**

predicted that total sales of the A380 would amount to only 430 aircraft by 2020.[293] A *Credit Suisse First Boston* research report echoed this view in December 2001, asserting that "the Airbus A380 business case was based on very optimistic assumptions" and that:

> it remains far from clear to us that the financial returns from the programme will match management (and investor) expectations. It is not just about the size of the overall market for very large aircraft, but also about the timing of the development of demand . . .[294]

270. The Ellis Report confirms that the French Launch Aid for the A380 confers a benefit, concluding that the rate a commercial investor would demand for a comparable project-specific and success-dependent loan would be at least **[ ]** percent.[295]

271. French government documents also confirm that the A380 Launch Aid is specific within the meaning of Article 2 of the SCM Agreement, as the aeronautics industry is the only recipient of French Launch Aid.[296] In addition, the intergovernmental agreement between Airbus and the four Airbus governments **[ ]**,[297] and France is providing the aid under a contract negotiated specifically with Airbus France.[298]

272. Finally, as the United States demonstrates in Section IV.B below, the French Launch Aid for the A380 is contingent upon export performance within the meaning of Article 3 of the SCM Agreement. Under the terms of Article 2.3 of the SCM Agreement, export subsidies are "deemed" specific.

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[293] *See, e.g.*, Chris Jasper, *A3XX Market Just 430 Aircraft by 2020 Say GE/P&W*, Air Transport Intelligence (Nov. 10, 1998) (Exhibit US-117).

[294] Harald Hendrikse, *Who Pays for the A380?*, Credit Suisse/First Boston Equity Research, at 31 (Dec. 10, 2001) (Exhibit US-118).

[295] *See* Ellis Report at 27 (Exhibit US-80; see BCI Annex).

[296] For 2001, Le Grand (Jean-Francois), Senate Report, Avis No. 94, Projet de Loi de Finances pour 2001, at 14-15 (Exhibit US-119); *See also* Collin (Yvon), Senate Report No, 73, Projet de Loi de Finances pour 2004, at 43 (Exhibit US-120); Collin (Yvon), Senate Report No. 87, Projet de Loi de Finances pour 2002, at 23 (Exhibit US-121).

[297] *See* Airbus A380 Launch Aid Agreement, DS316-EC-BCI-0000597, 609-10 (Exhibit US-122; see BCI Annex).

[298] French A380 Launch Aid Contract (Exhibits US-75 and US-116; see BCI Annex).

ii. The German Launch Aid for the A380 is a specific subsidy

273. Germany agreed to provide just over Euro **[ ]** in Launch Aid for the A380, including Euro 942,610,000 that it paid directly to Airbus Germany.[299]

274. The German Launch Aid for the A380 constitutes a financial contribution, as it takes the form of a repayable advance, a direct transfer of funds or a potential direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[300]

275. The German Launch Aid also confers a benefit on Airbus. Germany is providing the aid on a success-dependent basis, with project-specific repayment via per-plane levies on the first **[ ]** deliveries.[301] Repayment of the Launch Aid is **[ ]**.[302] The financing is unsecured, so the German government is not guaranteed any return, even of principal. The 2002 Federal Budget explicitly recognizes that the German government bears the risk of default should Airbus fail to meet its A380 debt commitments:

> The Federal Government will bear the default risk from these loan arrangements, including any refundable or unpaid interest.[303]

276. Instead of a guaranteed return, the contract provides for a potential return that is set at **[ ]**, which the government will only realize if Airbus sells **[ ]** A380s.[304] Thus, the potential return is **[ ]**.[305] Like France, the German government is charging Airbus no risk premium to compensate for the risks it assumes on Airbus's behalf.[306]

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[299] *See* Birgit Marschall and Gerhard Hegmann, *Airbus - loans secure production balance*, Financial Times Deutschland (Oct. 19, 2006) (stating that Airbus must repay a portion of the Launch Aid on each delivery) (Exhibit US-123); German A380 Launch Aid Contract, Preamble, para. 2, DS316-EC-BCI-0000345 **[ ]** (Exhibit US-72; see BCI Annex). Germany is disbursing the aid in annual installments between 2002 and 2013. *See* BT-Drs. 14/10002, at 3 (Exhibit US-124).

[300] *Id.*

[301] German A380 Launch Aid Contract, Art. 7.1, DS316-EC-BCI-0000345 (Exhibit US-72; see BCI Annex).

[302] *See* German A380 Launch Aid Contract, Art. 7.3 (Exhibit US-72; see BCI Annex).

[303] Federal Budget 2002, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 870 91-634 (the original German text reads: *Das Ausfallrisiko aus diesen Darlehensverhältnissen, einchliesslich gegebenenfalls zu erstattender bzw. ausfallender Zinsbeträge trägt der Bund . . .*") (Exhibit US-17JJ).

[304] German A380 Launch Aid Contract, Art. 6.1 (Exhibit US-72; see BCI Annex).

[305] [ ] *See* Ellis Report at exhibit 3 (Exhibit US-80; see BCI Annex). (Emphasis added)

[306] The German government did include a provision in its Launch Aid contract that obliges Airbus Germany to pay a **[ ]** royalty on the portion of the value of each delivery that is attributed to Airbus Germany,

(continued...)

277. The German government also **[**

]. Like the French Launch Aid, repayment of the German Launch Aid **[ ]**, not those of independent experts.

278. In light of these facts, it is perhaps not surprising that Appendix 14 to the German A380 Launch Aid contract is entitled **[ ]**[307]

279. The Ellis Report confirms that the German Launch Aid confers a benefit, concluding that the rate a commercial investor would demand for a comparable project-specific and success-dependent loan would be at least **[ ]** percent.[308]

280. German budget documents also make clear that the A380 Launch Aid is specific within the meaning of Article 2 of the SCM Agreement, as the budgets single out the A380 as the recipient of Launch Aid.[309] In addition, as the United States explained above with respect to French A380 Launch Aid, the intergovernmental agreement between Airbus and the four Airbus governments **[ ]**,[310] and Germany is providing the aid under a contract negotiated specifically with Airbus.[311]

281. Finally, as the United States demonstrates in Section IV.B below, the Launch Aid for the A380 is contingent upon export performance within the meaning of Article 3 of the SCM Agreement. Under the terms of Article 2.3 of the SCM Agreement, export subsidies are "deemed" specific.

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[306] (...continued)
but this royalty is only due after the **[ ]** delivery and only for **[ ]**. Thus, although the German government assumed 100 percent of the downside risk that Airbus would default on the loan, it agreed to **[ ]**, even if the A380 is a fabulous success and sells for decades. The United States discusses this issue further in the HSBI Appendix to this submission.

[307] *See* German A380 Launch Aid Contract, Appendix 14, **[ ]**, DS316-EC-BCI-0000532 (Exhibit US-125; see BCI Annex).

[308] *See* Ellis Report at 27 (Exhibit US-80; see BCI Annex).

[309] Federal Budget 2002, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 870 91-634 (Exhibit US-17JJ).

[310] *See* Airbus A380 Launch Aid Agreement, DS316-EC-BCI-0000609-10 (Exhibit US-122; see BCI Annex).

[311] German A380 Launch Aid Contract (Exhibit US-72; see BCI Annex).

iii. The Spanish Launch Aid for the A380 is a specific subsidy

282. On December 27, 2001, Spain agreed to provide Euro 376,000,000 in Launch Aid for the A380.[312]

283. The Spanish Launch Aid for the A380 constitutes a financial contribution, as it involves a direct transfer of funds or a potential direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[313]

284. The Spanish Launch Aid also confers a benefit on Airbus. Like Germany and France, Spain is providing the aid on a success-dependent and **[ ]** basis, with project-specific repayment via per-plane levies on the **[ ]** deliveries.[314] The financing is unsecured, so the Spanish government is not guaranteed any return, even of principal.

285. Instead of a guaranteed return, the contract provides for a potential return of **[ ]** percent, which the government will only realize if Airbus sells **[ ]** A380s.[315] Thus, the potential return is **[ ]**,[316] and Spain **[ ]**.[317] Like France and Germany, Spain is charging Airbus no risk premium to compensate for the risks it assumes on Airbus's behalf.

286. In addition, by allowing Airbus to repay the aid over **[ ]** deliveries, the Spanish government is assuming that **[ ]** will prove correct, even though the contemporaneous independent forecasts noted above **[ ]**. If the independent predictions are more accurate, **[ ]**.

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[312] *See* Press release, *El Ministerio Aportará al Desarollo {de A380} 376 Millones de Euros Hasta 2013,* Ministry of Science and Technology (Oct. 2, 2003) (Exhibit US-126). The Spanish A380 Launch Aid Contract at 3 ("Octavo"), **[ ]** DS316-EC-BCI-0000549, -551 (Exhibit US-73; see BCI Annex);

[313] *See* Spanish A380 Launch Aid Contract at 3 ("Octavo"), DS316-EC-BCI-0000549, -551 (Exhibit US-73; see BCI Annex).

[314] *See, e.g.,* Spanish A380 Launch Aid Contract at 6 ("Septima"), DS316-EC-BCI-0000549, -554 (Exhibit US-73; see BCI Annex).

[315] *Id.*

[316] **[ ]**. Therefore, the interest rate on the Spanish A380 Launch Aid may in fact be **[ ]**. The contract does not explain this discrepancy (unless the explanation is in one of the portions of the contract that the EC refused to provide (redacted) when it provided the overall contract in the Annex V process).

[317] Spanish A380 Launch Aid Contract at 6 ("Septima"), DS316-EC-BCI-0000549 (Exhibit US-73; see BCI Annex).

287. The Ellis Report confirms that Spanish Launch Aid for the A380 confers a benefit, concluding that the rate a commercial investor would demand for a comparable project-specific and success-dependent loan would be at least **[ ]** percent.[318]

288. The Spanish Launch Aid for the A380 is also specific within the meaning of Article 2 of the SCM Agreement. First, Spain is providing the aid under a contract negotiated specifically with CASA,[319] and the intergovernmental agreement between Airbus and the Airbus governments **[ ]**.[320] Spanish government documents also single out CASA/Airbus as the recipient of Launch Aid subsidies.[321]

289. Finally, as the United States demonstrates in Section IV.B below, the A380 Launch Aid is contingent upon export performance within the meaning of Article 3 of the SCM Agreement. Under the terms of Article 2.3 of the SCM Agreement, export subsidies are "deemed" to be specific.

iv. The UK Launch Aid for the A380 is a specific subsidy

290. The UK was the first of the four Airbus governments to announce its commitment of Launch Aid for the A380, announcing on March 13, 2000 that it would provide £530,000,000.[322]

291. The UK Launch Aid for the A380 constitutes a financial contribution, as it involves a direct transfer of funds or a potential direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[323]

292. The UK Launch Aid for the A380 also confers a benefit on Airbus. Like all of the other Launch Aid that the Airbus governments have provided over the years, the UK is providing the A380 Launch Aid on a success-dependent and **[ ]** basis, with project-specific repayment

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[318] Ellis Report at 27 (Exhibit US-80; see BCI Annex).

[319] Spanish A380 Launch Aid Contract, DS316-EC-BCI-0000549 (Exhibit US-73; see BCI Annex).

[320] *See* Airbus A380 Launch Aid Agreement, DS316-EC-BCI-0000609-10 (Exhibit US-122; see BCI Annex).

[321] Dictámenes de Comisiones sobre iniciativas legislativas, proyecto de ley de presupuestas generales del estado para el ano 2004 (singling out the A380's development as a large industrial project that needs development support) (Exhibit US-127); Press release, *El Ministerio Aportará al Desarollo {de A380} 376 Millones de Euros Hasta 2013,* Ministry of Science and Technology (Oct. 2, 2003) (Exhibit US-126) (discussing financing for the Airbus project).

[322] *See, e.g.,* Mark Odell, *UK takes the lead in A3XX Financing*, Financial Times (Mar. 13, 2000) (Exhibit US-128).

[323] UK A380 Launch Aid Contract, Art. 5, DS316-EC-BCI-0000556 (Exhibit US-79; see BCI Annex).

via levies on the **[ ]** deliveries.[324] The financing is unsecured, so the UK government is not guaranteed any repayment, even of principal.[325]

293. Instead of a guaranteed return, the contract provides for a potential return of **[ ]**, which the government will only realize if Airbus sells **[ ]** A380s.[326] The potential return is **[ ]**,[327] and the UK government **[ ]**. Like the other Airbus governments, the UK government is charging Airbus no risk premium to compensate for the risks it assumes on Airbus's behalf.

294. Moreover, the UK joined the other Airbus governments in allowing Airbus to repay the aid over a number of deliveries (in the case of the UK, **[ ]**) that Airbus will only reach if **[ ]**, prove correct. The United States discusses the UK government's own views of the **[ ]** in the HSBI Appendix to this submission.

295. The Ellis Report confirms that UK Launch Aid for the A380 confers a benefit, concluding that the rate a commercial investor would demand for a comparable project-specific and success-dependent loan would be at least **[ ]** percent.[328]

296. The United States discusses additional evidence demonstrating that the UK A380 Launch Aid is a subsidy in the HSBI Appendix.[329]

297. Finally, the UK Launch Aid for the A380 is specific within the meaning of Article 2 of the SCM Agreement. The UK government has confirmed on numerous occasions that UK

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[324] *See, e.g.,* UK A380 Launch Aid Contract at 25 (Schedule 3, para. 3), DS316-EC-BCI-0000556 (Exhibit US-79; see BCI Annex).

[325] *See, e.g.,* UK A380 Launch Aid Contract at 5 (Art. 3.1) (stating that the UK government's claims with respect to BAE Systems would **[ ]**), DS316-EC-BCI-0000556 (Exhibit US-79; see BCI Annex).

[326] UK A380 Launch Aid Contract at 25 (Schedule 3, para. 3)DS316-EC-BCI-0000556 (Exhibit US-79; see BCI Annex). The UK government did provide that Airbus will owe a royalty on each delivery after a specified number. This royalty, however, is only due after the **[ ]** delivery. Airbus's A380 business case expects to deliver a total of 751 A380s over the life of the program, indicating that **[ ]**. *See* Andreas Sperl, *Status of the A380 programme and way forward*, EADS, Global Investor Forum 2006, at 9 (reporting that the Airbus business case expects 751 A380 deliveries) (Exhibit US-74). The United States discusses this issue further in the HSBI Appendix to this submission.

[327] **[ ]**. *See* Ellis Report at exhibit 3 (Exhibit US-80; see BCI Annex).

[328] *See* Ellis Report at 27 (Exhibit US-80; see BCI Annex).

[329] HSBI Appendix, Art. III.

Launch Aid is only available to companies in the aerospace sector.[330] In addition, the intergovernmental agreement between Airbus and the four Airbus governments **[ ]**,[331] and the UK is providing the aid under a contract negotiated specifically for the A380 project.

298. Moreover, as the United States demonstrates in Section IV.B below, the Launch Aid is contingent upon export performance within the meaning of Article 3 of the SCM Agreement. Under the terms of Article 2.3 of the SCM Agreement, export subsidies are "deemed" specific.

4. In 2006, the Airbus Governments "Reaffirmed Their Agreement to Support Airbus" in the Development of New Models of LCA

299. As the United States has described in detail in the preceding sections of this submission, the Airbus governments have provided Launch Aid for every major Airbus model and three derivative models. Each individual grant of Launch Aid effectuates the broader scheme that the Airbus governments maintain to ensure that at least one of the world's LCA producers will be European. Airbus's commercial position today – it is the world's largest producer of LCA – is the result of this scheme.

300. In spite of Airbus's leading global position, the Airbus governments refuse to end their practice of supporting Airbus with grants of Launch Aid. To the contrary, they have already agreed to provide at least $1,700,000,000 in Launch Aid for Airbus's newest aircraft, the A350. Recent events suggest that the final amount of the aid will be double or even triple that amount.

301. In discussing the payments under the Launch Aid system that the Airbus governments made for the A380, the United States noted that one reason for the riskiness of the A380 project was a basic disagreement about the potential demand for the aircraft. Airbus has justified the project on the grounds that increasing congestion and capacity constraints at key airports worldwide will lead to substantial and increasing demand for new aircraft larger than any currently flying today: as many as 1,235 such aircraft over the next 20 years. Boeing, by contrast, argues that the airline market is "fragmenting," as new, relatively smaller aircraft are becoming increasingly capable of serving intercontinental markets, thus allowing airlines to bypass the "hub-to-hub" routes that the A380 is targeting in favor of greater point-to-point service.

302. As a consequence of these differing visions, Airbus and Boeing took different approaches to their new aircraft programs. Airbus launched the A380 in December 2000. Boeing, by

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[330] *See, e.g.,* Department of Trade and Industry web site, *Aerospace and Defence Industries*, *Launch Investment*, at para. 1 (explaining that "{l}aunch investment is a risk-sharing Government investment in the design and development of specific civil aerospace projects in the UK. . . . Launch investment is available only to the aerospace sector and stems from the provisions of the Civil Aviation Act 1982.") (Exhibit US-106).

[331] *See* Airbus A380 Launch Aid Agreement, DS316-EC-BCI-0000609-0000610 (Exhibit US-122; see BCI Annex).

contrast, launched the 787, a highly fuel-efficient mid-sized aircraft aimed at addressing the market "fragmentation" that it predicts. It launched the aircraft in April 2004.

303. Airbus initially dismissed the 787 as a "reaction to the A330" and as an A330 "with a sexy paint job," and it rejected any need to respond with a new aircraft of its own.[332] This reaction reflected the fact that Airbus was (and is) still fully involved in developing the A380, which it has not yet begun delivering to customers. Since aircraft customers pay for LCA at the time of delivery (Airbus will not make its first delivery until October 2007 at the earliest), Airbus has recouped none of the $15,000,000,000 in A380 development costs. Given this substantial financial burden, it was not clear that Airbus had the resources to develop yet another new aircraft program at that time.

304. As sales for the 787 mounted, however, Airbus's views about the need for its own new aircraft evolved. In September 2004, only four years after the launch of the $15,000,000,000 A380 project, Airbus confirmed that it was planning to launch another new aircraft after all, the Airbus A350.[333] It announced that the A350 would be a modified version of the Airbus A330-200 and would have development costs of between $2,600,000,000 and $4,600,000,000.[334]

305. Shortly thereafter, the Airbus governments confirmed that they would provide Launch Aid for the A350 project.[335]

- The UK government committed to provide at least £379,000,000.[336]

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[332] See, e.g., Graham Dunn, *FI2004: Forgeard insists no pressure to combat 7E7*, Air Transport Intelligence (July 20, 2004) (quoting Airbus CEO Foregeard's view that "{t}he 7E7 is clearly a reaction to the A330 and we do not feel obliged to react to a reaction") (Exhibit US-129); Mark Landler, *Plane Makers at Air Show Trade Barbs On New Jets*, N.Y. Times (July 20, 2004) (quoting Airbus Chief Commercial Officer Leahy's comment that "{w}e are pleasantly surprised by the yawns it is getting in the marketplace" and that he "likened it to an Airbus A330 'with a sexy paint job.'") (Exhibit US-130).

[333] *See, e.g., Airbus CEO: 7E7 rival would have more seats*, Reuters (Sept. 28, 2004) (reporting that Airbus CEO Forgeard confirmed Airbus was discussing the A350 with potential customers) (Exhibit US-131).

[334] *See, e.g.,* Laurence Frost, *Airbus Plans New Rival to Boeing's "Dreamliner"*, Seattle Post-Intelligencer (Nov. 23, 2004) (Exhibit US-132).

[335] *See, e.g.,* EADS Financial Statements and Corporate Governance (2005), Registration Document - Part 1, Risk Factors, Availability of Government Financing, at 11 (noting that "certain E.U. countries have already committed to fund the development of the A350 commercial aircraft program") (Exhibit US-77).

[336] *See, e.g.,* David Jones, *Give Airbus Cash to Beat the Spanish*, Daily Post (North Wales) (July 6, 2006) (reporting that "{t}he UK government has already said it will give £379m in repayable loans for the A350 carbon composite wing work at the Welsh site and more may be needed with a major redesign of the jet on the cards") (Exhibit US-133). On April 11, 2006, the UK trade and industry secretary reiterated that the UK government was "keen to do launch investment for the A350, as we did for the A380." Murdo Morrison, *EADS vows UK Airbus jobs secure*, Flight International (Apr. 11, 2006) (Exhibit US-134).

- The Spanish government committed at least Euro 110,000,000,[337] and it may have already increased its commitment to Euro 130,000,000.[338]

- The German government committed at least Euro 390,000,000,[339] and it may have already committed Euro 650,000,000.[340]

- The French government has committed to provide Launch Aid for the A350 but it has not publicly disclosed the amount.[341]

306. Although the EC has refused to provide any information on the financing that the Airbus governments have committed for the A350,[342] publicly available information indicates that the aid is in fact Launch Aid, *i.e.,* back-loaded, success-dependent, preferential financing, just as has been provided since Airbus's inception.

307. For example, in May 2005, the EC defended the Airbus governments' ability to grant Launch Aid for the A350 on the grounds that it "is currently part of the commercial landscape of aircraft development" in Europe.[343] In that same month, French Transport Minister Gilles de Robien confirmed that the French government was "studying at the ministry the A350 project

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[337] Antonio Ruiz del Árbol, *Germany wants to steal part of Spain's manufacturing rights for the A-350*, Cinco Días (Oct. 21, 2005) (Exhibit US-135).

[338] Antonio Ruiz del Árbol, *The changes in the A350 design will cost Spain 130 million*, Cinco Días (Apr. 19, 2006) (Exhibit US-136).

[339] *See* Bundeshaushaltsplan (Federal Budget Plan) 2005, Budget Plan 09 (Economics Ministry), Chapter 02, Part 09, Item 870 93-634 ("Ausgaben für die Inanspruchnahme aus einer Verwaltungsverieinbarung mit dem ERP-Sondervermögen zur Förderung der Entwicklungskosten des Airbus A350") (Exhibit US-17MM); *see also Airbus says government aid pledges are 'legally binding',* Associated Press (Oct. 7, 2005) (Exhibit US-48).

[340] *Airbus says government aid pledges are 'legally binding',* Associated Press (Oct. 7,2005) (Exhibit US-48).

[341] *See France clears A350 aid, no immediate payment*, Reuters (Oct. 5, 2005) (Exhibit US-137); *see also* Robert Wall, *Airbus Gets Go-Ahead for A350*, Aviation Week & Space Technology (Oct. 9, 2005) (reporting that "{a}ll four 'Airbus governments' - Britain, France, Germany and Spain - have set aside funds for such loans and expressed backing for the project in writing.") (Exhibit US-47).

[342] During the Annex V process, the Facilitator asked the EC and the Member States to provide information and documents regarding the Launch Aid for the A350. *See* Questions 15 and 24 from the Facilitator to the EC (Exhibit US-4; see BCI Annex). The EC and the Member States refused to provide the information. For example, the EC refused to provide copies of the "legally binding" letters that the four Airbus governments provided to Airbus, and that Airbus CEO Enders described as legally binding on October 7, 2005. *See* EC Reply to Questions 15 and 24 (Exhibit US-5; see BCI Annex). The EC also refused to provide any information in response to the U.S. requests during the consultations that the parties held on March 23, 2006. In fact, the EC representatives refused even to discuss the issue of A350 Launch Aid, much less provide answers to the written questions that the United States submitted to the EC in advance of the consultations.

[343] *See, e.g., EU backs new Airbus aid request, despite US opposition*, Agence France Presse (May 19, 2005) (Exhibit US-60).

within the framework of reimbursable loans."[344] And in April 2006, the UK government stressed that it was "keen to do launch investment for the A350, as we did for the A380."[345]

308. Similarly, as the United States has previously noted, Airbus officials have already confirmed that the A350 Launch Aid will confer a benefit on Airbus, and that it therefore constitutes a subsidy. For example:

- Airbus chief commercial officer Leahy stated in June 2005 that Launch Aid would improve the revenue projections for the A350 (as compared to a situation where Airbus financed the program commercially).[346]

- EADS' co-CEO Noël Forgeard stated in September 2005 that Airbus could produce the A350 without Launch Aid, but that its profitability would be "destroyed."[347]

309. In addition, Airbus has been quite explicit in stating that it has launched the A350 to take orders that would otherwise go to the 787.[348] It has also made clear that the A350 is intended to target the Boeing 777 as well as the 787. On May 23, 2005, for example, the project manager for the A350 boasted that "{w}e are positioning our program to be a 777-200ER killer."[349] As one industry analyst has observed, the A350 "will threaten the entire Boeing 777 product line, placing Boeing in the awkward predicament of having to figure out what to do at a time when the 787 program is entering production and plans are being made to design a successor to the 737."[350]

310. Finally, recent events suggest that the final amount of Launch Aid that the Airbus governments will provide for the A350 will be even higher than the amount they have already

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[344] *France's Robien sees little risk for Airbus if subsidies case goes to WTO*, AFX News, FinanzNachrichten.de (April 13, 2005) (Exhibit US-138).

[345] Murdo Morrison, *EADS vows UK Airbus jobs secure*, Flight International (Apr. 11, 2006) (Exhibit US-134).

[346] Robert Wall, *A350 Faces Busy Time Until Industrial Launch*, Aviation Week & Space Technology (June 20, 2005) (Exhibit US-83).

[347] Kevin Done and Peter Spiegel, *EADS firm on launch aid for the A350*, Financial Times (Sept. 14, 2005) (Exhibit US-84).

[348] *See, e.g.,* Jean-Michel Belot and Tim Hepher, *Airbus A350 Unleashes New War with Boeing*, Reuters (Dec. 10, 2004) (reporting Airbus Chief Commercial Officer Leahy's comment that "{y}ou will see a significant portion of customers that Boeing thought they might have for the 7E7 now switching to the A350 because of performance of the aircraft") (Exhibit US-139).

[349] Robert Wall, Michael Mecham and Andy Nativi, *Counterattack; Airbus fights back. The manufacturer redefines A350, eyes 100-plus orders at Paris air show*, Aviation Week & Space Technology (May 23, 2005) (quoting Airbus A350 program manager Olivier Andries) (Exhibit US-140).

[350] Scott Hamilton, *A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge*, Leeham Co. LLP, at 1 (June 6, 2006) (Exhibit US-141).

announced.

311. First, the development costs of the A350 have increased substantially in recent months. Airbus has redesigned the aircraft several times, and it announced its latest redesign, which it designated the A350 XWB, in July. Airbus estimated in July that the total development costs for the aircraft would be $10,000,000,000; more than double the amount it had originally estimated.[351] Press reports now indicate, however, that Airbus is planning further changes to the aircraft that may push total development costs to $12,000,000,000.[352]

312. In addition, in recent months, the A380 program has encountered serious production delays that have resulted in a reduction of some Euro 6,300,000,000 in the program's cumulative free cash flow.[353] Also, in April 2006, Airbus co-owner BAE Systems exercised a put option that required EADS to buy BAE's 20 percent interest in Airbus. EADS concluded the purchase on October 13, 2006, at a cost of Euro 2,750,000,000.[354] The cumulative effect of these events on EADS's and Airbus's cash flow is over Euro 9,000,000,000.

313. The co-CEO of EADS, Thomas Enders, stated on October 19, 2006 that the A380 production delays:

> have carved "huge holes out of our resources . . . we have to take cost-cutting measures to compensate for this. . . . We don't want the A380 to be the last model we build. We want to keep making new airplanes."[355]

314. The A380 is plainly not going to be the last model of LCA that Airbus builds. Enders correctly recognizes, however, that a manufacturer with Euro 9,000,000,000 in unanticipated costs that has not yet recouped any of the money it invested in its most recent $15,000,000,000 aircraft program would not ordinarily be able to immediately launch yet another $12,000,000,000 development program. (EADS's current market capitalization is approximately Euro 16,600,000,000.).[356] But this is one of the very scenarios that the Launch Aid program is designed to address. The United States is witnessing a replay of 1987, when Airbus lacked the financial resources to launch the A330/A340 program at the same time that it was beginning

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[351] *See, e.g.,* Jane Wardell, *Emirates airlines is looking at revamped Airbus A350XWB and Boeing Dreamliner*, Associated Press (May 17, 2006) (Exhibit US-142).

[352] *See, e.g.,* Andrea Rothman, *Airbus to Spend $12 Billion to Develop A350 Jet, People Say (Update 1)*, Bloomberg (Nov. 3, 2006) (stating that "two people with direct knowledge of the proposal" say Airbus will spend $12 billion on developing the A350) (Exhibit US-143).

[353] Press Release, *EADS and Airbus finalise A380 review*, EADS (Oct. 3, 2006) (Exhibit US-66).

[354] Press Release, *EADS is 100 percent owner of Airbus*, EADS (Oct. 13, 2006) (Exhibit US-13).

[355] Susanna Ray, *EADS's Enders Says Airbus Deliveries May Rise in 2007 (Update1)*, Bloomberg (Oct. 19, 2006) (Exhibit US-144).

[356] EADS's 2005 annual report listed 797,140,426 shares outstanding. At a price of Euro 20.82 per share (closing price on October 25, 2006), the total capitalization is Euro 16.6 billion.

production of the A320.[357]

315. In 1987, the Airbus governments gave Airbus the Launch Aid it needed to accomplish both tasks. And now, history is poised to repeat itself. Once again, Launch Aid will make it possible for Airbus to take steps that it could not have taken if it was "constrained to debt and equity instruments alone."[358]

316. An additional impetus for providing additional Launch Aid is jobs. Since its founding, a major rationale for the Airbus governments' subsidization of Airbus has been the creation of jobs in their countries. Job creation has taken primacy over the need for Airbus to pay commercial rates on the Launch Aid it receives, as the terms and conditions of the aid demonstrate. Airbus and the Airbus governments have acknowledged this fact.

317. For example, **[**

]. It predicted that **[**
].[359] It also stressed the **[**
][360]

318. The German A380 Launch Aid contract demonstrates that **[**
], was the impetus for the Launch Aid. Article 3 of the contract could not be more explicit on the need to **[** **]**:

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[357] *See* Section II.B.

[358] Kim Kaivanto, *Premise and Practice of UK Launch Aid*, Journal of World Trade 40(3) at 495, 517 (2006) (Exhibit US-2).

[359] Airbus Germany Launch Aid application at 39-41, DS316-EC-BCI-00000369 (Exhibit US-145; see BCI Annex).

[360] Airbus Germany Launch Aid application at 44, DS316-EC-BCI-00000369 (Exhibit US-145; see BCI Annex).

[361] In the November 9, 2000 letter referenced in Article 3 of the contract, **[**

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The letter further explained that **[**

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See Letter from Rainer Hertrich and Dr. Gustav Humbert to Ministers Eichel and Muller and Dr. Steinmeier (Nov. 9, 2000), DS316-EC-BCI-0000521 (emphasis in original) (Exhibit US-146).

319. The financial impact of the A380 delays is affecting the near-term development of the A350. Airbus has stated that it must reduce its overall cost structure, and many industry analysts expect that it will have to cut jobs for the first time in its history. Officials in France, Germany, the UK, and Spain are opposing that prospect. German press reports indicate that the German A380 Launch Aid contract requires Airbus to maintain A380 production work in Germany that is approximately equal to the amount of work in France.[362] UK press reports indicate that the UK will offer further Launch Aid to keep jobs in the UK.[363]

320. At the July 2006 Farnborough air show, the Airbus ministers issued a communiqué that "reaffirmed their agreement to support Airbus to continue to innovate and to develop programmes in the context of international competition."[364] In other words, the Airbus governments will continue their decades-long program of supporting Airbus with Launch Aid subsidies to "give Airbus the means to win the battle against Boeing."[365]

B. The Launch Aid that Airbus Has Received for the A380, the A340-500/600, and the A330-200 Are Prohibited Export Subsidies

321. In this section, the United States demonstrates that the Launch Aid that the French, German, UK, and Spanish governments have provided for the A380, the Launch Aid that the French and Spanish governments have provided for the A340-500/600, and the Launch Aid that the French government has provided for the A330-200, are prohibited export subsidies.

322. First, the United States will set out the legal standard for demonstrating that a subsidy is contingent upon export performance. The United States also reviews previous panel and Appellate Body reports that have examined subsidy measures in the light of the relevant provisions of the SCM Agreement.

323. Next, the United States will demonstrate that the Launch Aid that the Airbus governments have provided for the A380 is export contingent because the Airbus governments tied the Launch Aid to actual or anticipated export performance.

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[362] Birgit Marschall and Gerhard Hegmann, *Airbus - loans secure production balance*, Financial Times Deutschland (Oct. 19, 2006) (Exhibit US-123). **[**

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[363] *See, e.g.*, David Robertson, *Darling in talks to secure 13,000 Airbus jobs*, The Times (UK) (Oct. 19, 2006) (reporting that UK Trade and Industry Secretary Darling will meet with Airbus and EADS officials and that he will likely offer further Launch Aid to Airbus to obtain job commitments) (Exhibit US-147).

[364] Communiqué text, Airbus Ministerial meeting at Farnborough International (July 17, 2006), reprinted in UK House of Commons Hansard Written Answers (July 24, 2006) (pt. 1989, Column 1014W) (July 17, 2006) (Exhibit US-63).

[365] Speech before Parliament, quoted in *Jospin pledges to aid Airbus in fight against Boeing*, Reuters, March 8, 2000, (Exhibit US-1).

324. The United States will then repeat this analysis for the French and Spanish Launch Aid for the A340-500/600, and conclude with the French Launch Aid for the A330-200.

1. The SCM Agreement Prohibits Subsidies That Are Contingent Upon Export Performance

325. Article 3.1 of the SCM Agreement prohibits subsidies that are contingent upon export performance ("export subsidies").[366] Article 3.1(a) states explicitly that the prohibition extends not only to subsidies that are contingent "in law" upon export performance, but also to subsidies that are contingent "in fact" upon export performance. Under Article 3.2 of the SCM Agreement, a Member shall neither grant nor maintain such subsidies.

326. In *Canada – Measures Affecting the Export of Civilian Aircraft*, the Appellate Body discussed the ordinary meaning of the term "contingent," which is "conditional" or "dependent on its existence for something else."[367] Thus, a subsidy is "contingent" upon export performance if it is "conditional" on export performance, or "dependent for its existence" on export performance.[368]

327. The Appellate Body has noted that the legal standard expressed by the term "contingent" is the same for subsidies that are contingent "in law" and those that are contingent "in fact."[369] The type of evidence that can be employed to demonstrate the two types of export contingency will differ, however.[370]

328. In *Canada – Autos*, the Appellate Body stated that a subsidy is contingent "in law" upon export performance "when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure."[371] In addition, although the export condition may in the rare case be set out expressly on the face of the measure, it is not necessary that it be so:

> a subsidy is also properly held to be *de jure* export contingent where the condition to export is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be *de jure* export contingent, the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfillment of the condition of export performance. Such conditionality can also be derived by

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[366] SCM Agreement, Art. 3.1(a). The prohibition applies both when the relevant contingency is the only condition for obtaining the subsidy and also when it is just one of several conditions for obtaining the subsidy. *Id*.

[367] *Canada – Aircraft (AB)*, para. 166.

[368] *Canada – Autos (AB)*, para. 123.

[369] *Canada – Aircraft (AB)*, para. 167.

[370] *Canada – Aircraft (AB)*, para. 167.

[371] *Canada – Autos (AB)*, para. 100.

necessary implication from the words actually used in the measure.[372]

329. By contrast, when a subsidy is contingent "in fact" upon export performance, "the existence of this relationship of contingency . . . must be *inferred* from the total configuration of facts constituting and surrounding the granting of the subsidy, none of which is likely to be decisive in any given case."[373]

330. Footnote 4 of the SCM Agreement provides a legal standard for determining whether a particular subsidy is contingent "in fact" upon export performance. Specifically:

> This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.[374]

Thus, a finding of export contingency "in fact" involves proof of three elements: (1) the "granting" of a subsidy; (2) that is "tied to" (3) "actual or anticipated exportation or export earnings."[375]

331. In *Canada – Aircraft*, the Appellate Body discussed each of these elements. It first stated that the relevant inquiry with respect to the "granted" element is whether the *granting authority* imposed a condition based on export performance when it provided the subsidy.[376] It then found that the ordinary meaning of the term "tied to" is to "limit or restrict as to . . . conditions", and that a relationship of "conditionality" or "dependence" between the subsidy and exports must be demonstrated. In the Appellate Body's view, "the facts must 'demonstrate' that the granting of a subsidy is tied to or contingent upon actual or anticipated exports. It does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result."[377]

332. The Appellate Body then examined the third of the elements. It noted that the ordinary meaning of the term "anticipated" is "expected." Therefore, a panel must conduct an examination of objective evidence to determine whether exports were anticipated or "expected."

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[372] *Canada – Autos (AB)*, para. 100 (emphasis added).

[373] *Canada – Aircraft (AB)*, para. 167.

[374] SCM Agreement, Art. 3.1(a), footnote 4. The Appellate Body has found that "the existence of this relationship of contingency, between the subsidy and export performance, must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case." *Canada – Aircraft (AB)*, para. 166 (emphasis in original).

[375] SCM Agreement, Art. 3.1(a), footnote 4; *see also Canada – Aircraft (AB)*, para. 169.

[376] *Canada – Aircraft (AB)*, para. 170 (emphasis in original).

[377] *Canada – Aircraft (AB)*, para. 171.

This examination is separate from the examination whether there is a tie between the granting of the subsidy and actual or anticipated exports.[378]

333. Finally, the Appellate Body examined the second sentence of footnote 4. It found that there is a "logical relationship" between the second sentence and the "tied to" requirement in the first sentence. The Appellate Body stated that "merely knowing that a recipient's sales are export-oriented does not demonstrate, without more, that the granting of a subsidy is tied to actual or anticipated exports." On the other hand, the Appellate Body also found that "the export orientation of a recipient may be taken into account as *a* relevant fact, provided that it is one of several facts which are considered and is not the only fact supporting a finding."[379]

334. The panel report in the *Australia – Leather* dispute illustrates the types of facts that may support a finding that a particular subsidy is contingent "in fact" upon export performance. In that dispute, the panel first discussed the legal standard that applies when examining subsidies that are alleged to be contingent "in fact" on exports. It concluded that "the facts considered must demonstrate that the grant or maintenance of the subsidy is conditioned on actual or anticipated exportation or export earnings."[380] The panel then examined two different subsidy measures, a grant contract and a loan contract, that the Australian government had concluded with an Australian leather producer, Howe Leather ("Howe").

335. The panel first examined the grant contract. Australia conceded that the payments under the contract were subsidies,[381] so the panel focused its analysis on whether the subsidies were contingent "in fact" on export performance. It noted that, at the time Australia concluded the contract, Howe exported a significant amount of its production, and that the Australian government was aware of this fact.[382] It also noted that Howe's exports had increased significantly, that an overwhelming majority of its sales were for export, and that the government was concerned that Howe remain in business.[383] The panel concluded that these facts, viewed together, demonstrated that anticipated exportation was an "important condition" to the provision of the subsidies. "While the fact of exportation cannot be the sole determinative factor in the evaluation, in our view, it is clearly a relevant factor in this case, as is the level of exports."[384]

336. The panel then addressed the nature of the Australian market for automotive leather. It first found that the size of the Australian domestic market was too small to absorb Howe's production. In light of this fact, it found that Howe would not be able to expand its sales

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[378] *Canada – Aircraft (AB)*, para. 172.

[379] *Canada – Aircraft (AB)*, para. 173.

[380] *Australia – Leather*, paras. 9.54-9.57.

[381] *Australia – Leather*, para. 9.45.

[382] *Australia – Leather*, para. 9.66.

[383] *Australia – Leather*, para. 9.66.

[384] *Australia – Leather*, para. 9.66.

sufficiently to meet sales performance targets contained in the grant contract without continuing, and even increasing, exports. It also found that the Australian government was aware of these facts when it entered into the grant contract with Howe, and thus "anticipated continued and possibly increased exports by Howe."[385]

337. The panel found that these facts, viewed together, indicated that the grant payments were in fact tied to actual or anticipated exportation or export earnings.[386] Accordingly, the panel found that the grant contract was contingent "in fact" upon exportation, and therefore inconsistent with Article 3.1(a) of the SCM Agreement.[387]

338. The panel then turned to the loan contract. As with the payments under the grant contract, Australia conceded that the loan contract was a subsidy within the meaning of the SCM Agreement.[388] Therefore, the panel focused its analysis on whether the subsidy was contingent "in fact" upon export performance, and concluded that it was not.

339. There were several reasons for the panel's finding that the loan contract was not contingent "in fact" on exports. First, the panel found that there was nothing in the contract that "explicitly links the loan to Howe's production or sales, and therefore nothing in its terms, the design of the loan payment, or the repayment provisions that would tie the loan directly to export performance, or even sales performance." Second, the panel rejected the argument that Howe had no choice but to export if it was to repay the loan, because, in the panel's view, it was:

> ultimately up to Howe and ALH {the parent company} to decide upon the source of funds that will be used to repay the loan. The source of funding will not necessarily be export sales, and there is nothing in the facts before us to suggest that it was expected at the time the loan was entered into that export sales would generate the funds to repay the loan. . . . {T}he mere fact that one possible source of funds to pay off the loan is potential export earnings is insufficient to conclude that the loan was contingent in fact upon anticipated exportation or export earnings.[389]

340. Third, the panel noted that Howe was a subsidiary of ALH, and that ALH had other businesses and products that could generate the funds that Howe could use to repay the loan. In addition, "the loan {was} secured by a lien on the assets and undertakings of ALH, which is itself responsible for repayment of the loan, and not merely on the assets and undertakings of

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[385] *Australia – Leather*, para. 9.67.

[386] *Australia – Leather*, para. 9.71.

[387] *Australia – Leather*, para. 9.72. Australia argued that the grants were not contingent "in fact" upon exports because the government had no ability to take the funds back once it disbursed them, and because a change in Howe's level of exports would not affect disbursement of the funds. The panel found that these facts were irrelevant. "In our view, the pertinent consideration is the facts at the time the conditions for the grant payments were established, and not possible subsequent developments." *Id*., para. 9.70.

[388] *Australia – Leather*, para. 9.43.

[389] *Australia – Leather*, para. 9.75. ALH is the parent company of Howe.

Howe."[390]

341. Finally, the panel found that there was nothing in the terms of the loan contract that suggested a specific link to actual or anticipated export earnings (in contrast with the grant contract).

342. For all of these reasons, the panel concluded that there was not a "sufficiently close tie" between the subsidy and anticipated exportation or export earnings to make the loan contract contingent "in fact" upon exportation. Therefore, the panel found that the loan contract was not inconsistent with Article 3.1(a) of the SCM Agreement.[391]

2. The UK, French, German, and Spanish Launch Aid for the A380 Is Contingent on Export Performance

343. As the United States discussed above, a finding of export contingency involves three elements: (1) the "granting" of a subsidy; (2) that is "tied to" (3) "actual or anticipated exportation or export earnings."[392] The United States will demonstrate in the remainder of this section that the Launch Aid that the UK, French, German, and Spanish governments have provided to Airbus for the A380 includes each of these elements and is therefore prohibited under Articles 3.1(a) and 3.2 of the SCM Agreement.

a. The UK, French, German, and Spanish Governments Have "Granted" Subsidies for the A380

344. The United States established in Section IV.A.3.f of this submission that the UK, French, German, and Spanish governments have each granted Launch Aid to their respective Airbus companies to support the development of the Airbus A380. The United States also established that, in each case, the Launch Aid is a subsidy within the meaning of Article 1.1 of the SCM Agreement, as it involves a financial contribution that confers a benefit on the recipient. Therefore, for each provision of A380 Launch Aid, the first element for demonstrating export contingency is met.

b. The UK, French, German, and Spanish Governments Anticipated or Expected Exportation or Export Earnings

345. The second element for demonstrating export contingency is the existence of actual or anticipated exportation or export earnings. The evidence surrounding the Airbus governments' decision to provide Launch Aid for the A380 demonstrates not only that the governments anticipated or expected that exportation or export earnings would result from the project, but also

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[390] *Australia – Leather*, para. 9.75.

[391] *Australia – Leather*, para. 9.76.

[392] SCM Agreement, Art. 3.1(a), footnote 4; *see also Canada – Aircraft (AB)*, para. 169.

that the governments knew Airbus was developing the A380 *primarily* for the export market, and that export sales would be critical to the project's success.

346. First, in 1999-2000, at the time that the Airbus governments were discussing Launch Aid for the A380 with Airbus, Airbus was stating publicly **[ ]** that it was developing the A380 primarily for the export market. For example:

- In the 1999 version of its Global Market Forecast ("GMF"), Airbus predicted that LCA operators around the world would need to acquire a total of 1,208 new passenger aircraft with more than 400 seats during the 1999-2018 period.[393] Airbus stated that the Asia-Pacific region was "dominating demand" for aircraft of that size, and that 55 percent of the orders for such aircraft would come from that region, including China.[394] By contrast, Airbus predicted that the European market would represent only 23 percent of total demand for aircraft with more than 400 seats, or just 278 aircraft.[395]

- Airbus repeated this assertion in **[ ]**. For example, **[ ]**.[396]

- Airbus reached a similar conclusion in its 2000 Global Market Forecast, predicting that LCA operators would need to acquire a total of 1,235 aircraft with more than 400 seats during the 2000-2019 period.[397] Airbus predicted that a full 80 percent of these aircraft orders would be placed with operators outside Europe, some 57 percent in the Asia-Pacific region alone, including China. By contrast, Airbus predicted that European airlines would account for only 20 percent of total orders, or a total of 247 aircraft, which was a 31-aircraft reduction in total European demand as compared to its prediction in 1999.[398]

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[393] Airbus Industrie, GMF '99, at 29 (Exhibit US-356). Each year, Airbus issues a "Global Market Forecast" that seeks to forecast the evolution of large civil aircraft fleets worldwide over the next 20 years. Airbus says the basic assumptions that it uses in preparing the forecast "are both realistic and consistent with historical and currently foreseeable trends." *See, id.* at 8.

[394] Airbus Industrie, GMF '99, at 41 (Exhibit US-356). Airbus also predicted that six of the top ten airports served by aircraft with more than 400 seats would be located in the Asia-Pacific region; only two would be located in Europe. *Id.* at 42.

[395] Airbus Industrie, GMF '99, at 41 (Exhibit US-356).

[396] *See* Anlage 1 zum A380 Darlehensvertrag, DS316-EC-BCI-0000369, at 0000388 (Exhibit US-357; *see* BCI Annex). The EC and the Member States did not provide copies of the A380 Launch Aid applications submitted by any of the other Airbus companies. There is additional relevant information in the French "critical project appraisal," however. *See* Full HSBI Appendix, Section VII.

[397] Airbus, Global Market Forecast 2000, at 29-30 (Exhibit US-358).

[398] Airbus, Global Market Forecast 2000, at 37 (Exhibit US-358).

- In 1999 and 2000, Airbus published a series of "A3XX Briefings" that discussed the fact that most demand for the A380 would be outside Europe.[399] For example, the Third Quarter 1999 edition stated that "The market for large passenger aircraft will be **concentrated**: both geographically, with over half the projected deliveries expected to go to airlines domiciled in the Asia-Pacific region, and in terms of customers, with 20 airlines taking more than 75% of the aircraft."[400]

347. Second, the four Launch Aid agreements between the Airbus governments and Airbus each anticipate a level of A380 sales that substantially exceeds the 247 aircraft with more than 400 seats that Airbus was predicting it would sell in Europe, thus demonstrating that the governments anticipated exports. For example:

- An annex to the German A380 agreement refers to **[ ]** forecast A380 deliveries in 20 years.[401]

- The Spanish A380 agreement refers to the expectation that there will be deliveries of **[ ]** passenger versions of the A380, and **[ ]** cargo versions.[402]

- The French and UK "project appraisals" for the A380 **[ ]**. However, since the EC has designated the documents as HSBI in their entirety, the United States will only discuss the actual information in the HSBI appendix to this submission.[403]

348. Third, the four governments specifically referenced the global nature of the A380 project and Airbus's export sales. For example:

- The Spanish A380 agreement **[ ]**."[404]

- The press release announcing the UK commitment of A380 Launch Aid boasts that "{w}ithin 25 years Airbus has grown to take 55% of the civil aircraft

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[399] Airbus originally designated the A380 as the A3XX; it changed the designation to A380 when it formally launched the project.

[400] Airbus Industrie, A3XX 3rd Quarter Briefing (1999), at 3 (bold emphasis in original; underscored emphasis added) (Exhibit US-359).

[401] *See* Anlage 1 zum A380 Darlehensvertrag, DS316-EC-BCI-0000369, at 0000381 (Exhibit US-357; *see* BCI Annex).

[402] *See* Spanish A380 Agreement, DS316-EC-BCI-0000549, at 3 "Septimo" (Exhibit US-73; *see* BCI Annex).

[403] *See* France, A380 project appraisal, DS316-EC-HSBI-00011434, at 9-10; UK, A380 project appraisal, DS316-EC-HSBI-0001211, at 35-36.

[404] Spanish A380 Agreement, DS316-EC-BCI-0000549, at "Sexto" (Exhibit US-73; *see* BCI Annex).

production market and contributes £1 billion to the UK's trade balance."[405]

- At the ceremony unveiling the first A380 to the public, the British Prime Minister said the UK would benefit to the tune of 100,000 jobs and that "{t}he export gains will run into the billions of pounds."[406]

349. Fourth, when Airbus was seeking the Launch Aid, it pointed to potential export earnings, and it stressed the importance of export sales to the project's success. For example:

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]."[407]

- Airbus Senior Vice President for Marketing John Leahy stated in February 2000 that "{a}bout half the demand for the A3XX will come from Asia. . . . I am sure that we would not be launching it if there were not key Asian airlines on board."[408]

- A March, 2000 article in *The Economist* noted Leahy's view that Asia would account for around half of the sales of the A380. It reported that Leahy "hopes to win launch orders from two Asian carriers, one European or Middle Eastern airline and one American. . . . He says he is encouraged by the responses from Singapore Airlines, Cathay Pacific, Malaysia Air Lines and Emirates."[409]

350. Fifth, in addition to the fact that the A380 is an export-oriented project, Airbus itself is a highly export-oriented company.[410] For example:

- As the following chart demonstrates, over the past 14 years, an average of 84

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[405] Press Release, *Byers Announces £530 Million Government Investment in Airbus*, Department of Trade and Industry (Mar. 13, 2000) (emphasis added) (Exhibit US-360).

[406] *See, e.g., Blair Says Airbus A380 will Repay 530 Mln Stg UK Govt Investment*, AFX.com (Jan. 18, 2005) (Exhibit US-361).

[407] Anlage 1 zum A380 Darlehensvertrag, DS316-EC-BCI-0000369, at 0000417 (Exhibit US-357; *see* BCI Annex). As the United States noted above, the EC and the Member States did not provide copies of any of the other A380 Launch Aid applications.

[408] *Airbus Launches A3XX Program, Sees Strong Demand in Asia*, Aviation Now (Feb. 2000) (emphasis added) (Exhibit US-362).

[409] *Airbus Bets the Company*, The Economist (Mar. 16, 2000) (Exhibit US-363). As the *Economist* article notes, Airbus apparently was prepared to launch the A380 project without any orders from European airlines.

[410] The Appellate Body stated in the *Canada – Aircraft* dispute that, in determining whether a particular subsidy is contingent "in fact" on exports, "the export orientation of a recipient may be taken into account as *a* relevant fact, provided that it is one of several facts which are considered and is not the only fact supporting a finding." *Canada – Aircraft (AB)*, para. 173.

percent of total Airbus sales of aircraft of all sizes have been export sales.[411]

Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Airbus Orders Global	124	34	115	78	275	377	431	323	431	365	294	278	399	1097
Airbus Orders EC	1	6	10	29	38	60	132	45	38	44	142	17	68	276
Export %	99	82	91	73	86	84	69	86	91	88	73	94	83	75

- Airbus' Global Market Forecasts consistently state that a substantial majority of its future sales of all types of aircraft will come from export sales. For example, its Global Market Forecast for 2000 predicted that, in the 2000-2019 period, 70 percent of sales would come from non-European airlines: "The biggest share (35 per cent) of deliveries will go to airlines in North America. European airlines will take 30 per cent, and Asia-Pacific (including PRC) airlines 24 per cent, leaving just 11 per cent for airlines in Latin America, Africa and the Middle East."[412]

- In April 2000, the EC's External Advisory Group for Aeronautics submitted a report to the European Commission that stated that the aeronautics industry in Europe "employs a huge workforce and, through exports, contributes strongly to Europe's ability to fund other changes and to develop the quality of life of its citizens."[413]

351. In sum, the evidence demonstrates that when the four Airbus governments decided to provide Launch Aid for the A380, they were aware of the exports that Airbus was already making, knew that the success of the A380 project depended on exports, and anticipated that the A380 project would result in substantial exportation and export earnings.

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[411] The source of the data in this table is the Airclaims CASE database, an independent database that tracks orders and deliveries. The EC appears to have used the same database to prepare documents that it submitted during the Annex V process. *See* DS316-HSBI-1117; DS316-HSBI-1119.

[412] Airbus, Global Market Forecast 2000, at 27 (Exhibit US-358).

[413] Aeronautics for Europe, *A Position Paper Produced by the External Advisory Group for Aeronautics, Recommendations to the European Commission*, at 5 (April 2000) (emphasis added) (Exhibit US-364). The report specifically identified Airbus as "a world leading supplier" of aeronautical products. *Id*. at 7.

c. The A380 Launch Aid Subsidies Were "Tied To" Anticipated or Expected Exportation or Export Earnings

352. The third and final element for demonstrating that a subsidy is contingent on export performance is that the subsidy must have been "tied to" anticipated or expected exportation or export earnings. The terms of the Launch Aid contracts themselves, as well as the evidence surrounding the grant of the Launch Aid, demonstrates such a tie.

353. As the United States explained in Section IV.A.2.b.ii of this submission, a key feature of Launch Aid is that the Airbus governments tie repayment of the aid to sales of the particular aircraft model that the Launch Aid is funding. If sales of the aircraft fail to meet expectations, repayment of the aid is forgiven or indefinitely postponed. The A380 aid is no different; the four governments each tied repayment of the aid explicitly (and entirely) to A380 sales:

- The UK Launch Aid contract requires Airbus to repay the Launch Aid through per-plane levies on the **[ ]**.[414] If sales are fewer than expected, the government has no other recourse to obtain repayment.

- The German Launch Aid contract requires Airbus to repay the Launch Aid through per-plane levies on the **[ ]** sales.[415] As with the UK Launch Aid contract, if sales are fewer than expected, the German government has no other recourse to obtain repayment.

- The French Launch Aid contract requires Airbus to repay the Launch Aid through per-plane levies on the **[ ]** sales.[416] Like the German and UK Launch Aid contracts, if sales are fewer than expected, the French government has no other recourse to obtain repayment.

- The Spanish Launch Aid contract requires Airbus to repay the Launch Aid through per-plane levies on the **[ ]**.[417] Like all of the other A380 Launch Aid contracts, if sales are fewer than expected, the Spanish government has no other recourse to obtain repayment.

354. Therefore, under the terms of the Launch Aid contracts, the only way that any of the four governments will receive full repayment of the aid is if Airbus sells in excess of **[**

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[414] *See, e.g.,* UK A380 Agreement, DS316-EC-BCI-0000556, at 25 (para. 3) (Exhibit US-79; *see* BCI Annex).

[415] *See* German A380 Agreement, DS316-EC-BCI-0000345, at §7 ("Darlehensrueckzahlung") (Exhibit US-72; *see* BCI Annex).

[416] French A380 protocole, DS316-EC-BCI-0000249, Articles 6.2 and 6.3 (Exhibit US-365; *see* BCI Annex).

[417] *See* Spanish A380 Agreement, DS316-EC-BCI-0000549, at 6 (Exhibit US-73; *see* BCI Annex).

] A380 aircraft. As the United States noted above, however, Airbus has stated **[ ]** that total European demand for aircraft with more than 400 seats is only 247 aircraft. This necessarily implies that:

- The UK tied the grant of the A380 Launch Aid to Airbus making at least **[ ]** export sales.
- France and Germany tied the grant of the A380 Launch Aid to Airbus making at least **[ ]** export sales.
- Spain tied the grant of the A380 Launch Aid to Airbus making at least **[ ]** export sales.

355. It also implies that, without exports, Airbus would repay **[ ]** the principal amount that it owes, and no interest.

356. In addition, Airbus will almost certainly sell fewer than 247 A380s in Europe; it would only be able to sell that number by taking 100 percent of the European demand that Airbus has forecast for aircraft with more than 400 seats. Since Airbus's Global Market Forecast defines the "more than 400 seat" category to include the Boeing 747, the Boeing 777-300, and the Airbus A340-600, the actual European market for the A380 is less than 247 sales.[418] By using the 247 sales figure to calculate Airbus's export requirements, the United States is being conservative; Airbus's actual export requirements are even higher.

357. Thus, when the four Airbus governments tied repayment of the A380 Launch Aid to sales, they necessarily tied the aid to substantial exports.[419]

358. The facts surrounding the grant of the aid are quite similar to the facts surrounding the grant contract that the *Australia – Leather* panel found contingent "in fact" upon export performance. First, like the leather market in Australia, the European market for aircraft with more than 400 seats is too small to absorb Airbus's production of A380s. Second, like the grant contract, the A380 Launch Aid contracts included conditions (namely, success-dependent repayment terms, with repayment via per-plane levies) that Airbus cannot meet without "continuing, and even increasing, exports." Third, like the Australian government, the UK, French, German, and Spanish governments were aware of these facts when they entered into the Launch Aid contracts, and thus they "anticipated continued and possibly increased exports" by Airbus."[420]

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[418] *See, e.g.,* Airbus, Global Market Forecast 2000, at 74 (Exhibit US-358).

[419] *See Canada – Autos (AB)*, para. 123.

[420] *Australia – Leather*, para. 9.67. Furthermore, in the *Canada – Aircraft* dispute, one of the factors that supported the panel's finding that TPC financing was contingent "in fact" upon export performance was that the

(continued...)

359. On the other hand, the facts that led the *Australia – Leather* panel to conclude that the loan contract was not contingent "in fact" upon export performance are entirely absent from the A380 contracts. For example:

- The *Australia – Leather* panel found that there was nothing in the loan contract with Howe that "explicitly link{ed} the loan to Howe's production or sales, and therefore nothing in its terms, the design of the loan payment, or the repayment provisions that would tie the loan directly to export performance, or even sales performance."[421] By contrast, repayment of the French, German, Spanish and UK Launch Aid is explicitly tied to sales of the A380.

- The *Australia – Leather* panel rejected the argument that Howe had no choice but to export if it was to repay the loan because it was "ultimately up to Howe and ALH to decide upon the source of funds that will be used the repay the loan."[422] Under the terms of the A380 Launch Aid, however, repayment is via a levy on each individual sale of the A380. It is not "up to Airbus" to decide the source of the funds to repay the Launch Aid; under the contract, Airbus repays the funds by selling (and thus exporting) A380s.

- The *Australia – Leather* panel emphasized the fact that Howe was a subsidiary of ALH, and that "the loan {was} secured by a lien on the assets and undertakings of ALH, which is itself responsible for repayment of the loan, and not merely on the assets and undertakings of Howe."[423] The A380 Launch Aid, by contrast, is unsecured. The four governments do not have any claim on revenues from sales of other Airbus aircraft, much less on the assets and undertakings of Airbus or its parent companies, EADS and BAE Systems. If Airbus fails to export A380s, the four governments will not be repaid, much less receive any return on their money.

360. In conclusion, the French, German, Spanish, and UK Launch Aid for the A380 involves (1) the granting of a subsidy that (2) is "tied to" (3) "actual or anticipated exportation or export earnings."[424] The export contingency is both implicit in the terms and conditions of the Launch

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[420] (...continued)
subsidy in question was "near to market" in nature. The form of the subsidy – financing to support the development of a new model of aircraft, with repayment via levies on sales – was virtually identical to the Launch Aid that the UK, French, German, and Spanish governments provided to Airbus for the A380. As in the *Canada – Aircraft* dispute, the "near to market" nature of the Launch Aid for the A380 is evidence that the Launch Aid was contingent "in fact" on export performance.

[421] *Australia – Leather*, para. 9.74.

[422] *Australia – Leather*, para. 9.75. ALH is the parent company of Howe.

[423] *Australia – Leather*, para. 9.75.

[424] SCM Agreement, Art. 3.1(a), footnote 4.

Aid and inferred from the total configuration of facts constituting and surrounding the granting of the subsidy. Therefore, the subsidies are contingent upon export performance, and thus are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

3. The French and Spanish Launch Aid for the A340-500/600 Is Contingent on Export Performance

361. The United States noted above that a finding of export contingency involves three elements: (1) the "granting" of a subsidy; (2) that is "tied to" (3) "actual or anticipated exportation or export earnings."[425] As the United States will discuss in this section, the same types of facts that demonstrate export contingency for the A380 Launch Aid also demonstrate that the Launch Aid that the French and Spanish governments provided for the A340-500/600 is contingent upon export, and thus is prohibited under Articles 3.1(a) and 3.2 of the SCM Agreement.

a. The French and Spanish Governments Have "Granted" Subsidies for the A340-500/600

362. The United States established in Section IV.A.3.e of this submission that the French and Spanish governments each granted Launch Aid to their respective Airbus companies to support the development of the Airbus A340-500/600.[426] The United States also established that, in each case, the Launch Aid is a subsidy within the meaning of Article 1.1 of the SCM Agreement, because it involves a financial contribution that confers a benefit on the recipient. Therefore, for each grant of A340-500/600 Launch Aid, the first element for demonstrating export contingency is met.

b. The French and Spanish Governments Anticipated or Expected Exportation or Export Earnings

363. As is the case with the A380 Launch Aid, the evidence surrounding the French and Spanish governments' decisions to provide Launch Aid for the A340-500/600 demonstrates that the governments knew that exportation or export earnings would result from the project.

364. First, the Spanish A340-500/600 Launch Aid contract **[**

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365. The French critical project appraisal for the A340-500/600 also contains relevant information. Since the EC has designated the document as HSBI in its entirety, the United States

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[425] SCM Agreement, Art. 3.1(a), footnote 4; *see also Canada – Aircraft (AB)*, para. 169.

[426] *See* Section IV.A.3.e.

[427] Spanish A340-500/600 Agreement, DS316-EC-BCI-0000535, at 2 (Exhibit US-37; *see* BCI Annex).

will only discuss the information in the HSBI appendix to this submission.[428]

366. Second, in 1997-1998, at the time that the French and Spanish governments were considering the A340-500/600 Launch Aid, Airbus was predicting that the substantial majority of its sales of aircraft of all types over the next 20 years would be for export. For example:

- In the 1997 version of its Global Market Forecast ("GMF"), Airbus predicted that European airlines would represent only 25 to 29 percent of its total orders during the 1997-2016 period.[429]

- Similarly, in the 1998 version of its GMF, Airbus predicted that European airlines would represent only 25 to 28 percent of its total orders during the 1997-2017 period.[430]

367. Third, on the dates that the French and Spanish governments signed their Launch Aid agreements with Airbus, almost half of the firm orders that Airbus had already received for the A340-500/600 were export sales: Virgin Atlantic, Lufthansa, and Swissair had ordered a total of 29 A340-500/600s; and Air Canada, Emirates, ILFC (based in the United States), and Egyptair had ordered a total of 23.[431]

368. Fourth, when the European Commission reviewed France's A340-500/600 Launch Aid under EC state aid rules, it noted the French government's expectation that the development of the A340-500/600 would allow Airbus to compete for sales throughout the world:

> From the global standpoint, the A340-500/600 program will have only one competitor – Boeing. The A340-500/600 will be able to compete with the 747-400 and 777-300. The A340-500 will be able to compete with the Boeing 777-200GW.[432]

369. Fifth, as the United States noted above when discussing the A380 Launch Aid, Airbus is

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[428] For example, relevant information appears on pages 10 (sales projections) and 15 (customer lists). *See* DS316-EC-HSBI-0001143.

[429] Airbus Industrie, Global Market Forecast 1997-2016, *Confirming Very Large Demand* (March 1997), at 5, 19 (Exhibit US-366).

[430] Airbus, Global Market Forecast 1998-2017 (April 1998), at 36 (Exhibit US-367).

[431] *See* Exhibit US-368. The source of the data in the exhibit is Airclaims. The French Launch Aid contract is dated December 29, 1998. *See* French A340-500/600 Agreement, at 1 (Exhibit US-36; *see* BCI Annex). The Spanish Launch Aid contract is dated December 28, 1998. *See* Spanish A340-500/600 Agreement, at 1 (Exhibit US-37; *see* BCI Annex).

[432] Letter from Karel Van Miert to Hubert Vedrine, *Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program*, Aid No. N369/98, at 3 (translation at 5) (Jan. 26, 1999) (emphasis added) (Exhibit US-3).

a highly export-oriented company.[433] As the Panel will recall, over the past 14 years, an average of 84 percent of total Airbus sales of aircraft of all sizes have been export sales.[434] Moreover, as the table of orders demonstrates, in the 1992-1997 period (*i.e.,* the period predating the French and Spanish governments' decisions to provide the A340-500/600 Launch Aid), 86 percent of total Airbus sales were for export.[435]

370. Thus, Airbus's sales history immediately prior to the French and Spanish governments' decisions to provide the Launch Aid clearly indicated that the A340-500/600 was also going to be highly dependent upon and result in substantial export sales.

371. In sum, the evidence demonstrates that when the French and Spanish governments decided to provide Launch Aid for the A340-500/600, they were aware of the exports that Airbus was already making and the importance of exports to the project's success, and they anticipated that the A340-500/600 would result in substantial additional exportation or export earnings.

c. The A340-500/600 Launch Aid Subsidies Were "Tied To" Anticipated or Expected Exportation or Export Earnings

372. The third and final element for demonstrating that a subsidy is contingent on export performance is that the subsidy must have been "tied to" anticipated or expected exportation or export earnings. Like the terms of the A380 Launch Aid contracts, the terms of the A340-500/600 Launch Aid demonstrates such a tie.

373. To be specific, as with the A380 Launch Aid, the French and Spanish governments tied the grant of the A340-500/600 Launch Aid to export sales:

- The French Launch Aid contract requires Airbus to repay the Launch Aid through per-plane levies on the **[ ]** sales.[436] If sales are fewer than expected, the government has no other recourse to obtain repayment. The French project appraisal for the A340-500/600 makes clear that **[ ]**.[437]

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[433] The Appellate Body stated in the *Canada – Aircraft* dispute that, in determining whether a particular subsidy is contingent "in fact" on exports, "the export orientation of a recipient may be taken into account as *a* relevant fact, provided that it is one of several facts which are considered and is not the only fact supporting a finding." *Canada – Aircraft (AB)*, para. 173.

[434] *See* Airbus table of orders set out at para. 349.

[435] *Id*.

[436] *See, e.g.,* French A340-500/600 Agreement, DS316-EC-BCI-0000276, Arts. 6.2, 7 (Exhibit US-36; *see* BCI Annex).

[437] Since the EC designated the critical project appraisal document as HSBI in its entirety, the United States will only discuss the details in the HSBI annex to this submission. However, relevant information appears on pages 10-11 and 26 of the appraisal. *See* DS316-EC-HSBI-0001143.

- The Spanish Launch Aid contract also requires Airbus to repay the Launch Aid through per-plane levies.[438] The EC and Spain redacted all of the numbers from the Launch Aid repayment schedule, so it is not possible to determine over how many deliveries Airbus must repay the financing. The Launch Aid contract anticipates **[ ]** worldwide sales of the aircraft over a 20-year period, however.[439] In light of the EC's and Spain's refusal to provide the actual information, the reasonable inference is that Airbus must repay the aid over a similar number of sales.[440]

374. Furthermore, the United States has already explained the facts surrounding the grant of the A380 Launch Aid and their strong similarity to the facts surrounding the grant contract that the *Australia – Leather* panel found was contingent "in fact" upon export performance. The United States has also discussed why the facts surrounding the grant of the Launch Aid are entirely different from those surrounding the loan contract that the panel found was not contingent "in fact" upon export performance. The same analysis applies with respect to the Launch Aid that the French and Spanish governments provided for the A340-500/600. Instead of repeating that explanation here, the United States respectfully refers the Panel to the earlier discussion.[441]

375. In conclusion, the French and Spanish Launch Aid for the A340-500/600 involves (1) the granting of a subsidy that (2) is "tied to" (3) "actual or anticipated exportation or export earnings."[442] The export contingency is both implicit in the terms and conditions of the Launch Aid, and inferred from the total configuration of facts constituting and surrounding the granting of the subsidy. Therefore, the subsidies are contingent upon export performance, and thus are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

4. The French Launch Aid for the A330-200 Is Contingent on Export Performance

376. Finally, the same types of facts that demonstrate the export contingency of the A380 and A340-500/600 Launch Aid also demonstrate that the Launch Aid that the French government has provided for the A330-200 is contingent upon exportation or export earnings, and thus is

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[438] *See, e.g.*, Spanish A340-500/600 Agreement, DS316-EC-BCI-0000534, at 3 ("Octavo") and 6 ("Quinta") (Exhibit US-37; *see* BCI Annex). Like the French A340-500/600 Launch Aid contract, if sales are fewer than expected, the Spanish government has no other recourse to obtain repayment.

[439] Spanish A340-500/600 Agreement, DS316-EC-BCI-0000534, at 2 ("Primero") (Exhibit US-37; *see* BCI Annex).

[440] The United States respectfully requests that the Panel either use its authority under Article 13 of the DSU to request the EC and Spain to provide the necessary information or else draw the adverse inference that Airbus must repay the aid over **[ ]** sales.

[441] *See* Section IV.B.2.c.

[442] SCM Agreement, Art. 3.1(a), footnote 4.

prohibited under Articles 3.1(a) and 3.2 of the SCM Agreement.

a. The French Government Has "Granted" Subsidies for the A330-200

377. The United States established in Section IV.A.3.d of this submission that the French government granted Launch Aid to Aérospatiale in 1996 to support the development of the Airbus A330-200. The United States also established that the Launch Aid is a subsidy within the meaning of Article 1.1 of the SCM Agreement, because it involves a financial contribution that confers a benefit on the recipient. Therefore, the first element for demonstrating export contingency is met.

b. The French Government Anticipated or Expected Exportation or Export Earnings

378. As the United States has already noted, the second element for demonstrating export contingency is that the government granting the subsidy anticipated exportation or export earnings. The United States discussed above that Airbus is an export-oriented company and that its sales have always depended substantially on exports. In order to avoid needless repetition, the United States respectfully refers the Panel to the earlier discussions.[443]

379. The evidence of Airbus's overall export orientation is not, however, the only information that evidences the French government's expectation that the Launch Aid for the A330-200 would lead to substantial exportation or export earnings. For example, the French government's "project appraisal" for the A330-200 contains relevant information. Since the EC has designated the document as HSBI in its entirety, the United States will only discuss the information in the HSBI appendix to this submission.

380. In addition, when the French government was deciding whether to commit the A330-200 Launch Aid in 1995-96, Airbus was already predicting that the substantial majority of its sales of aircraft of all types over the next 20 years would be for export. For example, in the 1995 version of its Global Market Forecast ("GMF"), Airbus predicted that European airlines would represent only 28 percent of its total orders during the 1995-2014 period.[444]

381. Indeed, on the date that the French government signed the A330-200 Launch Aid contract, 100 percent of the firm orders that Airbus had already received for the A330-200 were export sales.[445]

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[443] See Section IV.B.2.c.

[444] Airbus Industrie, Global Market Forecast 1995-2014 (March 1995), at 5, 18 (Exhibit US-369).

[445] Dubai-based Emirates Airlines had ordered 16, the U.S. leasing company ILFC had ordered four, and Canada 300 airlines had ordered two. *See* Exhibit US-368. The source of the data in the exhibit is Airclaims. The

(continued...)

382. In sum, the evidence demonstrates that when the French government decided to provide Launch Aid for the A330-200, it was aware of the exports that Airbus was already making and the importance of exports to the project's success, and it anticipated that the project would result in substantial additional exportation or export earnings.

c. The A330-200 Launch Aid Was "Tied To" Anticipated or Expected Exportation or Export Earnings

383. Finally, the evidence also demonstrates the tie between the French government's grant of the Launch Aid and anticipated or expected exportation or export earnings.

384. The A330-200 Launch Aid contract requires Airbus to repay the Launch Aid through per-plane levies on the first **[ ]** sales.[446] If sales are fewer than expected, the government has no other recourse to obtain repayment. The French project appraisal for the A330-200 makes clear that **[ ]**.[447]

385. Furthermore, the United States has already explained the facts surrounding the grant of the A380 Launch Aid and their strong similarity to the facts surrounding the grant contract that the *Australia – Leather* panel found was contingent "in fact" upon export performance. The United States has also discussed why the facts surrounding the grant of the Launch Aid are entirely different from those surrounding the loan contract that the panel found was not contingent "in fact" upon export performance. The same analysis applies with respect to the Launch Aid that France provided for the A330-200. Instead of repeating that explanation here, the United States respectfully refers the Panel to the earlier discussion.[448]

386. In conclusion, the French Launch Aid for the A330-200 entails (1) the granting of a subsidy that (2) is "tied to" (3) "actual or anticipated exportation or export earnings."[449] The export contingency is both implicit in the terms and conditions of the Launch Aid, and inferred from the total configuration of facts constituting and surrounding the granting of the subsidy. Therefore, the subsidy is contingent upon export performance, and thus is inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

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[445] (...continued)
Launch Aid contract is dated November 28, 1996. DS316-EC-BCI-0000316, 320 (Exhibit US-78; *see* BCI Annex). A protocol to the contract is dated December 23, 1996. DS316-EC-BCI-0000316 (Exhibit US-78; *see* BCI Annex).

[446] *See, e.g.,* French A330-200 Agreement, protocol, DS316-EC-BCI-0000321, at Art. 6.2 (Exhibit US-78; see BCI Annex).

[447] Since the EC designated the critical project appraisal document as HSBI in its entirety, the United States will only discuss the details in the HSBI annex to this submission.

[448] *See* Section IV.B.2.c.

[449] SCM Agreement, Art. 3.1(a), footnote 4.

C. The European Investment Bank Has Repeatedly Subsidized the Development of Airbus Large Civil Aircraft

387. Throughout the late 1980s, 1990s, and most recently in 2002, the European Investment Bank ("EIB") has provided significant financial support to Airbus for the development of its new models of large civil aircraft. This financial support has taken the form of loans – at least 11 to date – with a total principal value of approximately Euro 1,600,000,000. The EIB provides the loans for the development of specific models of Airbus LCA, usually as a supplement to the Launch Aid that the various Airbus governments provide for the same models. The most recent loan of which the United States is aware, and the largest to date, is a Euro 700,000,000 loan in 2002 for the purpose of underwriting A380 research and development costs. Each of the EIB loans is a subsidy within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement.

388. In this section, the United States will first provide the factual background of the EIB and the role it plays as the financing institution of the European Union. The United States will then discuss the Euro 700,000,000 loan that the EIB agreed to provide to EADS for the A380. Finally, the United States will discuss the earlier loans that the EIB provided to Airbus between 1988 and 1997.

1. Factual Background on the European Investment Bank

389. The European Investment Bank, "the financing institution of the European Union, was created by the Treaty of Rome. The members of the EIB are the Member States of the European Union, who have all subscribed to the Bank's capital."[450]

390. The EIB's two main governing bodies are the Board of Governors and the Board of Directors. The Board of Governors is normally made up of the Finance Ministers of the Member States. The Board of Directors has 26 members representing each Member State and the European Commission.[451] The EIB's day-to-day "Management Committee" is appointed by the Board of Governors on a proposal by the Board of Directors.[452]

391. The EIB describes itself as "the EU's policy-driven Bank."[453] It has "close working relations with the other EU institutions, in particular the European Parliament, the European

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[450] *The EIB, the EU's financing institution*, European Investment Bank, http://www.eib.org/about/index.asp?cat=181 (Exhibit US-148).

[451] *The EIB, FAQ – Structure and Organization*, at 2 www.eib.org/faq/index.asp?designation=faq_structure (Exhibit US-149); Statute of the EIB, Arts. 9(1), 11(2), (Exhibit US-150).

[452] Statute of the EIB, Art. 13(1) (Exhibit US-150).

[453] European Investment Bank, *Financing Europe's Future*, at 1 (Exhibit US-151).

Council and the European Commission."[454] It provides financing in support of EU policy priorities.[455] The projects it funds must "help achieve EU objectives such as making European industries and small businesses more competitive."[456]

392. For all of these reasons, the EIB is a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement.

393. In 2000, the EIB established the Innovation 2000 Initiative ("i2i"). The purpose of the i2i program is to support "the guidelines laid down by the Heads of State or Government" in connection with the "Lisbon Strategy" of European innovation and economic development.[457] The EIB targets i2i lending at "sectors of the future with high technological value added."[458]

394. In June 2001, the European Commission and the EIB signed a "joint memorandum" that created a framework for coordinating the EIB's lending activities under the i2i program with the EC's provision of research subsidies under its R&D "Framework" Programs.[459] Under the terms of the framework, the EC and the EIB shall "co-operate, so as to maximise the impact of their respective financing of research and development activities."[460]

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[454] *Id.*

[455] *Id*. Article 267 of the *Treaty Establishing the European Community* states that the task of the EIB is to contribute to "the balanced and steady development of the common market in the interest of the Community." *See* (Exhibit US-152).

[456] The European Investment Bank, *What Does the Bank Do,* http://europa.eu.int/institutions/eib/index_en.htm (Exhibit US-153).

[457] *The Innovation 2000 Initiative, Actively promoting a European economy based on knowledge and innovation*, European Investment Bank, at 2 (Exhibit US-154).

[458] *The Innovation 2000 Initiative, Actively Promoting a European Economy based on Knowledge and Innovation*, European Investment Bank, at 3 (Exhibit US-154).

[459] The United States discusses the subsidies that the EC has provided to Airbus under the EC Framework Programs in Section IV.G of this submission.

[460] Joint Memorandum establishing a framework for co-operation between the community research framework programme and the "Innovation 2000 Initiative" between the European Community represented by the Commission of the European Communities and the European Investment Bank, at 2 (Exhibit US-155). *See also* EIB, Annual Report 2004, Activity Report 2004, at 16 (confirming that the EIB "cooperates, *inter alia*, with the European Commission, acting as a complement to the grant instruments operating via the European Union budget") (Exhibit US-156).

2. The Loan That the EIB Provided to EADS in 2002 Is a Subsidy Under Articles 1 and 2 SCM Agreement

395. In 2002, the EIB agreed to provide a Euro 700,000,000 "individual loan" to EADS for R&D related to the Airbus A380.[461] The EIB provided the loan to EADS under the i2i program. As the United States explains in the remainder of this section, the loan is a subsidy within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement.

a. The EIB Loan Constitutes a Financial Contribution

396. As the United States has repeatedly noted, Article 1.1(a)(i) of the SCM Agreement includes loans by governments and public bodies among the types of "direct transfers of funds" that constitute financial contributions under Article 1.1(a)(i). The EIB is a public body, and the Euro 700,000,000 that it agreed to provide to EADS for the A380 – like all of the other EIB measures that the United States is challenging in this dispute – is in the form of a loan.[462] Accordingly, it is a financial contribution within the meaning of Article 1.1(a)(i) of the SCM Agreement.

b. The EIB Loan Confers a Benefit

397. The loan also confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement. As the Appellate Body found in *Canada – Aircraft*, "the ordinary meaning of 'benefit' clearly encompasses some form of advantage."[463] In addition, the proper basis for measuring the existence of such an advantage is the market:

> In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favorable than those available to the recipient in the market.[464]

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[461] *See* Overview of EIB loans, EIB Loan Detail: EADS R&D 1 & 2 (Exhibit US-157 at Exhibit A); Projet EADS Airbus R&D, Contrat de Financement entre la Banque Européenne d'Investissement et EADS (Aug. 2, 2002) at 2, DS316-EC-BCI-0000676, -678 (Exhibit US-158; *see* BCI Annex). During the Annex V process, the EC reported that [
]. *See* EC Response to Question 81(k) from the Facilitator (Exhibit US-5; see BCI Annex).

[462] *See* Projet EADS Airbus R&D, Contrat de Financement entre la Banque Européenne d'Investissement et EADS (Aug. 2, 2002), DS316-EC-BCI-0000676 (Exhibit US-158; *see* BCI Annex).

[463] *Canada – Aircraft (AB)*, para. 153 (quoting, with approval, the panel's finding).

[464] *Canada – Aircraft (AB)*, para. 157 (emphasis added). *See also US – Lead Bars (AB)*, para. 68 (stating that "{t}he question whether a 'financial contribution' confers a 'benefit' depends, therefore, on whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market.")

Thus, if a government or public body provides a loan to a company on terms that are more favorable than those available to the company in the market, the lender confers a benefit, and thus a subsidy, on the recipient.

398. The EIB loan for the A380 is on terms that are more favorable than those available in the market. First, the EIB readily admits that its entire purpose is to support the EU's public policy objectives by providing loans on better terms than the recipients could otherwise obtain, if they could obtain the loans at all:

> This backing by the member states gives the EIB the highest possible credit rating (AAA) on the money markets, where it can therefore raise very large amounts of capital on very competitive terms. This in turn enables the Bank to invest in projects of public interest that would otherwise not get the money - or would have to borrow it more expensively.[465]

399. The EIB effectuates this benefit by passing on the interest rate it pays on its own (AAA-rated) capital market borrowings to its non-AAA rated borrowers, and by lending the funds at cost. As it explains in a portion of its website headed "*What are the benefits of an EIB loan?"*:

> With an excellent "AAA" credit reputation and operating as a major international borrower on financial markets, EIB is able to raise funds at advantageous rates. Being a not-for-profit institution, the Bank passes on the benefits to its clients in the form of loans at fine rates. Interest rates are based on EIB's borrowing cost and a small margin to cover administrative expenses and other costs.[466]

400. Thus, like the *Technology Partnerships Canada* ("TPC") program at issue in the *Canada – Aircraft* dispute, the EIB "neither seeks nor earns a commercial rate of return" on the loans it provides.[467] The *Canada – Aircraft* panel treated this factor as dispositive in determining

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[465] The European Investment Bank, *What Does the Bank Do?,* http://europa.eu.int/institutions/eib/index_en.htm (emphasis added) (Exhibit US-153). The bank made a similar comment in its 2004 annual report, describing itself as "a leading AAA-rated quasi-sovereign benchmark borrower, enabling it to grant loans on the best possible terms." EIB, Annual Report 2004, Volume I, Activity Report 2004, at 11 (emphasis added) (Exhibit US-159).

[466] EIB, FAQs, Projects & Loans at 1-2, http://www.eib.org/faq/faq.asp?faq=65 (emphasis added) (Exhibit US-160). Similarly, an introduction to the EIB and its financing activities states, under the heading "*Offering a Financial Advantage*," that:

> As the EIB has an excellent credit rating (AAA), it borrows funds on capital markets worldwide at fine rates, mainly through bond issues. Operating on a non-profit basis, the Bank passes on these resources to project promoters with a small margin to cover operating expenses.

European Investment Bank, *Financing Europe's Future*, at 1 (under the heading "Offering a Financial Advantage"), www.eib.org/Attachments/general/financing_future_en.pdf (Exhibit US-151).

[467] *Canada – Aircraft (Panel)*, para. 9.314; *see also id.*. at paras. 9.313-15 (finding that loans under the *Technology Partnerships Canada* program were subsidies because the TPC program, "as a matter of policy, does not

(continued...)

the existence of a subsidy in that dispute.[468] It is equally dispositive with respect to the EIB's loan to EADS.

401. Furthermore, the EIB's ability to provide loans is circumscribed. Article 18 of the EIB Statute explicitly limits EIB lending to situations where "funds are not available from other sources on reasonable terms."[469] The conditional nature of EIB financing further demonstrates that the EIB loans confer benefits on their recipients.

402. Moreover, in addition to the interest rate benefit that the EIB provides to its recipients, the EIB's loans confer still another benefit, because the EIB does not charge its borrowers "commitment fees" to compensate for committing the loans, nor "non-utilization fees" in cases where borrowers do not use the credit lines the EIB has provided. As the EIB has explained:

> In addition to its usually advantageous lending rates, the EIB charges neither commitment fees nor non-utilization fees, but may charge fees for a project's appraisal and required legal services in appropriate cases.[470]

403. **[ ]**.[471] Commercial lenders do charge such fees, or they otherwise include compensation for the commitment of funds in the fee or interest rate structure of their loans.[472]

404. Finally, the information that the EC provided during the Annex V process confirms that the EIB loan for the A380 confers a benefit. The EC has stated that the interest rate on the loan is set at **[ ]** percent.[473] The Ellis Report indicates that – by conservative estimates – the risk-adjusted commercial borrowing rate that the market would have charged EADS in 2002 on an equivalent long-term loan[474] would have been in the range of **[ ]** percent,[475] plus applicable commitment and non-utilization fees. The loan therefore confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

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[467] (...continued)
seek a commercial rate of return on its contributions").

[468] *See id* at paras. 9.313-15.

[469] Statute of the EIB, Art. 18(1) (Exhibit US-150).

[470] EIB FAQs, Projects & Loans at 4, http://www.eib.org/faq/faq.asp?faq=65 (Exhibit US-160).

[471] *See* Projet EADS Airbus R&D, Contrat de Financement entre la Banque Européenne d'Investissement et EADS (Aug. 2, 2002), DS316-EC-BCI-0000676, -678 (loan total, [ ] (Exhibit US-158; see BCI Annex).

[472] Richard A. Brealey at al., *Principles of Corporate Finance*, 856-857 (2006) (Exhibit US-161).

[473] EADS Airbus R&D 1 (July 7, 2005), DS316-EC-BCI-0000735 (Exhibit US-162; *see* BCI Annex).

[474] The EIB loan took the form of a credit line with a 10-year maturity. *See* EIB-EADS 2002 Loan Agreement, Art. 1.02bis, sub 5, DS316-EC-BCI-0000676 (Exhibit US-158; see BCI Annex).

[475] Ellis Report at exhibit 6 (Exhibit US-80; see BCI Annex).

c. The EIB Loan Is Specific Under Article 2 of the SCM Agreement

405. The Euro 700,000,000 loan to EADS is also specific within the meaning of Article 2 of the SCM Agreement. First, as the United States noted above, the EIB provided the loan to EADS in 2002 as part of its i2i program. Since total funding for R&D under the i2i program amounted to just Euro 2.1 billion in 2002, the Euro 700,000,000 that the EIB committed for the A380 is disproportionately large.[476] It is disproportionate both in percentage – one third of the total amount committed that year – and in absolute terms, since the average loan for R&D in 2002 was just Euro 140,000,000.[477]

406. Second, every "individual loan" that the EIB provides is entirely discretionary. It is negotiated with and limited to the specific recipient in question, with terms and conditions that vary widely. As the EIB itself states, the criteria it applies when deciding whether to approve a loan – such as the rationale for the financing and the economic value it expects to obtain from the financing – are "tailored to each individual project."[478] Every decision whether to provide financing is subject to the opinion of the member State on whose territory the project will be located, as well as the European Commission.[479]

3. The Loans That the EIB Provided to Airbus Between 1988 and 1993 Are Specific Subsidies

407. The Euro 700,000,000 that the EIB agreed to provide for the A380 was not its first loan to an Airbus project. Since 1988, the bank has provided at least eleven additional loans for the development of specific Airbus models. These loans include:[480]

- Euro 112,614,303 to Aérospatiale for the Super Transporteurs program in 1993;
- Euro 38,098,547 to Aérospatiale for the Super Transporteurs program in 1997;[481]

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[476] *See, e.g.*, European Investment Bank, Annual Press Conference 2003, Background Note No. 1: Innovation and Knowledge-Based Economy, at 2 (Exhibit US-164); *see also* The EIB Group, Activity Report 2002, at 14 (stating that "{i}n 2002, the EIB ploughed 2.1 billion into 15 R&D projects spanning 6 EU countries") (Exhibit US-165).

[477] *See, e.g.*, European Investment Bank, Annual Press Conference 2003, Background Note No.1: Innovation and Knowledge-Based Economy, at 2 (Exhibit US-164); *see also* The EIB Group, Activity Report 2002, at 14 (stating that "{i}n 2002, the EIB ploughed 2.1 billion into 15 R&D projects spanning 6 EU countries") (Exhibit US-165).

[478] EIB, *The Project Cycle at the European Investment Bank*, at 4-5 (July 12, 2001) (Exhibit US-166).

[479] *Id.* at 4.

[480] The source of the information on the amounts of each of these loans is the EIB website. The United States has attached the relevant documentation to this submission. *See* Overview of EIB loans (Exhibit US-157).

[481] During the Annex V process, the EC reported that Aérospatiale never drew on this loan, and that it was cancelled. If the EC is able to confirm this point to the Panel, the United States believes it would not be necessary

(continued...)

- Euro 113,237,458 to Aérospatiale for A330/340 production in 1988;
- Euro 36,288,525 to Aérospatiale for A330/340 production in 1992;
- Euro 76,343,453 to British Aerospace for the A320 in 1988;[482]
- Euro 154,189,878 to British Aerospace for the A320 in 1989;
- Euro 142,498,656 to British Aerospace for the A330/340 in 1990;
- Euro 141,274,864 to British Aerospace for the A330/340 in 1991;
- Euro 103,871,576 to CASA for the A320 and A330/340 in 1989;
- Euro 44,541,626 to CASA for the A320 and A330/340 in 1990; and
- Euro 136,835,303 to Airbus Industrie for the A321 in 1990.

408. As the United States will explain in the remainder of this section, each of these loans constitutes a specific subsidy to Airbus within the meaning of Articles 1 and 2 of the SCM Agreement.

a. The 1988 – 1993 EIB Loans Constitute Financial Contributions

409. As discussed above, the EIB is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. In addition, each of the contributions listed above took the form of a loan.[483] Since loans by public bodies are included among the financial contributions listed in Article 1.1(a)(1)(i) of the SCM Agreement, the 1988 – 1997 EIB loans to Airbus are financial contributions within the meaning of the SCM Agreement.

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[481] (...continued)
for the Panel to determine whether the loan was a subsidy.

[482] The information on the EIB website pertaining to this loan conflicts with information in BAE's 1988 annual report. The United States is listing the lesser amount in order to be conservative. *Compare* Overview of EIB loans, EIB loan detail: British Aerospace A320 (Exhibit US-157 at Exhibit F) *with* BAE, Annual Report and Accounts 1988 at 7 (stating that it "negotiated two fixed rate sterling loans, the first of which was an amount of £150 million from the European Investment Bank to support our involvement in Airbus. £50 million of this loan is included in the Accounts and the remaining £100 million was drawn down in February 1989") (Exhibit US-163).

[483] See EIB overviews of funding, all referring to "pret" or loan in their description of the relevant measure (Exhibit US-157).

b. The 1988 – 1993 EIB Loans Confer Benefits on Airbus

410. During the Annex V process, the Facilitator asked the EC for information on the terms and conditions of each of the eleven loans that the EIB provided to Airbus between 1988 and 1997. The EC refused to provide any information on all but one of the loans. Nonetheless, the publicly available information indicates that each of the loans – like the Euro 700,000,000 that the EIB agreed to provide for the A380 – confers benefits on Airbus because they were provided on better than commercial terms.

411. First, the interest rate of the only loan for which the EC did agree to provide information – the EIB's 1992 loan to Aérospatiale for the Airbus A330/A340 program – is below the rate a commercial lender would demand. The contract shows that the interest rate on the loan is set at **[ ]** percent.[484] The Ellis Report indicates that – by conservative estimates – the general corporate borrowing rate that the market would have charged Aérospatiale in 1992 on an equivalent long-term loan would have been approximately **[ ]** percent, or **[ ]** basis points higher than the rate the EIB demanded, plus applicable commitment and non-utilization fees.[485] Therefore, the 1992 loan confers a benefit on Airbus.

412. The fact that this EIB loan and the 2002 loan are on better terms than those available to Airbus in the market, coupled with the EIB's very purpose, suggests strongly – particularly in light of the EC's refusal to provide information in the Annex V process – that the remaining loans are also on better than commercial terms, and thus confer benefits on Airbus.

413. Second, the United States has already demonstrated the numerous ways in which the EIB structures its loans to provide benefits to the recipients.[486] This includes its practice of passing on the interest rate it pays on its own (AAA-rated) capital market borrowings to its non-AAA rated borrowers, and by lending the funds at cost.[487] Unlike commercial lenders, the EIB "neither seeks nor earns a commercial rate of return" on the loans it provides. The panel in the *Canada – Aircraft* dispute treated this factor as dispositive in determining the existence of a subsidy.[488]

414. The EIB also provides loans where financing by commercial lenders would be less advantageous to the borrower. As explicitly stated in Article 18 of the EIB's Statute, the bank

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[484] DS316-EC-BC1-0000661 (Exhibit US-167; *see* BCI Annex).

[485] Ellis Report, at exhibit 6 (Exhibit US-80; see BCI Annex).

[486] *See* Section IV.C.2.b.

[487] European Investment Bank, *Financing Europe's Future*, at 1 (Exhibit US-151); EIB, FAQs, Projects & Loans, at 1-2, http://www.eib.org/faq/faq.asp?faq=65 (Exhibit US-160).

[488] *Canada – Aircraft (Panel)*, paras. 9.313-15 (finding that loans under the *Technology Partnerships Canada* program were subsidies because the TPC program, "as a matter of policy, does not seek a commercial rate of return on its contributions").

grants loans when "funds are not available from other sources on reasonable terms."[489] Furthermore, the EIB does not charge commitment or non-utilization fees to its borrowers.[490]

415. Finally, although the EC's refusal to provide the actual terms of all but one of these EIB loans makes it impossible to compare their terms to commercial terms, the publicly available information supports the conclusion that the terms of the loans are not commercial. First, the EIB's annual reports for 1996 – 2004 list the average interest rates that the EIB charged its borrowers in each of those years.[491] In each year, the average rates are below the general corporate borrowing rates (*i.e.*, the corporate borrowing rates without any project-specific risk premium) that the Ellis report concludes the market would have demanded of the relevant Airbus company:[492]

	1996	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**
EIB Average	7.87	7.21	6.70	5.91	6.06	5.64	4.74	4.06	3.82
Germany	8.04	7.53	6.56	6.48	7.14	6.75	6.75	6.14	6.11
France	8.13	7.47	6.63	6.60	7.27	6.89	6.83	6.20	6.17
UK	9.25	8.41	6.82	6.21	6.54	6.20	6.10	5.76	6.12
Spain	10.56	8.29	6.82	6.72	7.41	7.07	6.93	6.19	6.17

416. In light of the EC's refusal to provide the actual terms of the loans, the reasonable inference is that EIB loans provided before 1992 are similarly beneficial.

c. The 1988 – 1993 EIB Loans Are Specific Within the Meaning of Article 2 of the SCM Agreement

417. As in the case of the Euro 700,000,000 EIB loan to EADS in 2002, each of the EIB loans provided to Airbus between 1988 and 1997 is specific.

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[489] Statute of the EIB, Art. 18(1) (Exhibit US-150).

[490] EIB, FAQs, Projects & Loans, "What are the conditions of EIB lending?" at 4, http://www.eib.org/faq/faq.asp?faq=65 (Exhibit US-160). *See also* Brealy & Myers, op. Cit., at 856-857 (Exhibit US-161).

[491] The EIB average interest rates were 7.87 percent in 1996; 7.21 percent in 1997; 6.70 percent in 1998; 5.91 percent in 1999; 6.06 percent in 2000; 5.64 percent in 2001; 4.74 percent in 2002; 4.06 percent in 2003; and 3.82 percent in 2004. See EIB, Annual Report 1997, at 61 (Exhibit US-168); EIB, Annual Report 1998, at 69 (Exhibit US-169); EIB, Annual Report 1999, at 77 (Exhibit US-170); EIB, Annual Report 2000, at 33 (Exhibit US-171); EIB, Annual Report 2001, at 40 (Exhibit US-172); EIB, Annual Report 2002, at 41 (Exhibit US-173); EIB, Annual Report 2003, at 41 (Exhibit US-174); EIB, Annual Report 2004, at 54 (Exhibit US-175). Pre-1996 annual reports do not list average interest rates.

[492] *See* Ellis Report at exhibit 6 (Exhibit US-80; see BCI Annex).

418. First, eligibility for loans from the EIB is not automatic. Rather, the EIB provides its loans in support of EU policy priorities.[493] The projects it funds must "help achieve EU objectives such as making European industries and small businesses more competitive."[494] The EIB's assessment of projects "includes an evaluation of a project's contribution to EU policies."[495] The decision whether to provide a particular loan is entirely discretionary and policy-driven.

419. Second, like the Euro 700,000,000 loan to EADS for the A380, each of the 1988 – 1997 EIB loans is an "individual" loan that the EIB negotiated directly with the relevant Airbus company. Access to the loan is explicitly limited to that company.

420. Third, in the years at issue, the amounts of the subsidies that the EIB provided to Airbus were disproportionately large. Airbus was the largest single recipient of EIB loans between 1988 and 1993 in the EIB's "industry, services, and agriculture" sector category, receiving approximately 10 percent of all individual loans. Excluding state-owned utilities, Airbus was the single largest corporate recipient of EIB loans between 1988 and 1993. Finally, the EIB provided a total of Euro 1,060,000,000 in loans to Airbus between 1988 and 1993, which accounted for approximately 20 percent of the loans it provided during that period to its "international competitiveness and European integration of large firms" lending objective.[496]

D. The German, French, UK, and Spanish Governments Have Subsidized Airbus Through the Provision of Infrastructure and Infrastructure-Related Grants

421. In addition to Launch Aid and EIB loans, the Airbus governments have provided massive subsidies to Airbus to develop, expand, and upgrade infrastructure and other facilities. These subsidies increased markedly in recent years in connection with the development of the Airbus A380. The subsidies at issue were granted by German authorities in Hamburg, Nordenham, and

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[493] European Investment Bank, Financing Europe's Future, at 1 (Exhibit US-151). Article 267 of the *Treaty Establishing the European Community* states that the task of the EIB is to contribute "to the balanced and steady development of the common market in the interest of the Community." *See* Exhibit US-152.

[494] The European Investment Bank, *What Does the Bank Do?,* http://europa.eu.int/institutions/eib/index_en.htm (Exhibit US-153).

[495] European Investment Bank, *Financing Europe's Future*, at 1 (Exhibit US-151).

[496] The EIB separates its lending statistics into two broad categories: (1) "energy and infrastructure," which contains mostly state-owned-and-operated sectors like petroleum, electricity, railways, roads, telecom, water, and sewage; and (2) "industry, services, and agriculture", which includes, *inter alia*, "transport equipment" (the sector for aeronautical engineering), mining, metal production, electronics, chemicals, rubber & plastics, glass & ceramics, construction materials, foodstuffs, textiles, paper & printing, tourism, research & development, advanced information services, and waste recovery & recycling. *See* EIB, Annual Report 1988, Tbl. 24 (Exhibit US-176); EIB, Annual Report 1989, Tbl. E (Exhibit US-177); EIB Annual Report 1990, Tbl. E (Exhibit US-178); EIB, Annual Report 1991, Tbl. E (Exhibit US-179); EIB, Annual Report 1992, Tbl. E (Exhibit US-180); EIB, Annual Report 1993, Tbl. E (Exhibit US-181).

Bremen; by French authorities in Toulouse; by UK authorities in Broughton; and by Spanish authorities in numerous locations in Spain.

422. Under Article 1.1(a) of the SCM Agreement, the provision of goods and services (other than general infrastructure) by a government constitutes a financial contribution, and, if it confers a benefit, a subsidy. It is well established that the relevant comparison for determining the existence of a benefit is the market, and that a financial contribution on better than commercial terms confers a benefit within the meaning of Article 1.1(b).[497] As the panel noted in *EC – DRAMs*:

> {a} finding that the financial contribution was provided on terms more favourable than what the market place provided for is . . . sufficient to find that a benefit existed.[498]

1. German Authorities Subsidized Airbus by Creating an Industrial Site for Airbus in Hamburg

423. When Airbus launched the A380, it decided to establish two A380 assembly facilities – one at Hamburg-Finkenwerder, and the other in Toulouse. At the time that Airbus made this decision, however, its existing facilities in Hamburg were located on a peninsula, with the river Elbe and wetlands on three sides, leaving no space on which to build the A380 facility. Hamburg authorities solved this issue by transforming one of the wetlands – the internationally-protected "Mühlenberger Loch" – into an industrial site, at a cost of approximately Euro 751,000,000. As the United States demonstrates in this section, the development of the Hamburg-Finkenwerder site and its provision to Airbus is a financial contribution that confers a benefit on Airbus within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement.

a. Factual Background on the Hamburg Infrastructure Subsidies

424. According to the publicly available information, Airbus wanted to locate its A380 assembly site next to its existing production facilities in order to utilize synergies with the existing facilities.[499] The only potential site in Hamburg that met Airbus's requirements was

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[497] *See*, *e.g.*,*Canada – Aircraft (Panel)*, para. 9.112 (stating that "a financial contribution will only confer a "benefit", i.e., an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market"); *Canada – Aircraft (AB)*, para. 157 (stating that "{i}n our view, the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been conferred ... .").

[498] *EC – DRAMs*, para. 7.178.

[499] *See* A REA, A380-Werkserweiterung im Mühlenberger Loch – Eine Bilanz, at 10 (Aug. 10, 2004) (Exhibit US-182). This document was published by the Realisierungsgesellschaft Finkenwerder mbH, a Hamburg government-owned company that the government established to manage the project. The United States discusses the

(continued...)

Mühlenberger Loch, a protected wildlife habitat[500] and the largest freshwater tideland in Europe. Since the Mühlenberger Loch area was entirely unsuitable for industrial use, Hamburg authorities offered to transform a portion of the Loch into an industrial site, and Airbus agreed:

> Hamburg . . . must deliver possession of the necessary space in Mühlenberger Loch on time and in a condition suitable for building, so that the construction of the production facilities can be completed so as to guarantee timely delivery in accordance with the ATO (Authorization to Offer).[501]

425. Hamburg expended enormous resources to transform the Mühlenberger Loch into an industrial site meeting Airbus's specifications and to extend the existing company runway on Airbus's Hamburg site to accommodate A380 flights:

- First, Hamburg had to create 1.4 square kilometers (140 hectares) of land by transforming the wetland area into a developed industrial site suitable for housing Airbus's production facilities.[502]

- Second, Hamburg built a 4.5 kilometer-long flood protection system, erected a new quay wall with Roll-on/Roll-off installations to load A380 parts manufactured in Hamburg onto ships, and provided other facilities and infrastructure required by Airbus.[503]

- Third, since Mühlenberger Loch was protected under the RAMSAR Convention and the EC's Flora, Fauna and Habitat rules, Hamburg had to request approval

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[499] (...continued)
company in more detail below.

[500] *See* A REA, A380-Werkserweiterung im Mühlenberger Loch – Eine Bilanz, at 10 (Aug. 10, 2004) (Exhibit US-182).

[501] Hamburgische Bürgerschaft, Drucksache 16/4734, Mitteilung des Senats an die Bürgerschaft, at 2 (Sept. 5, 2000) (emphasis added) (In the original German, "So muss Hamburg insbesondere die notwendigen Flächen im Mühlenberger Loch zeitgerecht in einem bebaubaren Zustand übergeben, damit der Bau der Produktionseinrichtungen so abgeschlossen werden kann, dass eine termingerechte Auslieferung gemäß ATO (Authorization to Offer - Einholung verbindlicher Kaufzusagen) sichergestellt its.") (Exhibit US-183).

[502] A REA, A380-Werkserweiterung im Mühlenberger Loch – Eine Bilanz, at 10, 29 (Aug. 10, 2004) (Exhibit US-182); *see also* Hamburgische Bürgerschaft, Drucksache 16/4734, Mitteilung des Senats an die Bürgerschaft, at 8 (Sept. 5, 2000) (providing a detailed description of the project) (Exhibit US-183). The latter document includes a map that shows the area created in Mühlenberger Loch, the existing facilities, and the surroundings. *See id*., at Anhang (attachment) 1. In addition, Anlage 1 (annex 1) of the document shows how Airbus intends to use the newly-created area.

[503] *See, e.g.,* A REA, A380-Werkserweiterung im Mühlenberger Loch – Eine Bilanz, at 12 (Aug. 10, 2004) (Exhibit US-182). In addition, some of the measures taken are identified on a map set out in Annex ("Anlage") 2a to Hamburgische Bürgerschaft, Drucksache 16/4734, Mitteilung des Senats an die Bürgerschaft, at 8 (Sept. 5, 2000) (Exhibit US-183).

from the European Commission for the project[504] and provide substitute wetland areas elsewhere in Germany as compensation.[505] It also had to defend against lawsuits by environmental groups seeking to halt the Loch's destruction.[506]

- Fourth, Hamburg extended the existing Airbus runway to the North and to the South. This required the creation of 80,281 square meters of new land ("Rüschhalbinsel"),[507] the relocation of the access channel to the Rüsch harbor, the construction of the runway extension to the North, the purchase of land to the South, and other measures.[508]

426. Hamburg established a wholly government-owned entity, the Projektierungsgesellschaft Finkenwerder mbH & Co. KG ("ProFi"), to implement the project. Hamburg gave ProFi the ownership rights to the existing and future land and provided ProFi the funds needed to create and develop the site and to build the additional Airbus facilities that Hamburg had promised to provide. According to the publicly available information, ProFi then entered into a 20-year lease with Airbus for the land and facilities.[509]

427. In addition, Hamburg set up and funded a second wholly government-owned company, the ReGe Hamburg Projekt-Realisierungsgesellschaft mbH ("ReGe"), to manage the project and deal with flood protection measures.[510]

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[504] *See* Hamburgische Bürgerschaft, Drucksache 16/4734, Mitteilung des Senats an die Bürgerschaft, at 1 (Sept. 5, 2000) (Exhibit US-183); Hamburgische Bürgerschaft, Drucksache 18/4115, Mitteilung des Senats an die Bürgerschaft, at 7-8 (Apr. 18, 2006) (Exhibit US-184). The RAMSAR Convention on Wetlands, signed in Ramsar, Iran, in 1971, is an intergovernmental treaty which provides a framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. *See* http://www.ramsar.org/.

[505] *See*, *e.g.*, A REA, A380-Werkserweiterung im Mühlenberger Loch – Eine Bilanz, at 20, 23 (Aug. 10, 2004) (Exhibit US-182)

[506] *See, e.g., Injunction Sought in Germany's Highest Court to Stop Airbus' Destruction of Protected Habitat*, PR Newswire, Hamburg (Apr. 25, 2001) (Exhibit US-185).

[507] *See* the map set out in attachment ("Anhange 1") of Hamburgische Bürgerschaft, Drucksache 16/4734, Mitteilung des Senats an die Bürgerschaft (Sept. 5, 2000) (Exhibit US-183).

[508] Hamburgische Bürgerschaft, Drucksache 16/4734, Mitteilung des Senats an die Bürgerschaft, at 8-9 (Sept. 5, 2000) (Exhibit US-183).

[509] *See, e.g.*,Hamburgische Bürgerschaft, Drucksache 17/3641, Mitteilung des Senats an die Bürgerschaft, at 5-6 (nos. 2.2, 2.3), 9 (Nov. 11, 2003) (Exhibit US-186); Hamburgische Bürgerschaft, Drucksache 16/4734, Mitteilung des Senats an die Bürgerschaft, at 12-14 (Sept. 5, 2000) (Exhibit US-183). The publicly available information indicates that Airbus is leasing 1.6 million square meters of land, the roll-on, roll-off facility, quays, floodgates, pump stations, and drainage systems, as well as infrastructure related to Airbus's runway. Although the Annex V Facilitator explicitly requested the EC to provide a copy of the lease agreements, the EC refused to do so.

[510] *See, e.g.,* Hamburgische Bürgerschaft, Drucksache 16/4734, Mitteilung des Senats an die Bürgerschaft, at 12-14 (Sept. 5, 2000) (Exhibit US-183). The original name of ReGe was Realisierungsgesellschaft DA-Erweiterung mbH. It was renamed the Realisierungsgesellschaft Finkenwerder mbH, and then renamed again to its current name. *See* Hamburgische Bürgerschaft, Drucksache 18/1512, Mitteilung des Senats an die Bürgerschaft, at 5

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428. Hamburg estimated that the total cost of the project would be Euro 693,700,000.[511] The Hamburg Accounting Office criticized this estimate and predicted that the total costs to Hamburg would amount to Euro 751,000,000.[512]

429. A September 2000 report that the Hamburg government provided to the Hamburg Parliament analyzed the project under SCM Agreement rules and concluded that the project was a subsidy:

> It is true that the improvements to the infrastructure of the area and its subsequent lease to AI is, in principle, a subsidy within the meaning of Article 1 (1) (iii) of the GATT Subsidy Agreement . . . .[513]

b. The Provision of the Hamburg Site Constitutes a Financial Contribution to Airbus

430. Article 1.1(a)(1)(iii) of the SCM Agreement includes the provision of goods or services other than general infrastructure among the types of measures that constitute financial contributions. As the above description demonstrates, the provision of the Hamburg-Finkenwerder site to Airbus[514] constitutes the provision of "goods or services other than general infrastructure," and thus constitutes a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement.

c. The Provision of the Hamburg Site Confers a Benefit on Airbus

431. The provision of the Hamburg-Finkenwerder site to Airbus also confers a benefit on Airbus within the meaning of Article 1.1(b) of the SCM Agreement because the Hamburg

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[510] (...continued)
(Dec. 21, 2004) (Exhibit US-184).

[511] According to the Hamburg government's final report on the creation of the site, Hamburg had already contracted 89 percent (Euro 617.4 million) and spent 87 percent (Euro 603.5 million) of this amount by August 31, 2005. *See* Hamburgische Bürgerschaft, Drucksache 18/4115, Mitteilung des Senats an die Bürgerschaft, at 11-12 (annex 1) and 13 (annex 2) (Apr. 18, 2006) (Exhibit US-184). The Hamburg government categorized the Euro 693.7 million as follows: Euro 581.5 million to create and develop the site; Euro 29.3 million for flood protection; and the remainder to create substitute wetland areas elsewhere in Germany. Hamburgische Bürgerschaft, Drucksache 18/4115, Mitteilung des Senats an die Bürgerschaft, at 11-12 (Apr. 18, 2006) (Exhibit US-187).

[512] *See* Hamburgische Bürgerschaft, Drs. 17/2267, Report from the Audit Office to the Bürgerschaft, at 155 (Feb. 19, 2003) (Exhibit US-188).

[513] Hamburgische Bürgerschaft, Drs. 16/4734, at 3 (in the original German, "Bei der infrastrukturellen Herrichtung der Fläche und der anschliessenden Vermietung an AI handelt es sich […] grundsätzlich […] um eine Subvention im Sinne des Artikel 1 Absatz 1 (iii) des GATT-Subventionsübereinkommens") (Exhibit US-183).

[514] As the United States noted above, the provision of the site to Airbus included the transformation of the Mühlenberger Loch into land fit for production facilities, the putting into place and provision of a flood protection system, a new quay wall, an extension of the runway, other facilities and infrastructure on the site, etc.

authorities created a site that the market would not have created and they have provided the site to Airbus for less than adequate remuneration.

i. The Hamburg Government created a site that the commercial market would not have created

432. As the United States noted above, the publicly available information indicates that the Hamburg authorities spent approximately Euro 751,000,000 to create the Hamburg-Finkenwerder site. Since the surface area of the site is 1.4 square kilometers (or 1,400,000 square meters), this amounts to an investment of approximately Euro 536.43 per square meter. As explained in the attached report by the German real estate surveyor firm Dr. Keunecke & Stoehr, however, the fair market value for land in the immediate vicinity of the Hamburg site in 2000, the year in which the government decided to create and develop the site, ranged between Euro 51.13 and Euro 61.36 per square meter.[515] Therefore, the Hamburg government spent Euro 751,000,000 to create a site that was worth between Euro 71,600,000 and Euro 85,900,000.[516]

433. As the Keunecke Report notes, a commercial investor in real property in Germany would not have made such an investment. Rather, if Airbus had wanted to expand its facilities at Hamburg-Finkenwerder, it would have had to spend the Euro 751,000,000 to create the site itself, thus significantly increasing the costs of the A380 project.[517] Consequently, the Hamburg government's decision to create the land and provide it to Airbus confers a benefit on Airbus within the meaning of Article 1.1(b) of the SCM Agreement.

434. This approach to analyzing the benefit to Airbus from the Hamburg project is virtually identical to the approach the European Commission uses to determine whether the sale of land

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[515] Expert Opinion No. 27649/06, Benchmarks for Land Values concerning Hamburg Airbus Site "Mühlenberger Loch," Kreekslag 10, 21129 Hamburg Firkenwerder, 9 October 2006 ("Keunecke Report") (Exhibit US-189). The relevant portion of the report is on page 5 (Exhibit US-189). The 30-person office of Dr. Keunecke & Stoehr is one of the most respected real estate surveyors in Germany. Its two partners, Dr. Klaus-Peter Keunecke and Eberhard Stoehr, have been appointed and sworn in as public surveyors by the Berlin Chamber of Commerce for the appraisal of developed and undeveloped plots of real estate and of leases.

[516] 1.4 million square meters at Euro 51.13 to Euro 61.36 per square meter equals Euro 71,582,000 to Euro 85,904,000. In addition, the Hamburg government's own reports estimated that the land Hamburg created had a maximum value of Euro 61.35 per square meter. Hamburgische Bürgerschaft, Drucksache 16/4734, Mitteilung des Senats an die Bürgerschaft, at 12 (Sept. 5, 2000) (Exhibit US-183) (explaining that "all the parcels of land that are later to be leased, including those owned by the City of Hamburg and those that must still be acquired from the German Government, will be transferred to the GmbH & Co. DG as contributions in kind (fair market value of about DM 50 million based on a commercial land value of DM 120/m2)") (in the original German, "Alle für die spätere Vermietung erforderlichen, im Eigentum der Freien und Hansestadt Hamburg befindlichen sowie die noch vom Bund zu erwerbenden Grundstücke sollen im Wege der Sacheinlage (Verkehrswert ca. 50 Mio. DM auf Basis eines Gewerbebodenwertes von 120.-DM/m2) auf die GmbH & Co KG übertragen werden"). The United States converted the amount to Euros using the official Euro/DM conversion rate. (Exhibit US-183).

[517] In this sense, the creation of the site is akin to a Euro 665-679 million grant to Airbus, since Airbus would have spent Euro 751 million to create a site worth only Euro 71.6-85.9 million.

constitutes state aid under EU state aid rules.[518] In *Scott Paper SA Kimberly-Clark*, for example, the Commission explained that the sale of land does not confer an "advantage" under EU state aid rules if:

> a private investor, on the basis of forecast potential profitability and ignoring any social, regional or sectoral policy considerations, would have invested in the land and then sold the plot at the same price as that asked by the local authorities.[519]

435. The *Scott Paper* case addressed a situation where the authorities had purchased existing land and transformed it from agricultural use to industrial use before selling it; they did not have to recoup the costs of creating the land in the first place. Thus, the facts were less egregious than the facts in Hamburg. Nevertheless, the Commission concluded that a private investor would not have gone ahead with the investment:

> the local authorities found themselves in a situation where no investment had been made apart from the initial purchase of the land in question for FRF 10,9 million (EUR 1,7 million). As explained in recital 157, when the local authorities decided to prepare the land and to build the factory warehouse, they already knew that the investment would result in a loss of some FRF 60 million (EUR 9,2 million). A private investor would not have gone ahead with such an investment.[520]

436. The same conclusion applies to the creation of the industrial site in Hamburg. When the Hamburg authorities committed to spend Euro 751,000,000 to transform a portion of the Mühlenberger Loch site into an industrial site, they knew the project would result in a loss of several hundred million euros. In the words of the European Commission, "a private investor would not have gone ahead with such an investment." By enabling Airbus to avoid spending the Euro 751,000,000 itself, the Hamburg government conferred a benefit on Airbus.

ii. The Hamburg Government is providing the site to Airbus for less than adequate remuneration

437. The United States has already noted that the publicly available information indicates the Hamburg government is leasing the Hamburg-Finkenwerder site to Airbus. Therefore, another basis for determining whether the government is providing the infrastructure for less than

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[518] As the United States noted in Section IV.A.2.b.vii, a government measure constitutes state aid under the EC's state aid rules when it "confers an economic advantage on a recipient." A requirement to show that a measure "confers an economic advantage on the recipient" is virtually identical to the SCM Agreement's requirement to show that a financial contribution confers a "benefit" on the recipient. Therefore, a DG-Competition finding that a particular measure is state aid is tantamount to a finding that the measure is a subsidy within the meaning of the SCM Agreement.

[519] *See* European Commission, Decision of July 12, 2000, Aid to Scott Paper SA Kimberly-Clark, OJ (2002) L 12/1, para. 149 (Exhibit US-190).

[520] *See* European Commission, Decision of July 12, 2000, Aid to Scott Paper SA Kimberly-Clark, OJ (2002) L 12/1, paras. 165 (emphasis added) (Exhibit US-190).

adequate remuneration is to determine whether the rent Airbus is paying under the lease will allow Hamburg to recoup its investment plus a market-based rate of return.

438. As the Keunecke report explains, commercial investors in real estate in Germany (*i.e.*, providers of capital to create and develop real estate and real property in Germany) expect to receive an annual return on their net investment (including financing costs) of between 9 and 12 percent.[521] To obtain even a 9 percent return, Hamburg would need to charge Airbus at least Euro 67.5 million per year in rent; to achieve a 12 percent return, the lease price would need to be set at over Euro 90 million per year.[522]

439. The EC and Germany refused to provide a copy of the lease to the Annex V Facilitator, so the United States does not know the precise amount of rent that Airbus is paying. It is highly unlikely that Hamburg is charging Airbus anywhere near that required to constitute adequate remuneration, however. First, Hamburg's former minister for economic affairs confirmed in an interview in March 2003 that the terms of the lease will result in a loss to the government:

> The investment would in fact be unprofitable based on the rent alone. The whole thing must be viewed in terms of the public economy.[523]

440. Second, reports by the Hamburg government to the Hamburg Parliament in late 2003 and early 2006 regarding the creation of the site state that the government expects Airbus to pay a total of Euro 29 million in rent through 2007.[524] That amounts to only Euro 4.9-7.25 million per year, which is less than a one percent annual return, before inflation. Viewed in this manner, the Hamburg project can be seen for what it is – an outright grant.

441. Finally, the United States notes again that the Hamburg government itself has admitted that the infrastructure project is a subsidy within the meaning of the SCM Agreement:

> It is true that the improvements to the infrastructure of the area and its subsequent lease to AI is, in principle, a subsidy within the meaning of Article 1 (1) (iii) of the GATT

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[521] Keunecke Report at 9-10 (Exhibit US-189); *see also Immobilienstandort Metropolregion Hamburg: Die Logistikbranche boomt dank dem Hafen*, Frankfurter Allgemeine Zeitung (June 3, 2005) (explaining that German investors expect recovery of their investments, not including financing costs or profits, to take 13 years) (Exhibit US-191).

[522] Keunecke Report at 10 (Exhibit US-189).

[523] *Airbus! Hark Bohm, Verlegen Bauer, Senator Uldall streiten beim Abendblatt*, Hamburger Abendblatt, at 3 (Mar. 2003) (in the original German, "Mit dem Zins alleine ware die Investition in der Tat unrentabel. Das Ganze muss volkswirtschaftlich betrachtet werden") (Exhibit US-192).

[524] Hamburgische Bürgerschaft, Drücksache 18/4115, Mitteilung des Senats an die Bürgerschaft, at 8 (Apr. 18, 2006) (Exhibit US-184); Hamburgische Bürgerschaft, Drücksache 17/3641, Mitteilung des Senats an die Bürgerschaft, at 8 (Nov. 11, 2003) (Exhibit US-186).

Subsidy Agreement . . . .[525]

442. In sum, the publicly available information indicates that the Hamburg government has provided the Hamburg site to Airbus for less than adequate remuneration. The EC's and Germany's refusal to provide a copy of the lease to the Annex V Facilitator is implicit confirmation of this fact. Therefore, the Panel should find that the Hamburg infrastructure project confers a benefit – and thus a subsidy – on Airbus.

d. The Hamburg Infrastructure Subsidies Are Specific Within the Meaning of Article 2 of the SCM Agreement

443. The publicly available information indicates that the Hamburg-Finkenwerder subsidies are specific within the meaning of Article 2 of the SCM Agreement.

444. The subsidies are specific "in law" to Airbus because the Hamburg authorities custom-built the Hamburg-Finkenwerder site to Airbus's specifications in order to provide space for Airbus's A380 assembly facility. In addition, the subsidies are specific "in fact" to Airbus because Airbus is the only company located on the site, Airbus is the only company that can use the site (the site is surrounded by water on three sides and by Airbus's existing facilities on the land side), and the Hamburg authorities exercised their discretion to create the site especially for Airbus.

e. The EC's Refusal to Provide Requested Information Gives Rise to Inferences

445. The evidence that the United States discussed above demonstrates that the development of the Hamburg-Finkenwerder site and its provision to Airbus is a financial contribution that confers a benefit on Airbus within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement. Furthermore, the United States notes that during the Annex V process, the Facilitator asked the EC and Germany to provide numerous categories of information relating to the creation of the site, including the total costs that Hamburg incurred to create the site; the terms and conditions of any sale or lease of any portion of the site to Airbus; and information regarding any payments by Hamburg to create the facilities that Airbus located on the site.[526] The EC and Germany refused to provide any of the information that the Facilitator requested.[527] The logical inference to be drawn from their refusals is that the information would have supported the U.S. claim that the measure is a specific subsidy. The United States suggests that the Panel draw such a logical inference. In

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[525] Hamburgische Bürgerschaft, Drs. 16/4734, at 3 (in the original German, "Bei der infrastrukturellen Herrichtung der Fläche und der anschliessenden Vermietung an AI handelt es sich […] grundsätzlich […] um eine Subvention im Sinne des Artikel 1 Absatz 1 (iii) des GATT-Subventionsübereinkommens") (Exhibit US-183).

[526] *See* Questions 38-45 from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

[527] *See* EC Responses to Questions 38-45 from the Facilitator (Exhibit US-5; see BCI Annex).

addition, this would appear to be a situation in which, in accordance with paragraph 7 of Annex V, the Panel would be justified in drawing an adverse inference that the withheld information demonstrates that the measure is a specific subsidy and the United States respectfully requests that the Panel so infer.

2. German Authorities Subsidized Airbus by Helping Pay the Costs of Constructing the A380 Assembly Line in Hamburg

446. In addition to creating and developing the Hamburg-Finkenwerder site, Hamburg also agreed to share the costs that Airbus incurred to construct the A380 assembly facilities. As a Hamburg Senate Report explains:

> In addition, AI {*i.e.*, Airbus Industrie} has taken {its decision to locate in Hamburg based on} Hamburg's offer with respect to the assumption of costs, made during the Incentive Campaign . . . . This {initiative} . . . includes participation in the costs of portions of the so-called "FAL" investments (FAL = final assembly line). This includes pile foundations for the building, strengthening the operating areas, and the costs of training new employees (the aerospace industry training program).[528]

447. While Hamburg made these financial contributions in connection with the creation and provision of the Hamburg-Finkenwerder site to Airbus, the contributions did not take the form of "goods or services other than general infrastructure." Instead, Hamburg provided co-financing, either as ex-ante payments to Airbus or as ex-post reimbursements.

448. During the Annex V process, the Facilitator asked the EC and Germany for information on these grants. The EC and Germany refused to provide the information.[529] Therefore, while the United States knows that Hamburg provided the grants, the amounts are unknown.

449. Nevertheless, as grants, the payments constitute direct transfers of funds, and thus financial contributions, within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. As the panel stated in *United States – Cotton*, grants "place the recipient in a better position than the recipient otherwise would have been in the marketplace," and thus confer benefits within the meaning of Article 1.1(b) of the SCM Agreement.[530] Therefore, the grants that Hamburg provided to Airbus are subsidies within the meaning of Article 1.1. In addition, since Hamburg made the grants as part of the overall Hamburg infrastructure project, they are specific for the same reasons that the Hamburg subsidies are specific.

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[528] Hamburgische Bürgerschaft, Drucksache 16/4734, Mitteilung des Senats an die Bürgerschaft, at 2 (Sept. 5, 2000) (emphasis added) (Exhibit US-183).

[529] *See* Question 44 from the Facilitator to the EC and Germany (Exhibit US-4; see BCI Annex); EC Response to Question 44 from the Facilitator (Exhibit US-5; see BCI Annex).

[530] *US – Cotton Subsidies (Panel)*, para. 7.1116; *see also Brazil – Aircraft (Article 21.5 II)*, para. 5.27 (stating that "{a}s a usual matter, of course, a non-refundable payment will confer a benefit").

3. German Authorities Subsidized Airbus by Spending at Least DM 50 Million to Lengthen the Runway at Bremen Airport for the Company's Exclusive Use

450. In addition to the infrastructure subsidies that German authorities provided to Airbus in Hamburg, Germany provided an additional DM 50 million in infrastructure subsidies to Airbus in Bremen.

451. Government authorities in the German region of Bremen agreed in 1988/1989 to extend the main runway at Bremen airport (RWY 09/27) to accommodate transport flights for Airbus wings manufactured in Bremen. The authorities extended the runway specifically for Airbus's requirements, and use of the extended portions of the runway is restricted to Airbus by regulation.[531] As a result, only Airbus can use the runway's entire 2,634 meters; the public runway is limited to just 2,034 meters.[532] The governing SPD in the Bremen Parliament has explicitly described the runway as a "Werksbahn" (or "company runway") for Airbus.[533]

a. The Provision of the Runway Constitutes a Financial Contribution to Airbus

452. Article 1.1(a)(1)(iii) of the SCM Agreement includes the provision of goods or services other than general infrastructure among the types of measures that constitute financial contributions within the meaning of the SCM Agreement. The extension of the Bremen runway and the provision of the runway to Airbus for its exclusive use constitutes the provision of "goods or services other than general infrastructure," and thus a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement.

b. The Provision of the Runway Confers a Benefit on Airbus

453. The provision of the runway also confers a benefit on Airbus. The City of Bremen paid the full DM 40 million cost of extending the runway,[534] and it spent another DM 10 million on

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[531] *See* the description in Verwaltungsgericht Bremen (Administrative Court) (Dec. 20, 2001), case no. 2K 2787/00, at 3 (Exhibit US-199); *see also* the maps published by the German air traffic control agency Deutsche Flugsicherung in the German AIP (Oct. 14 and Oct. 28, 2004) (Exhibit US-193); *see also* http://www.fluglaerm.de/bremen/flughafenvertrag _seite_1.htm for a description of the history of the extension (Exhibit US-194).

[532] *See id*.

[533] Bremische Bürgerschaft, Plenarprotokoll, 18, Sitzung, 12, Wahlperiode (May 18, 1988) at 1016 (stating also that the expenditure amounts to a subsidy of DM 250,000 per take-off) (Exhibit US-196); Bremische Bürgerschaft, Antrag (Entschließung) der Fraktion der SPD, Drucksache 12/194 (May 16, 1998) (Exhibit US-195).

[534] Bremische Bürgerschaft, Antrag (Entschließung) der Fraktion der SPD, Drucksache 12/194, para. 13 (May 16, 1988) (Exhibit US-195). The Bremen Parliament approved the extension and related expenditures on May 18, 1988. *See* Bremische Bürgerschaft, Plenarprotokoll, 18. Sitzung, 12. Wahlperiode, at 1018, 1028, 1032 (May 18,

(continued...)

noise reduction measures.[535] Airbus did not reimburse Bremen for any of these costs. In addition, neither the current fee regulations for Bremen airport nor the fee regulations that have applied in the past provide for additional landing fees for Airbus beyond those generally applicable to other users of the airport, even though Airbus is the only company allowed to use the runway's full length.[536]

c. The Provision of the Runway is Specific to Airbus

454. The provision of the runway is also specific to Airbus within the meaning of Article 2 of the SCM Agreement. As the United States has already explained, the Bremen authorities built the runway specifically for Airbus, and the use of the two 300 meters extensions of the runway is explicitly limited to Airbus by regulation.

d. The EC's Refusal to Provide Requested Information Gives Rise to Inferences

455. The evidence that the United States discussed above demonstrates that the extension of the Bremen runway and the provision of the runway to Airbus for its exclusive is a financial contribution that confers a benefit on Airbus within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement. Furthermore, the United States notes that during the Annex V process, the Facilitator asked the EC and Germany to provide numerous categories of information relating to the Bremen runway, including the costs incurred to extend the runway, rules for using the runway, and fees that Airbus and other users pay to use the runway.[537] The EC and Germany refused to provide any of the information that the Facilitator requested.[538] The logical inference to be drawn from their refusals is that the information would have supported the U.S. claim that the measure is a specific subsidy. The United States suggests that the Panel draw such a logical inference. In addition, this would appear to be a situation in which, in accordance with paragraph 7 of Annex V, the Panel would be justified in drawing an adverse inference that the withheld information demonstrates that the measure is a specific subsidy and the United States respectfully requests

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[534] (...continued)
1988) (Exhibit US-196).

[535] Bremische Bürgerschaft, Antrag (Entschließung) der Fraktion der SPD, Drucksache 12/194, para. 12 (May 16, 1988) (Exhibit US-195); *see also* Fücks (Grüne), Bremische Bürgerschaft, Plenarprotokoll, 18. Sitzung, 12. Wahlperiode, at 1016 (Exhibit US-196).

[536] *See* Airport Bremen "Gebühren/Entgelte – Auszug aus der Entgeltordnung für den Verkehrsflughafen Bremen, gültig ab 01.01.2005" (Exhibit US-197); *see also* the International Air Transport Association's overview of Bremen airport charges from 1989-2005 that provides no special charges to Airbus for the use of the 300 meter extensions (Exhibit US-198). Use of the runway is exclusively for aircraft types Aero Spacelines 377 Guppy/Super-Guppy carrying freight consisting of Airbus wings (models A330/A340 and future planes). Verwaltungsgericht Bremen, Az. 2 K 2787/00, at 3 (Exhibit US-199).

[537] *See* Questions 48-55 from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

[538] *See* EC Responses to Questions 38-45 from the Facilitator (Exhibit US-5; see BCI Annex).

that the Panel so infer.

4. French Authorities Subsidized Airbus by Creating the AéroConstellation Industrial Site in Toulouse for the A380

456. As the United States noted above, Airbus decided to establish two assembly sites for the A380, one in Hamburg, and the other in Toulouse. And like Hamburg, French authorities in Toulouse assisted Airbus by agreeing to develop the site. Specifically, French authorities expended some Euro 200,000,000 to transform agricultural land next to Airbus's Toulouse headquarters and the Blagnac airport into the "AéroConstellation" site[539] – an aeronautics industrial park that French authorities described as a "tailor-made solution for the A380"[540] – and to connect the site to the "Itinéraire à Grand Gabarit" ("IGG"), the extra wide highway that France created to make it possible for Airbus to transport A380 components from the French coast to Toulouse. In addition to the funds that the French national government expended, Greater Toulouse expended funds on preparatory studies, waterways, and development of the site;[541] the Département de la Haute-Garonne financed modifications to a number of roads needed to accommodate A380 transport vehicles and to link the site to the IGG;[542] and the Région Midi-Pyrénées provided additional financing for the site.[543] In this section, the United States demonstrates that the development of the AéroConstellation site and its provision to Airbus is a subsidy within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement.

a. Factual Background on the AéroConstellation Site

457. The EC's refusal to provide any of the information that the Facilitator requested with respect to the AéroConstellation site has forced the United States to rely entirely on public sources of information for purposes of this submission. These sources indicate that the French national government, the SIVOM Blagnac Constellation (a group of local authorities), Grand Toulouse, and the Département de la Haute-Garonne agreed to provide Airbus with the site for

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[539] The AéroConstellation site is a "Zone d'Aménagement Concentrée" ("ZAC"), a particular classification under French law for land for industrial use. *See* Articles L-300-1 et seq., including, in particular, Articles L-311-1 et seq., of the French Code de l'Urbanisme.

[540] Airbus, press release, A*irbus' A380 Final Assembly Facility inaugurated by French President*, July 16, 2002 (Exhibit US-200); *see also* www.aeroconstellation.com, Le Programme Constellation, Quelques Chiffres, "Le ZAC AéroConstellation" (Exhibit US-201).

[541] *See* Overview of "investissements publics partagés" at http://www.aeroconstellation.fr (Exhibit US-202).

[542] *See* the list of modifications published by the Conseil Général de la Haute-Garonne on its website at http://www.cg31.fr/actioncg31.asp?id=31 (Exhibit US-203).

[543] *See* the overview of "investissements publics partagés" at http:www.aeroconstellation.fr (Exhibit US-202). In addition to aid for the AéroConstellation site, France expended additional funds to construct the IGG itself, as well as funds on the development and construction of port facilities in Pauillac, the Pont de Pierre and the Installations Nautiques de Langon.

the A380:[544]

> In order to sustain Airbus' success, Europeans need a large capacity aircraft to compete with its American competitor. In that light, the A380 program was launched. The first phase involves the construction of the facilities. Thus, in the proximity of Blagnac, Colomiers and Toulouse, AéroConstellation has become one of the largest development projects of Europe.[545]

458. The publicly available information indicates that French authorities expended at least Euro 158,000,000 to develop the AéroConstellation site itself (which had previously been agricultural land used to grow vegetables), and another Euro 49,000,000 on roads (discussed in greater detail in Section C).[546] It also indicates that France[547] eventually sold approximately 49

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[544] *See, e.g.,* City of Blagnac, Les Parc d'Activités, available at http://www.blagnac-eco.com (Exhibit US-201). The "district" mentioned was the District of Grand Toulouse, today the Communauté d'Agglomeration de Grand Toulouse. The protocol that is referred to and signed on that day states that the purpose of the site is "de donner au secteur aéronautique un espace de développement optimal, en complement d'opération engagées ou sur le point de l'être: […] candidature à l'intégration de l'A3XX." (that is, "to give the aeronautics sector a place for optimal development for operations that have been engaged in or will soon be engaged in."). *Les élus toulousains réservent un site pour la chaîne d'assemblage de l'Airbus géant,* Les Echos No. 17994, at 13 (Sept. 28, 1999) (Exhibit US-205).

[545] Mairie de Toulouse, Capitole Infos, Eté 2004 - Supplément du N°146: Un dessein pour Toulouse (Summer 2004), at 10 (in the original French, "Pour consolider le succès d'Airbus, les Européens devaient disposer d'un avion de grande capacité pour concurrencer le constructeur américain. Aussi, a été lancé le programme A 380. La première phase consistait à construire l'usine. C'est ainsi qu'à proximité des parcs aéronautiques de Blagnac, Colomiers et Toulouse, AéroConstellation est devenu l'un des plus vastes projets d'aménagement d'Europe.") (Exhibit US-206).

[546] *See* Website of PromoToulouse Midi-Pyrénées, http://www.promotoulouse.com/english/toulouse_mp/grandtoulouse.htm (discussing the development of the AéroConstellation site, including that "[t]o take on the challenge of such an exceptional construction project, both in scope and level of technology, Greater Toulouse invested 158 million euros.") (Exhibit US-207). *See also* www.aeroconstellation.com, Le Programme Constellation, Quelques Chiffres, "Le ZAC AéroConstellation", at 8 (stating that the "public investments" in the site amounted to Euro 182 million, including Euro 133 million to develop the site itself and another Euro 49 million for roads) (Exhibit US-201).

[547] The SIVOM Blagnac Constellation, a group of local authorities in the Toulouse region, originally decided to develop the AéroConstellation site. However, the Communauté d'Agglomération du Grand Toulouse assumed the responsibility of developing the site effective January 1, 2001. *See* Grand Toulouse, Flash AéroConstellation, Bulletin d'information des riverains, No 1, July/August 2001, available at http://www.grandtoulouse.org/index.php?pagecode=20 (Exhibit US-208); Conseil de Communauté d'Agglomération du Grand Toulouse du Lundi 29 janvier 2001, ZAC AéroConstellation Phase 1: Dossier de Réalisation, http://publi.agglo-grandtoulouse.fr/) (Exhibit US-209). Ultimately, SETOMIP, a French public sector company in the form of a "Société d'Economie Mixte" ("SEM"), acquired and developed the site and then provided it to the users, including Airbus. *See* Conseil de Communauté d'agglomération du Grand Toulouse du vendredri 17 mai 2002, extrait du register des deliberations, autorisation d'occupation temporaire (AOT) des terrains appurtenant a l'etat: Delegation au President, No 2002-05-ADU-01 (Exhibit US-210). The city of Toulouse, Grande Toulouse, the Région Midi-Pyrénées and the Département de l'Aveyron own 75.7 percent of the shares of SETOMIP, which is tasked with pursuing local development projects on behalf of its public sector owners. For more information, *see* http://www.setomip.fr (Exhibit US-211).

hectares of land on the site to Airbus[548] and that the French government is leasing the "General Interest Equipment" (Equipements d'Intérêt Général) on the site – such as roads, taxiways, and aircraft parking spaces – to Airbus and the rest of the "association of users" (association d'usagers) under a 40-year lease.[549]

459. The publicly available information also indicates that the aeronautics industry is the only industry that may use the AéroConstellation site (including the EIG facilities) and that Airbus itself is the predominant user of the site. For example, when Greater Toulouse became responsible for creating the site in 2001, it gave the site its current name – "AéroConstellation" – and formally dedicated it to the aeronautics industry[550] as a "zone d'activités à vocation aéronautique"[551] that is "entièrement dédiée à l'aéronautique" (entirely dedicated to aeronautics).[552]

460. An official map of the AéroConstellation site demonstrates that Airbus occupies the largest single space on the site. The website indicates that Airbus's production hall and other facilities owned by Airbus account for 49 hectares (or more than half) of the total 95 hectares available on the site for industrial facilities.[553] Air France, the second biggest occupant of the site, has described its facilities as "ten times smaller than those of EADS [Airbus]."[554]

461. Airbus is also the predominant or exclusive user of most of the infrastructure on the site. Most of the taxiways on the site exclusively connect Airbus' assembly and testing facilities to

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[548] *See* www.aeroconstellation.com, Le Programme Constellation, Quelques Chiffres, "Le ZAC AéroConstellation", at 8 (Exhibit US-201); *see also*, *Airbus entame la construction de l'usine Star de l'A380 à Blagnac*, Les Echos No. 18555, at 12 (Dec. 19, 2001) (Exhibit US-212); *Les collectivités locales ont investi 172 millions d'euros dans la zone Aéroconstellation*, Les Echos No. 19155, at 20 (May 10, 2004) (Exhibit US-213).

[549] *See* Conseil de Communauté de Grand Toulouse, Délibération no. 2004-05-ADU-01 (May 28, 2004) (Exhibit US-214); *Les collectivités locales ont investi 172 millions d'euros dans la zone Aéroconstellation*, Les Echos No. 19155, at 20 (May 10, 2004) (Exhibit US-213).

[550] The Conseil in fact changed the formal zoning designation for this purpose. *See* Conseil de Communauté d'Agglomération du Grand Toulouse du Jeudi 19 avril 2001, 4ième Modification de l'Acte de Création de la ZAC de Grand Noble II, p. 3, available at http://publi.agglo-grandtoulouse.fr/ (Exhibit US-215).

[551] City of Blagnac, Les Parc d'Activités, available at http://www.blagnac-eco.com (Exhibit US-204); *see also Les élus toulousains réservent un site pour la chaîne d'assemblage de l'Airbus géant*, Les Echos No. 17994, at 13 (Sept. 28, 1999) (citing the protocol signed between various local, regional and central authorities in France on September 27, 1999, that documented the commitment of these entities to establish the site) (Exhibit US-205).

[552] *See* the description of the site available at http://www.grandtoulouse.org/index.php?pagecode=20 (Exhibit US-216).

[553] This figure does not include the surface used for roads, taxiways, parking, etc., the predominant user of which is also Airbus. *See* www.aeroconstellation.com, Le Programme Constellation, Quelques Chiffres, "Le ZAC AéroConstellation," at 8 (Exhibit US-201).

[554] *Air France inaugure son nouveau centre industriel de Blagnac*, at 25 (April 2, 2004) ("… notre bâtiment étant dix fois plus petit que celui d'EADS.") (Exhibit US-217).

the airport.[555] The large space in front of Airbus's production hall is used exclusively by Airbus as a testing site for the A380.[556] Most of the roads on the site are for access to Airbus's facilities, and most of the parking spaces will be used by Airbus's and its suppliers' employees, who will account for 70 percent of the employees on the site.[557]

462. Finally, several of the other companies located at the site exist primarily to supply Airbus. For example, ELYO supplies Airbus with energy, water, and compressed air; Exxon Mobil provides fuel for the testing and operation of the A380; Capelle provides transportation for A380 parts; and STTS and SIDMI provide painting, assembly, and other specialized services.[558]

b. The Provision of the AéroConstellation Site Constitutes a Financial Contribution to Airbus

463. Article 1.1(a)(1)(iii) of the SCM Agreement includes the provision of goods or services other than general infrastructure among the types of measures that constitute financial contributions. The provision of the AéroConstellation site to Airbus, including the sale of a portion of the site and the lease of another portion of the site, constitutes the provision of "goods or services other than general infrastructure," and thus constitutes a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement.

c. The Provision of the AéroConstellation Site Confers a Benefit on Airbus

464. The provision of the AéroConstellation site also confers a benefit on Airbus within the meaning of Article 1.1(b) of the SCM Agreement. First, the French authorities sold a portion of the site to Airbus for less than adequate remuneration. Second, the authorities are leasing the general facilities on the site (the EIG facilities) to Airbus for less than adequate remuneration.

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[555] *See* map at http://www.grandtoulouse.org/admin/upload/fichier/AéroConstellation/AéroConstellation.htm (Carte interactive) (Exhibit US-218). The areas marked in red are the "public" infrastructure: the roads, taxiways and airplane parking spaces on the site.

[556] See map at http://perso.orange.fr/franceaero/plan/planaccueil.htm (Exhibit US-219).

[557] 2000 of 3000 total. *See Le président de la République a inauguré hier le chantier de construction du site d'assemblage de L'A380*, Les Echos No. 18.698, at 2 (July 17, 2002) (reporting that Airbus will be employing 2000 people in A380 assembly by 2008) (Exhibit US-220); *Les collectivités locales ont investi 172 millions d'euros dans la zone Aéroconstellation*, Les Echos No. 19155, at 20 (May 10, 2004) (reporting that total employment at the AéroConstellation site is expected to reach 3000 by 2008) (Exhibit US-213).

[558] *See* description of the site at http://www.grandtoulouse.org/index.php?pagecode=20 ("les industriels associés au projet A380") (Exhibit US-216); *see also Le Grand Toulouse, amenageur de l'avenir* (color prints) (Exhibit US-218); Press Release, *Elyo becomes an Airbus partner* (July 23, 2001) (Exhibit US-221); Press Release, *ExxonMobil set to fuel the first A380 Flight*, http://www.exxonmobilaviation.com/AviationGlobal/AviationNews/avn_xom_12090303.asp (Exhibit US-222).

i. The French Authorities sold land on the AéroConstellation site to Airbus for less than adequate remuneration

465. The French authorities sold portions of the AéroConstellation site to Airbus and the other aerospace companies located on the site. The publicly available information indicates that the sale confers a benefit on Airbus within the meaning of Article 1.1(b) of the SCM Agreement because the authorities sold the land for less than adequate remuneration.[559]

466. According to French government publications, the AéroConstellation site has a total usable surface area of 214 hectares, which includes both "commercial" surfaces that are available for sale to users, and the taxiways, parking areas, and other areas that the government is leasing to users. Press reports indicate that the French authorities have already sold at least 49 hectares of the "commercial" surfaces to Airbus and eight hectares to Air France, and an additional 17 hectares to Airbus suppliers and other aeronautics companies.[560] The evidence also indicates that approximately 21 hectares of "commercial" surfaces may still be available for sale,[561] at a price of Euro 45.73 per square meter.[562]

467. In addition, press reports indicate that the French authorities expected to receive some Euro 20 million in total from selling the "commercial" land on the site, although it is unclear whether the Euro 20 million is for the 74 hectares of land they had already sold to Airbus and the other users at the time of the press report or whether it is for the entire 95 hectares (including the

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[559] As the United States noted above, the EC and France refused the Annex V Facilitator's request for information on the price that Airbus paid for the land it purchased. *See, e.g., Question 66 from the Annex V Facilitator to the European Communities and the member States* (Exhibit US-4; see BCI Annex); *EC Response to Question 66 from the Annex V Facilitator* (Exhibit US-5; see BCI Annex). This refusal to cooperate has forced the United States to rely entirely on public sources of information for purposes of this submission.

[560] *See, e.g., Airbus entame la construction de l'usine Star de l'A380 à Blagnac*, Les Echos No. 18555, at 12 (Dec. 19, 2001) (reporting that Airbus had purchased 50 hectares on the site) (Exhibit US-212); *Les collectivités locales ont investi 172 millions d'euros dans la zone Aéroconstellation*, Les Echos No. 19155, at 20 (May 10, 2004) (reporting that portions of the site were to be sold to Airbus and Air France) (Exhibit US-213); *see also* map of the AéroConstellation site available at http://www.grandtoulouse.org (with respect to the supplier companies) (Exhibit US-218). Measuring the sizes of other companies on the site versus Airbus and Air France shows that these other companies occupied around 17 hectares.

[561] *See* www.aeroconstellation.com, Quelques Chiffres, at 8 (explaining that there are 38 hectares of total "surfaces commercialisables" in addition to Airbus' and Air France's sites) (Exhibit US-201). Subtracting the 17 hectares that have already been sold from the 38 total hectares indicates that 21 hectares remain for industrial use and sale.

[562] *See* Agence d'Urbanisme et d'Aménagement du Territoire Toulouse Aire Urbaine, Atlas des Parcs d'Activités de la Haute-Garonne, available at http://www.auat-toulouse.org (Exhibit US-223); *see also Airbus entame la construction de l'usine Star de l'A380 à Blagnac*, Les Echos No. 18555, at 12 (Dec. 19, 2001) (reporting that, as of December 2001, 37 hectares were still available at Euro 45.73 per square meter) (Exhibit US-212).

21 hectares that was still available at the time of the reports).[563] If the former, then the French authorities charged Airbus approximately Euro 270,000 per hectare, or Euro 27 per square meter.[564] If the latter, then they charged Airbus approximately Euro 140,000 per hectare, or Euro 14 per square meter.[565]

468. Either way, the sale of the land was for less than adequate remuneration, and thus confers a benefit on Airbus. First, as the United States has already noted, the French authorities spent at least Euro 158 million to develop the AéroConstellation site (which may or may not have included the value of acquiring the land itself),[566] which corresponds to Euro 74 per square meter.[567] Thus, they sold the land to Airbus at a significant loss. A commercial actor would have charged Airbus a significantly higher price, or it would not have created the AéroConstellation site at all.[568]

469. Second, as the United States noted, after the sale to Airbus, the French authorities were selling the remaining "commercial" surfaces on the site for Euro 45.73 per square meter – substantially more than the Euro 14 to Euro 27 per square meter that they charged Airbus.[569]

470. Finally, at the same time that they created the AéroConstellation site, the French authorities also created the ZAC Andromède, a mixed residential and commercial (offices, shopping, hotels, etc.) area developed primarily to respond to the residential and commercial needs arising from the AéroConstellation project. The French authorities are charging purchasers of land in the ZAC Andromède – which is nearly adjacent to the AéroConstellation

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[563] The French newspaper *Les Echos* has reported that the total cost of the site was an estimated Euro 172 million (not including financing costs and costs for roads, etc.) and that the net cost of the site was Euro 152 million (taking into account revenues from the sale of a portion of the land). *Les collectivités locales ont investi 172 millions d'euros dans la zone Aéroconstellation*, Les Echos No. 19155, at 20 (May 10, 2004) (Exhibit US-213). This indicates that the sale of the land was expected to bring in Euro 20 million.

[564] Specifically, Euro 20,000,000 (the price of the total parcel) divided by 74 hectares equals Euro 270,270 per hectare, or approximately Euro 27 per square meter.

[565] Specifically, Euro 20,000,000 (the price of the total parcel) minus Euro 9,600,000 (the price of the 21 hectares that the French authorities have not yet sold, at Euro 45.73 per square meter) = Euro 10,400,000 (the price that Airbus and the other users must have paid for the 74 hectares already purchased). Euro 10,400,000 divided by 74 equals Euro 140,000 per hectare, or Euro 14 per square meter.

[566] The publicly available information is unclear on this latter point.

[567] Specifically, Euro 158,000,000 divided by 214 hectares in total surface area equals Euro 738,317 per hectare, or Euro 74 per square meter.

[568] Viewed from this perspective, the Euro 158,000,000 is akin to a grant, since the French government spent funds to create a site that Airbus would otherwise have had to create itself.

[569] *See* Agence d'Urbanisme et d'Aménagement du Territoire Toulouse Aire Urbaine, Atlas des Parcs d'Activités de la Haute-Garonne, available at http://www.auat-toulouse.org (Exhibit US-223); *see also Airbus entame la construction de l'usine Star de l'A380 à Blagnac*, Les Echos No. 18555, at 12 (Dec. 19, 2001) (reporting that, as of December 2001, 37 hectares were still available at Euro 45.73 per square meter) (Exhibit US-212).

site – Euro 200 per square meter.[570] Thus, the French government itself is charging other companies significantly higher prices than they are charging Airbus. Commercial sellers of such land are likely charging even more.[571]

471. For all of these reasons, the French authorities are providing the land on the AéroConstellation site to Airbus for less than adequate remuneration, and thus confer a benefit on Airbus.

ii. The French Government is leasing the EIG facilities on the AéroConstellation site to Airbus for less than adequate remuneration

472. As the United States noted above, a substantial portion of the AéroConstellation site is devoted to so-called EIG facilities (taxiways, parking, etc.). The French authorities are leasing these facilities to Airbus and the other users of the site (the "association of users"). The publicly available information indicates that the lease confers a benefit on Airbus within the meaning of Article 1.1(b) of the SCM Agreement, because the terms of the lease provide for less than adequate remuneration.[572]

473. To be specific, the publicly available information indicates that the lease, with a term of 40 years, was concluded in June 2002.[573] The information also indicates that the French authorities based the lease price on the total cost of the infrastructure as originally estimated (Euro 53.4 million) in 2002. The rent was determined by way of analogy to a loan with a 2.2 percent annual interest rate, with repayment of the principal and interest spread over the 40-year term of the lease. In addition, the authorities agreed to make the annual rents progressive, with lower lease payments in the early years and higher amounts later.

474. When the original cost for the EIG facilities was estimated at Euro 53.4 million, the

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[570] *See* Atlas des Parcs d'activités de la Haute-Garonne, Blagnac, ZAC Andromède, available at http://www.auat-toulouse.org/cdza_trav/Rcs_swf/loader.php (Exhibit US-224).

[571] The EC and France rejected the Annex V Facilitator's request for information on the purchase price per square meter that commercial investors charge for land in the areas surrounding the AéroConstellation site. *See Question 66(g) from the Annex V Facilitator to the European Communities and the member States* (requesting information on the purchase price per square meter "for similar land for industrial uses in the areas surrounding the AéroConstellation site . . . , including the price paid for such land by commercial investors") (Exhibit US-4; see BCI Annex); *EC Response to Question 66 from the Annex V Facilitator* (refusing to answer the question) (Exhibit US-5; see BCI Annex).

[572] The EC and France refused the Annex V Facilitator's request for information on the terms and conditions of the lease. *See Question 67 from the Annex V Facilitator to the European Communities and the member States* (Exhibit US-4; see BCI Annex); *EC Response to Question 67 from the Annex V Facilitator* (Exhibit US-5; see BCI Annex).

[573] *See*, *e.g.*, Conseil de Communauté de Grand Toulouse, Délibération no. 2004-05-ADU-01, 28 May 2004 (Exhibit US-214); *see also Les collectivités locales ont investi 172 millions d'euros dans la zone Aéroconstellation*, Les Echos No. 19155, at 20 (May 10, 2004) (Exhibit US-213).

annual rent was expected to be between Euro 1.6 million (in 2007) and Euro 2.8 million (in 2042). By 2003, however, the total costs of the project had increased to Euro 69.2 million. The French authorities responded by modifying the lease. Under the new terms, the French authorities treated Euro 56 million like a 40-year loan with a 2.2 percent annual interest rate. The authorities applied a 4.5 percent interest rate, again over 40 years, to the remaining Euro 13.2 million.

475. In 2004, after costs increased again (to Euro 80.1 million in total), the French authorities changed the lease agreement for a second time. This time, the authorities decided to treat Euro 62.6 million in accordance with the original lease terms (*i.e.,* like a 40-year loan with a 2.2 percent annual interest rate), and they charged a 4.5 interest rate on the remaining Euro 17.5 million.[574]

476. Since the EC and France refused the Annex V Facilitator's request for the terms and conditions of the lease and the terms and conditions of equivalent commercial leases, it is not possible to calculate the exact amount of the benefit to Airbus. The publicly available information makes clear, however, that the French authorities agreed to a lease price that merely allows them to recover their costs (after 40 years), plus a minimal interest payment over the 40-year term of the lease, which may not even cover the cost of inflation.

477. A commercial investor would not have agreed to terms such as these, which only allow for recovery of costs; at a minimum, the investor would have demanded a lease price that would allow it to recoup not only the initial investment and financing costs, but also a reasonable rate of return on its investment, and within a reasonable period of time – not 40 years. Thus, the French authorities are leasing the EIG facilities to Airbus for less than adequate remuneration, and thereby conferring a benefit on Airbus within the meaning of Article 1.1(b) of the SCM Agreement.

d. The AéroConstellation Subsidies Are Specific Within the Meaning of Article 2 of the SCM Agreement

478. Finally, the AéroConstellation subsidies are specific within the meaning of Article 2 of the SCM Agreement.

479. First, the subsidies are specific "in law," because the entire site, including the EIG facilities, was "tailor-made" for the A380 and is explicitly dedicated to the aeronautics industry as a "parc d'activités aéronautiques". The subsidies are also specific "in fact," because only aeronautics companies and their suppliers are located on the AéroConstellation site, and the official map of the site confirms that Airbus is the primary or predominant user of the site,

[574] *See* Conseil de Communauté de Grand Toulouse, Délibération no. 2004-05-ADU-01 (May 28, 2004) (Exhibit US-214).

including the EIG facilities.[575]

e. The EC's Refusal to Provide Requested Information Gives Rise to Inferences

480. The evidence that the United States discussed above demonstrates that the development of the AéroConstellation site and its provision to Airbus is a subsidy within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement.. Furthermore, the United States notes that during the Annex V process, the Facilitator asked the EC and France to provide numerous categories of information relating to the AéroConstellation site, including a copy of the agreement in which the French national and regional authorities agreed to develop the site; a detailed description of the site development project; a list of the measures that French authorities undertook and the costs they incurred to develop the site; information regarding the terms and conditions of any purchase by Airbus or any other entities of any portion of the site; and information on Airbus's use of the site.[576] The EC and France refused to provide any of the information that the Facilitator requested. The logical inference to be drawn from their refusals is that the information would have supported the U.S. claim that the measure is a specific subsidy. The United States suggests that the Panel draw such a logical inference. In addition, this would appear to be a situation in which, in accordance with paragraph 7 of Annex V, the Panel would be justified in drawing an adverse inference that the withheld information demonstrates that the measure is a specific subsidy and the United States respectfully requests that the Panel so infer.

5. French Authorities Subsidized Airbus by Spending Approximately Euro 49 Million to Build Access Roads and to Link the Aéroconstellation Site to the IGG

a. Factual Background on Access Roads and Link to the IGG

481. In addition to the Euro 158,000,000 that the French authorities spent to develop the AéroConstellation site, they spent approximately Euro 49,000,000 to build access roads for Airbus and to link the site to the IGG.[577] These projects included:

- the rebuilding of the Route Départementale RD1 (or RD901), which crosses the AéroConstellation site at its southern end, including two underpasses where the road crosses the taxiways that link the site to Toulouse airport (at a total cost of Euro 17,000,000);

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[575] *See* above, paras. 458-461.

[576] *See Questions 56-72 from the Facilitator to the EC* (Exhibit US-4; see BCI Annex)*; EC Responses to Questions 56-72 from the Facilitator* (Exhibit US-5; see BCI Annex).

[577] *See* www.aeroconstellation.com, Le Programme Constellation, Quelques Chiffres, "Le ZAC AéroConstellation," at 8 (Exhibit US-201).

- the building and expansion of the Route Départementale RD902, including the construction of two traffic circles (one linking the RD902 to the IGG from Bordeaux/Toulouse, and the other linking the RD902 to the AéroConstellation site) (at a total cost of Euro 33,000,000); and

- the re-routing of the Route Départementale RD963, which serves as an access road for the transport of A380 components from other manufacturing sites in Germany, Spain and the United Kingdom over the IGG. (The United States has not been able to locate any information on the costs of the work on the RD963.)[578]

482. The French authorities have described these projects as "{t}he road work related to the AéroConstellation industrial site."[579] As one French government website explains:

> The state and the General Council of the Haute Garonne take part in this {AéroConstellation} project by developing the access roads for the site: the connection with the Very Wide Road (IGG), the construction work needed on the RD902 and the re-routing of the RD901.[580]

b. The Provision of the Access Roads and the Link to the IGG Constitutes a Financial Contribution to Airbus

483. As in the case of the AéroConstellation site itself, the provision of the access roads to the site and the link between the site and the IGG is the provision of "goods or services other than general infrastructure" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. As the United States noted above, the publicly available information indicates that the authorities built the roads and the link from the AéroConstellation site to the IGG specifically as part of the overall AéroConstellation project.

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[578] *See* Conseil Général de la Haute-Garonne, Les autres voies de circulation, available at http://www.cg31.fr/actioncg31.asp?id=31, at 3 (describing the construction measures) (Exhibit US-203); and Grand Toulouse, Flash AéroConstellation, Bulletin d'information des riverains, No. 1 (July/August 2001) (describing the construction measures) and Grand Toulouse, Flash AéroConstellation, Bulletin d'information des riverains, No. 11 (November/December 2002) (providing cost of work on RD901 and RD902) (both available at http://www.grandtoulouse.org/index.php?pagecode=20) (Exhibit US-208). *See also* the maps provided at http://www.grandtoulouse.org/article.php?arbocode=2&articlecode=53 (Exhibit US-218).

[579] Conseil Général de la Haute-Garonne, Les autres voies de circulation, available at http://www.cg31.fr/actioncg31.asp?id=31 (In the original French, "Les aménagements routiers d'accompagnement de la zone d'activité d'Aéroconstellation") (Exhibit US-203).

[580] Grand Toulouse, Dossier Complet d'AéroConstellation at 5, http://www.grandtoulouse.org/admin/upload/document/366-AéroConstellation.pdf (In the original French, "L'Etat et le Conseil Général de la Haute-Garonne participent à ce project [the AéroConstellation project] en réalisant les dessertes du secteur: l'aboutissement terminal de l'Itinéraire à Grand Gabarit, les travaux necessaries sur la RD902 et la deviation de la RD901.") (Exhibit US-201).

c. The Provision of the Access Roads and the Link to the IGG Confers a Benefit on Airbus

484. The publicly available information also indicates that the provision of the access roads and the link to the IGG confers a benefit to Airbus within the meaning of Article 1.1(b) of the SCM Agreement. Although the French authorities spent at least Euro 49,000,000 to develop the infrastructure (approximately Euro 17,000,000 to rebuild the RD901 through and beneath the AéroConstellation site and Euro 33,000,000 to adapt the RD902 to Airbus' needs),[581] the access roads and link have been provided to Airbus free of charge. In essence, their provision to Airbus is a grant.

d. The Subsidies Arising from the Provision of the Access Roads and the Link to the IGG Are Specific Within the Meaning of Article 2 of the SCM Agreement

485. Finally, the subsidies are specific within the meaning of Article 2 of the SCM Agreement. As the French authorities concede, the road-related projects are part of the broader AéroConstellation project. The authorities built the roads specifically for Airbus and the aeronautics companies located at the AéroConstellation site, and Airbus and the other aerospace companies located at the site are their primary or predominant users.

6. The Airbus Governments Have Provided Numerous Infrastructure-Related Grants to Airbus That Constitute Subsidies Within the Meaning of Article 1.1 of the SCM Agreement

486. In addition to the infrastructure subsidies that the United States has already discussed, the Airbus governments have further subsidized Airbus by providing numerous grants for the construction of Airbus and EADS manufacturing and assembly facilities. The grants at issue include (1) a Euro 6,000,000 grant by the German Land of Lower Saxony for the expansion of Airbus's Nordenham facility; (2) a £19,500,000 grant by the Welsh government for Airbus' Broughton site; and (3) approximately Euro 230,000,000 in grants by Spanish local and regional governments for the expansion and modernization of Airbus and EADS plants in Puerto de Santa Maria, Illescas, Puerto Real, and La Rinconada.

487. Article 1.1(a)(1)(i) of the SCM Agreement includes grants among the types of "direct transfers of funds" that constitute financial contributions. As the panel stated in *United States – Cotton*, grants "place the recipient in a better position than the recipient otherwise would have been in the marketplace," and thus confer benefits within the meaning of Article 1.1(b) of the

[581] Flash AéroConstellation , Bulletin d'information des riverains, No. 11 (November/December 2002), available at http://www.grandtoulouse.org/index.php?pagecode=20 (Exhibit US-208).

SCM Agreement.[582] Therefore, a grant necessarily constitutes a subsidy within the meaning of Article 1.1.

a. The Euro 6 Million Grant by the German Land of Lower Saxony for Airbus's Nordenham Site Is a Specific Subsidy

488. In June 2002, the parliament of the German land of Lower Saxony approved a Euro 6,000,000 grant to Airbus to help underwrite a Euro 49,000,000 expansion of Airbus's production facility in Nordenham.[583] The purpose of the expansion was to accommodate the production of components for the A380.[584] As a grant, the Euro 6,000,000 necessarily constitutes a subsidy within the meaning of Article 1.1 of the SCM Agreement.

489. The grant is also specific within the meaning of Article 2 of the SCM Agreement, since it is an *ad hoc* grant exclusively to Airbus for the specific purpose of expanding its A380 component production facility.[585]

b. The £19.5 Million Grant by the Welsh Assembly for Airbus's Broughton Facility Is a Specific Subsidy

490. On September 24, 2000, the Welsh Assembly announced that it had agreed to provide a £19,500,000 grant package to BAE Systems in support of its A380 wing production work in Broughton.[586] The package included £15,000,000 from the Welsh Development Agency for the "general infrastructure of a big site" and £4,900,000 for the "development of people."[587] As a grant, the £19,500,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement.

491. The grant is also specific within the meaning of Article 2 of the SCM Agreement. Initially, BAE Systems applied for a £25,000,000 grant under the Welsh Assembly's Regional

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[582] *US – Cotton Subsidies (Panel)*, para. 7.1116; *see also Brazil – Aircraft (Article 21.5 II)*, para. 5.27 (stating that "{a}s a usual matter, of course, a non-refundable payment will confer a benefit").

[583] Niedersächsischer Landtag, Drs. 14/3447, Entschliessungsantrag der SPD Fraktion, June 5, 2002 (Exhibit US-225).

[584] Niedersächsischer Landtag, Drs. 14/3447, Entschliessungsantrag der SPD Fraktion (June 5, 2002) (Exhibit US-225).

[585] Niedersächsischer Landtag, Drs. 14/3447, Entschliessungsantrag der SPD Fraktion (June 5, 2002) (Exhibit US-225).

[586] Press Release, *Rhodri Morgan Confirms Support Package for Broughton*, Welsh Assembly Government, W00957-ind (Sept. 24, 2000) (Exhibit US-226).

[587] House of Commons, Minutes of evidence taken before the Welsh Affairs Committee, testimony of Mr. Fleet (BAE), at 8 (Feb. 11, 2004) (Exhibit US-227); *see also* Welsh Enterprise Institute, "Reaching for the Skies or Waiting for the Wings to Fall off? The Welsh Assembly, Grant Aid and British Aerospace," Paper 8, November 2000, at 2, 9, 15 (Exhibit US-228).

Selective Assistance ("RSA") scheme.[588] The Welsh Assembly rejected the application, however, because it failed to meet the scheme's eligibility criteria. As the National Assembly First Secretary stated at the time:

> RSA is a discretionary grant. It is not an automatic subsidy for capital investment projects. To qualify for assistance, projects must demonstrate a need for grant. To offer assistance, we must be satisfied that the project will not proceed in the Assisted Area. Any amount offered is the minimum necessary to secure the project. It is not sufficient to say "We'll give you X jobs for £Y million". Companies actually do invest in Wales for sound commercial reasons, many without RSA. We must be satisfied that the grant requested is needed. If not, then we cannot offer support under RSA.[589]

492. The Welsh Assembly's rejection of BAE's application caused an uproar. Opposition politicians and union members attacked the Assembly's decision,[590] and BAE Systems threatened to move the A380 wing production work to Germany unless the Assembly reconsidered.[591] In the face of this pressure, the Welsh Assembly reversed itself and agreed to provide an *ad hoc* grant totaling £19,500,000 in lieu of the £25,000,000 initially requested.[592]

493. Additional evidence of the specificity of the £19,500,000 can be found in Article 2 of the UK A380 Launch Aid contract, **[**

[593]**]**.

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[588] Regional Selective Assistance is a discretionary grant scheme that the Welsh Assembly uses to help companies carry out capital investment projects in certain "assisted areas" in Wales. *See, e.g., Regional Selective Assistance Brochure* at 1 (downloaded from Welsh Assembly Government website on August 1, 2006) (Exhibit US-229). Under Article 2.2 of the SCM Agreement, such grants are specific by definition.

[589] Press Release, *Statement by Rhodri Morgan on RSA Grant Application by BAE Systems*, Welsh Assembly Government, W00302-Ind (Mar. 28, 2000) (Exhibit US-230).

[590] *See, e.g., MP Heads Airbus Lobby*, BBC News (May 23, 2000) (reporting that North Wales MP Barry Jones was leading a delegation of union officials to London to lobby the Wales Office to pressure the Welsh Assembly to reverse its denial of BAE's application) (Exhibit US-231); *Air Workers to Lobby Assembly*, BBC News (Sept. 6, 2000) (reporting that BAE workers were traveling to Cardiff to stage a protest rally and lobby the Welsh Assembly to reverse its decision) (Exhibit US-232); *Pressure Grows Over Plane Grant*, BBC News (Aug. 8, 2000) (reporting that workers at the BAE plant had established a "fighting fund" to pressure the Welsh Assembly) (Exhibit US-233).

[591] *See, e.g., Bishop Backs Airbus Campaign*, BBC News (June 6, 2000) (reporting on BAE's threat to move the work to Germany) (Exhibit US-234); Welsh Enterprise Institute, *Reaching for the Skies or Waiting for the Wings to Fall off? The Welsh Assembly, Grant Aid and British Aerospace*, Paper 8, November 2000, at 14 (noting that the Managing Director of BAE had informed workers that "[t]he Assembly decision will force us to look again at the extent of the work undertaken in Broughton.") (Exhibit US-228).

[592] *See, e.g.,* Press Release, *Rhodri Morgan Confirms Support Package for Broughton*, Welsh Assembly Government, W00957-Ind (Sept. 24, 2000) (Exhibit US-226).

[593] A380 Launch Aid Contract at Art. 2.1.2, DS-316-EC-BCI-0000556, 0000562 (the United States does not know **[** **]** referenced in the contract, because the EC redacted the relevant information from the copy of the contract that it provided to the Annex V Facilitator) (Exhibit US-79; see BCI

(continued...)

c. The Euro 2.2 million and Euro 814,000 Grants by the Spanish Government to EADS-CASA's Sevilla and La Rinconada Facilities Are Specific Subsidies

494. In April 2001, the Spanish Ministry of Economics issued an order approving regional grants of Euro 2,200,000 to EADS-CASA at Sevilla and Euro 814,000 to EADS-CASA at La Rinconada, Sevilla.[594] As grants, the Euro 2,200,000 and Euro 814,000 are subsidies within the meaning of Article 1.1 of the SCM Agreement.

495. The grants are also specific within the meaning of Article 2 of the SCM Agreement. The basis for the Ministry's action is a statute that authorizes grants "in geographical areas experiencing less favorable conditions and to those other {areas} that are experiencing particular economic difficulties."[595] Thus, eligibility for the subsidies is explicitly limited to certain designated geographical regions within the jurisdiction of the authority granting the subsidies (Spain). Under Article 2.2 of the SCM Agreement, "{a} subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific."

d. The Euro 37.9 Million Grant by the Spanish Government for Airbus España's Illescas (Toledo) Facility Is a Specific Subsidy

496. In March 2003, the Spanish Ministry of Economics approved a Euro 37,900,000 grant to Airbus España. The grant covered 15 percent of the total investment costs of an expansion of Airbus' parts and components production site in Illescas, in Toledo, Spain.[596] As a grant, the Euro 37,900,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement.

497. The grant is also specific within the meaning of Article 2 of the SCM Agreement. Like the Sevilla grants discussed above, the legal basis for the Ministry's order approving the Illescas grant was a statute that authorizes grants "in geographical areas experiencing less favorable

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[593] (...continued)
Annex).

[594] Orden ECO/981/2002 of April 12, 2002 (8621), Ministerio de Economia, Boletin Oficial del Estado Num. 108, May 6, 2002, at 16422, 16425 (Exhibit US-235). The regional incentives program is based on Law 50/1985 (Exhibit US-236).

[595] Law 50/1985 ("en las zonas geográficas menos favorecidas y en aquallas otras que atraviesan especiales difficultades económicas.") (Exhibit US-236).

[596] Orden ECO/1336/2003 of April 21, 2003 (10823), Ministerio de Economia, Boletin Oficial del Estado Num. 128, May 29, 2003, at 20803 (Exhibit US-237). *See* also Press Release, Ministry of Economics, *Aprobados Incentivos Regionales para cinco proyectos por 105 milliones Euro*, March 6, 2003 (Exhibit US-238). The regional incentive program is based on Law 50/1985 (Exhibit US-236).

conditions and to those other {areas} that are experiencing particular economic difficulties."[597] As the United States noted above, under Article 2.2 of the SCM Agreement, "{a} subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific."

e. The Euro 43.1 Million Grant by the Spanish Government for EADS-CASA's La Rinconada Facility Is a Specific Subsidy

498. In July 2003, the Spanish Ministry of Economics issued an order approving another regional grant, this time in the amount of Euro 43,100,000, to EADS-CASA at La Rinconada, in Sevilla.[598] As a grant, the Euro 43,100,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement.

499. The grant is also specific within the meaning of Article 2 of the SCM Agreement. Like the other Spanish grants that the United States has already discussed, the legal basis for the Ministry's order approving the La Rinconada grant was a statute that authorizes grants "in geographical areas experiencing less favorable conditions and to those other {areas} that are experiencing particular economic difficulties."[599] Thus, eligibility for the subsidy was explicitly limited to certain designated geographical regions within the jurisdiction of the authority granting the subsidies (Spain), and the subsidy is therefore specific under Article 2.2 of the SCM Agreement.

f. The Euro 5.9 Million Grant by the Spanish Government for EADS-CASA's Puerto de Santa Maria Plant Is a Specific Subsidy

500. In July 2003, the Spanish Ministry of Economics issued an order approving a Euro 5,900,000 grant to EADS-CASA at Puerto de Santa Maria, in Cadiz.[600] As a grant, the Euro 5,900,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement.

501. The grant is also specific within the meaning of Article 2 of the SCM Agreement. Once again, the legal basis for the Ministry's order approving the grant was a statute that authorizes grants "in geographical areas experiencing less favorable conditions and to those other {areas}

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[597] Law 50/1985 ("en las zonas geográficas menos favorecidas y en aquallas otras que atraviesan especiales difficultades económicas.") (Exhibit US-236).

[598] Orden ECO/2357/2003 of July 25, 2003 (16574), Ministerio de Economia, Boletin Oficial del Estado Num. 200, August 21, 2003, at 32282, 32284 (Exhibit US-239). The regional incentive program is based on Law 50/1985 (Exhibit US-236).

[599] Law 50/1985 ("en las zonas geográficas menos favorecidas y en aquallas otras que atraviesan especiales difficultades económicas.") (Exhibit US-236).

[600] Orden ECO/2357/2003 of July 25, 2003 (16574), Ministerio de Economia, Boletin Oficial del Estado Num. 200, August 21, 2003, at 32282, 32284 (Exhibit US-239). The regional incentive program is based on Law 50/1985 (Exhibit US-236).

that are experiencing particular economic difficulties."[601] Thus, eligibility for the subsidy was explicitly limited to certain designated geographical regions within the jurisdiction of the authority granting the subsidies. Therefore, the subsidy is specific under Article 2.2 of the SCM Agreement.

g. The Euro 13.1 Million Grant by the Spanish Government for EADS/Airbus Espana's Puerto Real Facility Is a Specific Subsidy

502. In July 2003, the Spanish Ministry of Economics issued an order approving a Euro 13,100,000 grant to EADS/Airbus Espana's facility at Puerto Real, in Cadiz.[602] As a grant, the Euro 13,100,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement.

503. The grant is also specific within the meaning of Article 2 of the SCM Agreement, as it rests on the same statutory authority as all of the other Spanish grants that the United States has discussed above.[603] The grant is specific for the same reasons that the earlier grants are specific.

h. The Euro 8.6 Million Grant by the Government of Andalusia for EADS-CASA's Puerto de Santa Maria Plant Is a Specific Subsidy

504. In July 2001, the government of the Spanish region of Andalusia provided a Euro 8,600,000 grant to CASA for a new production and maintenance facility in El Puerto de Santa Maria, in Cadiz.[604] As a grant, the Euro 8,600,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement.

505. The grant is also specific within the meaning of Article 2 of the SCM Agreement. Although the Puerto de Santa Maria grant was not provided under the national statute already discussed, it was provided as part of an Andalusian government development plan for the Bahia de Cadiz, which is a region in Andalusia.[605] Thus, like the grants provided by the national government, the Andalusian grant to Puerto de Santa Maria was provided under a program that was limited to a designated geographical region within the jurisdiction of the authority granting the subsidies (Andalusia). Under Article 2.2 of the SCM Agreement, "{a} subsidy which is

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[601] Law 50/1985 ("en las zonas geográficas menos favorecidas y en aquallas otras que atraviesan especiales difficultades económicas.") (Exhibit US-236).

[602] Orden ECO/2357/2003 of July 25, 2003 (16574), Ministerio de Economia, Boletin Oficial del Estado Num. 200, August 21, 2003, at 32282, 32284 (Exhibit US-239). The regional incentive program is based on Law 50/1985 (Exhibit US-236).

[603] Namely, Law 50/1985 ("en las zonas geográficas menos favorecidas y en aquallas otras que atraviesan especiales difficultades económicas") (Exhibit US-236).

[604] Agreement of July 10, 2001, by the Governing Council of the Regional Government of Andalusia, Boletin Oficial de la Junta de Andalucia, Num. 96, August 21, 2001, at 14.290 (Exhibit US-240); *see also* Expansión, *Casa y Cepsa reciben ayudas para sus nuevas fábricas en Andalucía* (May 16, 2001) (Exhibit US-241).

[605] *See* Agreement of July 10, 2001, by the Governing Council of the Regional Government of Andalusia, Boletin Oficial de la Junta de Andalucia, Num. 96, August 21, 2001, at 14.291 (Exhibit US-240).

limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific."

i. The Euro 35.7 Million Grant by the Andalusian Government for EADS-CASA's Sevilla Facility Is a Specific Subsidy

506. In July 2002, the government of Andalusia authorized a grant of Euro 35,700,000 for an investment by EADS-CASA in Sevilla.[606] The grant was 75 percent financed by the European Regional Development Fund and 25 percent financed by the Andalusian government.[607] As a grant, the Euro 35,700,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement.

507. The grant is also specific within the meaning of Article 2 of the SCM Agreement. Subsidies under the European Regional Development fund are necessarily limited to "certain enterprises located within a designated geographical region within the jurisdiction of the granting authority," and thus are specific within the meaning of Article 2.2 of the SCM Agreement.

j. The Euro 17.5 Million Grant by the Andalusian Government for EADS/Airbus Espana's Puerto Real Facility Is a Specific Subsidy

508. In July 2003, the government of Andalusia authorized a further grant of Euro 17,500,000 for the expansion and modernization of Airbus's facilities in Puerto Real, in Cadiz.[608] The

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[606] Agreement of July 30, 2002, by the Governing Council of the Regional Government of Andalusia, Boletin Oficial de la Junta de Andalucia, Num. 126, October 29, 2002, at 21.001(Exhibit US-242). *See also* Press Release of the Consejeria de Innovacion, Ciencia y Empresa de la Junta de Andalucia, *El Consejo aprueba ayudas de 44.9 millones de euros para los proyectos aeronauticos de EADS-CASA en Sevilla* (Exhibit US-244).

[607] *See* Agreement of July 30, 2002, by the Governing Council of the Regional Government of Andalusia, Boletin Oficial de la Junta de Andalucia, Num. 126, October 29, 2002, at 21.001(Exhibit US-242). The European Regional Development Fund is one of the Structural Funds that find their legal basis in Articles 158 *et seq*. of the EC Treaty. The purpose of the Fund is "to provide investment in socially and economically challenged areas of Europe." *See, e.g.*, the UK Government's European Regional Development Fund website, http://www.erdf.odpm.gov.uk (Exhibit US-245).

[608] Agreement of July 29, 2003, by the Governing Council of the Regional Government of Andalusia, Boletin Oficial de la Junta de Andalucia, Num. 193, October 7, 2003, at 21.178 (Exhibit US-246); *see also* website of the Junta de Andalucia, Referencias del Consejo de Gobierno, *La Junta respalda con una ayuda de 17.5 milliones de euros la ampliacion de la factoria de Airbus en Puerto Real* (July 29, 2003) (Exhibit US-247), and Diario de Sevilla, *La Junta acumula mas de 100 millones en ayudas al sector* (July 30, 2003) (Exhibit US-248). The expansion and modernization of the Airbus plant was to prepare for the "enormous" existing demand of Airbus planes, requirements for increased production speed, and production of new Airbus models. The evidence suggests that this grant related to the same investment in the Puerto Real facility that the United States discussed in subparagraph (g) above.

European Regional Development Fund co-financed the grant.[609] As a grant, the Euro 17,500,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement.

509. The grant is also specific within the meaning of Article 2 of the SCM Agreement. As the United States has already discussed, subsidies under the European Regional Development fund are limited to "certain enterprises located within a designated geographical region within the jurisdiction of the granting authority," and thus are specific within the meaning of Article 2.2 of the SCM Agreement. In addition, the grant was provided under an Andalusian government development plan for the Bahia de Cadiz region, and is specific within the meaning of Article 2.2 for that reason as well.[610]

k. The Euro 7.6 Million Grant by the Government of Castilla-La Mancha for Airbus España's Illescas Facility Is a Specific Subsidy

510. In March 2004, the government of Castilla-La Mancha approved a Euro 7,600,000 grant to Airbus España for the expansion and modernization of Airbus' parts and components production site in Illescas, in Toledo.[611] The European Regional Development Fund co-financed the grant.[612] As a grant, the Euro 7,600,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement.

511. The grant is also specific within the meaning of Article 2 of the SCM Agreement. Once again, subsidies under the European Regional Development fund are necessarily limited to "certain enterprises located within a designated geographical region within the jurisdiction of the granting authority," and thus are specific within the meaning of Article 2.2 of the SCM Agreement.

l. The Euro 61.9 Million Grant by the Andalusian Government for EADS-CASA's Sevilla/La Rinconada Facility Is a Specific Subsidy

512. In October 2004, the government of Andalusia authorized a grant of Euro 61,900,000 for an investment project by EADS-CASA in the municipalities of Sevilla and La Rinconada,

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[609] Agreement of July 29, 2003, by the Governing Council of the Regional Government of Andalusia, Boletin Oficial de la Junta de Andalucia, Num. 193, October 7, 2003, at 21.178 (Exhibit US-246).

[610] Agreement of July 29, 2003, by the Governing Council of the Regional Government of Andalusia, Boletin Oficial de la Junta de Andalucia, Num. 193, October 7, 2003, at 21.179 (Exhibit US-246). *See also* Decreto 288/1955 declaring the Bahia de Cadiz y Jerez de la Frontera a "special action zone" (Exhibit US-249); Decreto 24/2001 (Exhibit US-250).

[611] Press Releases, Government of Castilla-La Mancha, *Aprobados mas de 7.5 millones de euros para la modernizacion de la planta de Airbus en Illescas (Toledo)* (Mar. 16, 2004) and *Las ayudas a Airbus España permitiran crear 274 nuevos empleos en cuatro años en la region* (Mar. 17, 2004) (Exhibits US-251 and US-252).

[612] *Consejeria de Industria y Trabajo Decreto 53/1998, de 26-05-98, sobre la competitividad e incentivos a la inversión empresarial en Castilla - La Mancha*, Preambulo, tenth unnumbered para. (Exhibit US-253).

Sevilla.[613] As a grant, the Euro 61,900,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement.

513. The grant is also specific within the meaning of Article 2 of the SCM Agreement. The Government of Andalusia provided the grant as part of a program of incentives for the aeronautics industry to establish facilities in the Technology and Aeronautics Park of Andalusia.[614] Therefore, access to the program was explicitly limited to "certain enterprises" within the meaning of Article 2.1 of the SCM Agreement, as well as to "certain enterprises located within a designated geographical region within the jurisdiction of the granting authority" within the meaning of Article 2.2 of the SCM Agreement.

m. The EC's Refusal to Provide Requested Information Gives Rise to Inferences

514. The evidence that the United States discussed above demonstrates that each of the grants to Airbus is a subsidy within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement. Furthermore, the United States notes that during the Annex V process, the Facilitator asked the EC and the Airbus governments to provide numerous categories of information regarding each of the grants described above, including the amount of the grant; the reasons for approval of the grant; the terms and conditions of the grant; how Airbus used the grant money; and all agreements or other documents providing the legal basis for the grant.[615] The EC refused to provide any of the information that the Facilitator requested.[616] The logical inference to be drawn from their refusals is that the information would have supported the U.S. claim that the measures were specific subsidies. The United States suggests that the Panel draw such a logical inference. In addition, this would appear to be a situation in which, in accordance with paragraph 7 of Annex V, the Panel would be justified in drawing an adverse inference that the withheld information demonstrates that the measures are specific subsidies and the United States respectfully requests that the Panel so infer.

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[613] Agreement of October 19, 2004, by the Governing Council of the Regional Government of Andalusia, Boletin Oficial de la Junta de Andalucia, Num. 211, October 28, 2004, at 24.457 (Exhibit US-254). *See also* Cinco Dias, *Andalucia entrega 62 millones a la planta de EADS en Sevilla* (Oct. 20, 2004) (Exhibit US-255), and Expansion, *La Junta concede su mayor ayuda industrial a Eads* (Oct. 20, 2004) (Exhibit US-256).

[614] Agreement of October 19, 2004, by the Governing Council of the Regional Government of Andalusia, Boletin Oficial de la Junta de Andalucia, Num. 211, October 28, 2004, at 24.457 (Exhibit US-254), noting that the Order of the Council for Employment and Technological Development (Exhibit US-257) on which the aid is based is meant for "empresas del sector aeronáutico y para la localizacíon de entitades y empresas en el Parque Tecnológico y Aeronáutico de Andalucía" ("enterprises in the aeronautics sector and for the establishment of organizations and companies in the Technological and Aeronautics Park of Andalusia").

Moreover, according to the press releases cited above, the Euro 62 million grant was the largest the government of Andalusia had ever bestowed.

[615] *See, e.g., Questions 46, 73-76, and 77 from the Facilitator to the EC* (Exhibit US-4; see BCI Annex).

[616] *See EC Responses to Question 46, 73-76, and 77 from the Facilitator* (Exhibit US-5; see BCI Annex).

E. The German Government Has Subsidized Airbus by Forgiving At Least DM 7.7 Billion of Deutsche Airbus's Government Debt

515. In this section of the U.S. submission, the United States will discuss the German government's decision in 1998 to forgive approximately DM 7,700,000,000 in debt owed to it by Deutsche Airbus. The German government's forgiveness of the debt is a subsidy within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement.

1. Factual Background on Germany's Forgiveness of Deutsche Airbus Debt

516. Deutsche Airbus was financially weak for much of its history, and it relied almost entirely on Launch Aid and other German government subsidies to underwrite its participation in the Airbus project. By the late 1990s, the total accumulated debt that it owed to the German government amounted to at least DM 11,000,000,000 (in principal alone). Of the DM 11,000,000,000, DM 9,400,000,000 related to A300/A310 and A330/A340 Launch Aid and other, smaller loans ("repayable grants") that the government had provided to the company.[617]

517. In the remainder of this section, the United States will first explain the different components of the DM 9,400,000,000 in debt, and then discuss the facts surrounding the German government's forgiveness of DM 7,700,000,000 of the debt.[618]

a. Factual Background on Deutsche Airbus's Accumulation of DM 9.4 Billion in Government Debt

518. According to the publicly available information, Deutsche Airbus accumulated at least DM 9,400,000,000 in debt in the years prior to 1998.[619] This debt had at least three components.

519. The first and largest component was the DM 5,400,000,000 in Launch Aid that the German government provided to Deutsche Airbus for the A300/A310 and A330/A340

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[617] The remainder related to Launch Aid for the A320. The German government and Deutsche Airbus agreed to a separate "settlement" of the A320 debt in 1997. The United States is not addressing the A320 debt settlement in this section of the U.S. submission.

[618] The EC and Germany refused to answer any of the Annex V Facilitator's questions about the subsidies or to provide any information with respect to them, thereby forcing the United States to rely entirely on public sources. *See Questions 85-90 from the Annex V Facilitator to the EC and Germany* (Exhibit US-4; see BCI Annex)*; EC Response to Questions 85-90 from the Facilitator* (Exhibit US-5; see BCI Annex).

[619] As the United States has already noted, the DM 9.4 billion does not include debt that Deutsche Airbus owed for A320 Launch Aid.

projects.[620] The DM 5,400,000,000 figure was for principal only.

520. The second and smallest component was a DM 165,000,000 loan that the German government provided to Deutsche Airbus in 1988 to underwrite the costs of producing the A320.[621] This A320 production loan was in addition to the DM 1,500,000,000 that the German government had previously provided in A320 Launch Aid. Deutsche Airbus was only required to make repayments on the DM 165,000,000 loan from its future profits, if any.[622]

521. The third and final component of Deutsche Airbus's debt reflected some DM 3,800,000,000 in additional loans that the German government provided to the company in the 1980s and early 1990s. The loans had their genesis in a restructuring of the German aerospace industry that the government engineered in 1988/1989. The German "Monopolkommission" – a German public body entrusted with the independent analysis of antitrust and merger control issues in Germany – described the background to the restructuring in a report on the subject that it issued in 1989.[623]

522. The report explains that Deutsche Airbus was originally a wholly-owned subsidiary of the German firm Messerschmitt Bölkow Blohm ("MBB"), and that the company relied almost entirely on government subsidies to fund its early Airbus projects:

> Because MBB has provided DA with insufficient equity capital (most recently DEM 445 million), it has previously been dependent on state subsidies or – when taking out bank loans – federal guarantees. That means that the financial risk is mostly borne by the federal government. DA functions as a *liability and risk barrier* for MBB.[624]

523. In the late 1980s, the German government decided to try to shift some of Airbus's financial risk to the private sector by bringing in additional private capital. After other companies rebuffed its advances,[625] the government tried to convince Daimler-Benz to acquire a majority shareholding in MBB (and thus Deutsche Airbus). Daimler-Benz was reluctant to do

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[620] To be specific, DM 2.4 billion for the A300/A310 and DM 3 billion for the A330/A340. The United States discusses the Launch Aid subsidies at length in Section IV.A of this submission.

[621] German budget documents indicate that the German government decided in 1987 to provide a total of DM 670 million loan to Deutsche Airbus GmbH for the production of the A320. The government converted the remainder of the loan into a DM 505 million capital injection in 1989. *See* Federal Budgets 1988 to 1991, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, budget item 86291-634 ("Darlehen zur Entlastung der Serienfinanzierung beim Airbus") (Exhibits US-17V; US-17W; US-17X; US-17Y). The United States discusses the DM 505 million capital infusion in Section IV.F.1 of this submission.

[622] *See* BT-Drs. 13/8409, at 14, in response to questions 21 and 22 at "b" (Exhibit US-31).

[623] The title of the report was "Zusammenschlußvorhaben der Daimler-Benz AG mit der Messerschmitt-Bölkow-Blohm GmbH, Sondergutachten 18, Sondergutachten der Monopolkommission, gemäß § 24b Abs. 5 Satz 7 GWB" ("Monopolkommission") (Exhibit US-30).

[624] Monopolkommission, para. 116 (emphasis in original) (Exhibit US-30).

[625] See BT-Drs. 11/4375 (government response to a Parliamentary question), at 20-21 (Exhibit US-14).

so, however, because it believed it would not be possible to withdraw public funding from Deutsche Airbus until the company's capital was increased to sufficient levels, its existing debts eliminated, and its product range completed.[626]

524. Therefore, to induce Daimler-Benz to take over MBB and Deutsche Airbus, the German government agreed to provide a substantial aid package to the companies.[627] The package had several elements that served to "significantly limit any risk to Daimler-Benz."[628]

525. First, the government agreed to continue deferring, until 2001, Deutsche Airbus's obligation to begin repaying the Launch Aid it had already received.[629] In the view of the Monopolkommission, this repayment deferral – as well as the repayment deferrals for the remainder of the DM 9,400,000,000 in debt – led "to a considerable interest rate subsidy."[630]

526. Second, the government agreed to an exchange rate guarantee scheme for the Airbus program that would shield Daimler-Benz from risks associated with the fluctuation of the U.S. dollar.[631] In 1992, a Tokyo Round Subsidy Code dispute settlement panel found that the scheme was a prohibited export subsidy.[632] Nevertheless, by the time the German government terminated the scheme, it had already provided Deutsche Airbus approximately DM 1,480,000,000 in the form of interest-free "repayable grants" that Deutsche Airbus was required to repay from its profits, if any, beginning in 2001.[633]

527. Finally, the government agreed to a "debt write-off"[634] for Deutsche Airbus's previously accumulated private debt. The government effectuated the write-off in two stages:

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[626] Monopolkommission, paras. 78-80, 129 (Exhibit US-30).

[627] *See, e.g.,* European Commission, Press Release, *Commission Approves Aid to Restructure German Civil Aircraft Industry* (IP/89/148) (Mar. 8, 1989) (describing the German government's agreement with Daimler-Benz as an aid package and noting that the aid was aimed to allow the further privatization of the company) (Exhibit US-258).

[628] Monopolkommission, paras. 129, 131 (emphasis in original) (Exhibit US-30).

[629] *See, e.g.,* BT-Drs. 13/8409, at 14 (Exhibit US-31). In addition, Daimler-Benz confirmed in its 1996 annual report that the German government had agreed to "defer its immediate rights to any repayment of development grants and other advances made to Daimler-Benz Aerospace Airbus and its predecessor companies." Daimler-Benz, Annual Report 1996, at 74 (Exhibit US-31). This was the second deferral of Deutsche Airbus's repayment obligations; the government had agreed to an earlier deferral in 1983. *See* BT-Drs. 11/4375, at 17 (Exhibit US-14).

[630] Monopolkommission, para. 132 (Exhibit US-30). The government also promised to continue to provide Launch Aid – which the Monopolkommission described as "subsidies subject to repayment under certain conditions" – in the future. *Id*., para. 133 (Exhibit US-30).

[631] Monopolkommission, para. 131 (Exhibit US-30). Large civil aircraft are normally priced in dollars.

[632] *See EEC – Airbus*.

[633] BT-Drs. 13/8409, at 14, in response to question 21 and 22 at "b" (Exhibit US-31).

[634] European Commission, Press Release, *Commission Approves Aid to Restructure German Civil Aircraft Industry* (IP/89/148) (Mar. 8, 1989) (Exhibit US-258).

- In 1987, the government adopted a cabinet resolution in which it agreed to help Deutsche Airbus repay DM 1,900,000,000 in private sector loans that the company had incurred to finance losses from the production of the A300 and A310. The government agreed to make the payments in annual installments from 1988 until 1994.[635]

- In 1989, the German government agreed to repay 75 percent of any remaining A300/A310 debt still on Deutsche Airbus's books as of December 31, 1994. In light of the repayment obligations it had already assumed (in 1987), the government expected that the remaining debt would not exceed DM 1 billion (and thus the German government's share would not exceed DM 750 million).[636]

528. The total payments under the debt write-off – which the German government called "Altlastenhilfe" – ultimately amounted to DM 2,330,000,000.[637] The German government made the payments in the form of long-term loans ("repayable grants") that Deutsche Airbus was required to repay beginning in 2001. The German government made Deutsche Airbus's obligation to repay the loans contingent on the existence of pre-tax profits, and it linked the amount of the repayments to the amount of such profits, if any.[638]

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[635] BT-Drs. 11/4375 (government response to a parliamentary question), at 18 (Exhibit US-14); *see also* German Economics Ministry, Press Release (Nov. 1988), reprinted in *Daimler-Benz – MBB / Erklärung des Bundesministeriums für Wirtschaft zur Neustrukturierung der Luftfahrtindustrie*, Handelsblatt, at 24 (Nov. 3, 1988) (Exhibit US-259).

[636] Monopolkommission, para. 131 (first bullet point) (Exhibit US-30); *see also* Daimler-Benz, Annual Report 1994, at 84 (Exhibit US-260); Daimler-Benz, Annual Report 1995, at 66 (Exhibit US-261). This second write-off was provided for in the "Rahmenvertrag" ("Framework Agreement") of March 14, 1989, between the German government, Daimler-Benz, MBB and Deutsche Airbus. Monopolkommission, paras. 131-132 (including table 13), and 249 (Exhibit US-30). Although the Annex V Facilitator requested a copy of the "Rahmenvertrag," the EC and Germany refused to provide one. *See Question 86 from the Annex V Facilitator to the EC and Germany* (Exhibit US-4; see BCI Annex); *EC Response to Question 86 from the Facilitator* (Exhibit US-5; see BCI Annex).

[637] BT-Drs. 13/8409 (government response to a parliamentary question), response to Question 21, at 14 (Exhibit US-31).

[638] As Daimler-Benz explained in its 1997 annual report:

> Such undertakings, advances and assistance were to be repaid on a contingent basis by Daimler-Benz Aerospace Airbus' making annual payments equal to 40% of its pretax profits (as defined), if any, beginning with the fiscal year 2001 (subject to advance to the year 2000 under certain conditions). Each annual payment is contingent on Daimler-Benz Aerospace Airbus' having earned pretax profits in the prior year. Pretax profits are subject to reduction by application of prior years' cumulative loss carryforwards.

Daimler-Benz, Annual Report 1997, at 96 (Exhibit US-262). *See* also BT-Drs. 13/8409 (government response to a Parliamentary question), at 14 (Exhibit US-31).

b. Factual Background to the German Government's Forgiveness of the DM 9.4 Billion in Deutsche Airbus Debt

529. As a result of these arrangements, Deutsche Airbus was able to defer its repayment obligations with respect to its DM 9,400,000,000 in debt until 2001.[639] As a consequence, it was still carrying the debt on its books in 1998.[640]

530. By the mid-1990s, however, Daimler-Benz was beginning to explore the possibility of a merger between DASA and one or more of the other Airbus companies. (Ultimately, DASA merged with Aérospatiale and CASA to create EADS.) The possibility of entering into such a merger led Daimler-Benz and the German government to conclude that it would be in the company's interest to reduce Deutsche Airbus's debt burden and thereby "strengthen the starting position of DaimlerChrysler Aerospace Airbus GmbH for setting up the Airbus Single Corporate Entity."[641] In addition, the German government was facing difficulties in locating funds to underwrite its share of the trans-European Eurofighter project (also developed and produced in part by DASA). It saw Deutsche Airbus's outstanding debts as a potential source of the funds it needed for that purpose.[642]

531. Thus, in 1997 and 1998, Deutsche Airbus and the German government entered into two agreements to strengthen Deutsche Airbus's balance sheet by "settling" the company's outstanding debts. In the 1997 agreement, the German government agreed to accept a payment of DM 1,400,000,000 to settle the DM 1,500,000,000 that Deutsche Airbus owed for the Launch Aid it had received for the A320. Then, in the 1998 agreement, the German government agreed to accept a further payment of DM 1,735,000,000 to settle the remainder of Deutsche Airbus's

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[639] Airbus's then Director for International Relations, Michel Dechelotte, confirmed in a 1993 hearing before the U.S. International Trade Commission that the German government had in fact suspended DASA's repayment obligations. *See Global Competitiveness of U.S. Advanced Technology Manufacturing Industries: Large Civil Aircraft*, U.S. ITC Investigation 332-332, Hearing before the ITC, at 140 (April 15, 1993) (Exhibit US-46). The questioner had asked whether it was true that Daimler-Benz's (i.e., Deutsche Airbus's) repayment obligations were under "a condition on its profitability and on rebuilding of Deutsche Aerospace's Airbus capital base such that there has been a virtual suspension of German repayments." Dechelotte replied that "I think this information is basically correct."

[640] Manfred Bischoff, then CEO of Deutsche Airbus's parent DASA, stated in 1997 that Deutsche Airbus owed DM 10.5 billion under the profit-sharing arrangement and DM 1 billion through direct sales levies (i.e., the "usual" German Launch Aid repayment terms). *Dasa bietet Mitfinanzierung des Eurofighters an*, Frankfurter Allgemeine Zeitung, at 11 (June 16, 1997) (Exhibit US-263). Similarly, Germany's then Finance Minister Theo Waigel confirmed that Deutsche Airbus's debt to the German government under the profit sharing arrangement was DM 10.4 billion. *Finanzierung des Eurofighter ist offenbar gesichert*, Frankfurter Allgemeine Zeitung, at 13 (May 24, 1997) (Exhibit US-264).

[641] DaimlerChrysler Aerospace (DASA), Annual Report 1998, at 34 (Exhibit US-265).

[642] *Dasa bietet Mitfinanzierung des Eurofighters an, Frankfurter Allgemeine Zeitung*, at 11 (June 16, 1997) (Exhibit US-263).

DM 9,400,000,000 in debt.[643] The government forgave the remaining DM 7,700,000,000.

2. The German Government's Forgiveness of DM 7.7 Billion of Deutsche Airbus's Debt Constitutes a Financial Contribution

532. Article 1.1(a)(1)(i) of the SCM Agreement includes grants among the types of "direct transfers of funds" that constitute financial contributions within the meaning of the SCM Agreement. As the panel stated in *Korea – Shipbuilding*, debt forgiveness is "comparable to a cash grant, as funds that were previously provided as a loan, against interest, are now provided for free, given the removal of the repayment obligation."[644]

533. Therefore, since the German government removed Deutsche Airbus's repayment obligations with respect to at least DM 7,700,000,000 of debt (not including interest), the transaction constitutes a financial contribution to Deutsche Airbus within the meaning of Article 1.1(a)(1)(i).

3. The German Government's Forgiveness of DM 7.7 Billion in Deutsche Airbus Debt Confers a Benefit on Airbus

534. The German government's debt forgiveness also confers a benefit on Deutsche Airbus. As the panel stated in *United States – Cotton*, grants "place the recipient in a better position than the recipient otherwise would have been in the marketplace," and thus confer benefits within the meaning of Article 1.1(b) of the SCM Agreement.[645] Debt forgiveness is "comparable" to a cash grant, and therefore confers a benefit – and thus constitutes a subsidy – for the same reasons.

535. Article 6.1(d) of the SCM Agreement confirms that debt forgiveness confers a benefit, and thus constitutes a subsidy, as debt forgiveness is one of only four types of transactions that are explicitly identified as subsidies in that article. Under the terms of Article 6.1(d), "direct

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[643] *See, e.g.,* DaimlerChrysler's Form 20-F for the fiscal year ended December 31, 1998, which states:

> During 1998 and 1997, DaimlerChrysler Aerospace Airbus GmbH settled these contingent obligations with the Federal Republic of Germany for payments of {Euro} 895 and {Euro} 716, respectively. The 1998 settlement, which resulted in the complete discharge of all remaining obligations to the German Federal Government, related to the Airbus A300/310 and A330/340 series aircraft as well as to financial assistance not related to development, while the 1997 settlement related primarily to the A320 aircraft and derivatives.

DaimlerChrysler, Form 20-F for the fiscal year ended December 31, 1998, Consolidated Statement of Income, Note F-43 (Exhibit US-39); *see also* Federal Budget for 1999, Economics Ministry, item 182 04, which records an actual (non-scheduled) receipt of DM 1.4 billion for 1997 and a scheduled receipt of DM 1.7 billion for 1998 (Exhibit US-266).

[644] *Korea – Commercial Vessels*, para. 7.413.

[645] *US – Cotton Subsidies (Panel)*, para. 7.1116; *see also Brazil – Aircraft 21.5 (II)*, para. 5.27 (stating that "{a}s a usual matter, of course, a non-refundable payment will confer a benefit").

forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment" is "deemed" to cause serious prejudice.[646] The fact that Article 6.1(d) categorizes debt forgiveness in this manner reflects the particularly distortive nature of this type of subsidy.[647]

4. The German Government's Forgiveness of DM 7.7 Billion in Deutsche Airbus Debt is "Specific" to Deutsche Airbus

536. Finally, the debt forgiveness is specific to an enterprise or industry or group of enterprises or industries within the meaning of Article 2 of the SCM Agreement. It was effectuated through an *ad hoc* agreement between the German government and Deutsche Airbus to settle all of the company's outstanding repayment obligations for all of the support it had previously received from the government. The debt forgiveness was specifically limited to Deutsche Airbus, and no other company participated in the transaction.

F. The German Government's Transfer of Its Ownership Share in Deutsche Airbus to the Daimler Group Is a Specific Subsidy to Airbus

537. As the immediately preceding section of this submission demonstrates, the German government went to great lengths in the late 1980s to convince Daimler-Benz to invest capital in Deutsche Airbus. Daimler-Benz was unwilling to do so, however, unless the German government agreed to mitigate most, if not all, of Daimler-Benz's risk in making the investment, including by eliminating Deutsche Airbus's existing debt burden and assisting in building up the company's capital base. These discussions culminated in the provision to Deutsche Airbus of a substantial aid package.

538. The United States discussed several elements of this aid package in the preceding section, including the postponement of Deutsche Airbus's obligation to repay over DM 10,000,000,000 (not including interest) in German government debt until 2001, and the government's forgiveness of DM 7,700,000,000 of that debt in 1998. The United States also explained that one element of the aid package was the creation of an "exchange rate guarantee scheme" for the Airbus program that shielded Daimler-Benz from risks associated with the fluctuation of the U.S. dollar/DM exchange rate.[648]

539. There was another element of the aid package that the United States has not yet discussed,

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[646] Article 6.1 of the SCM Agreement is no longer in effect. *See* SCM Agreement, Art. 31. The United States references the provision for illustrative purposes.

[647] *See US – FSC 22.6*, para. 5.32, n. 56 ("We are aware of the provisions of Article 31 of the SCM Agreement and that Members took no action to extend the application of the provisions of Articles 8 and 9 of the Agreement concerning nonactionable subsidies beyond the period of five years from the date of entry into force of the WTO Agreement. However, these provisions can nevertheless be helpful, in our view, in understanding the overall architecture of the Agreement with respect to the different types of subsidies it sought and seeks to address") (emphasis added).

[648] *See* Section IV.E.

however. In addition to the subsidies the United States has already addressed, the German government also agreed to make an equity infusion into Deutsche Airbus in 1989 by purchasing a 20 percent share of the company for DM 505,000,000 (Euro 258,000,000). Three years later, the German government agreed to give the shares to DASA, without compensation. As the United States discusses below, both transactions are subsidies within the meaning of Article 1.1 of the SCM Agreement that are specific within the meaning of Article 2.1 of the SCM Agreement.

1. Factual Background to the Euro 258 Million Equity Infusion

540. During the Annex V process, the Facilitator asked the EC and Germany for information about the German equity infusion into Deutsche Airbus. The EC refused to provide any of the information that the Facilitator requested.[649] According to the publicly available information, however, the vehicle for the infusion was the state-owned Kreditanstalt für Wiederaufbau (KfW), which acquired and held the stake on the government's behalf.[650] It is not clear from the public record whether KfW received its 20 percent share from Messerschmitt Bölkow Blohm ("MBB"), or whether Deutsche Airbus issued new shares to KfW.[651] Either way, a German government document indicates that KfW injected DM 505,000,000 (or Euro 258,000,000) for its 20 percent share at some point between 1989 and 1991.[652] The government document confirms that the purchase is a subsidy, as the document is a published response by the Deputy Secretary of Parliament to the question: "What subsidies has the Federal Government granted for Airbus (broken down by budget year)?"[653]

541. In addition to the information in the German government document, Deutsche Airbus' annual report for 1990 references a corresponding "contribution to capital increase" between 1989 and 1990.[654]

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[649] *See Questions 108-126 from the Facilitator to the European Communities and Germany* (Exhibit US-4; see BCI Annex); *EC Response to Questions 108-126 from the Facilitator* (Exhibit US-5; see BCI Annex).

[650] Economics Ministry, Press Release, *Daimler-Benz – MBB / Erklaerung des Bundesministeriums fuer Wirtschaft zur Neustrukturierung der Luftfahrtindustrie*, reprinted in Handelsblatt, at 24 (Nov. 3, 1988) (Exhibit US-259); *see also* MBB, Consolidated Annual Report 1989, at 12 (Exhibit US-267). The report notes that "(t)he capital increase required at Deutsche Airbus GmbH was decided on December 8, 1989 and entered in the company's commercial register on January 11, 1990."

[651] The annual report simply notes that the KfW "acquired a 20-percent share in Deutsche Airbus GmbH" in 1989. MBB, Consolidated Annual Report 1989, at 12 (Exhibit US-267).

[652] BT-Drs. 13/8409, at 14 (Exhibit US-31). Economics Ministry, Press Release, *Daimler-Benz – MBB / Erklaerung des Bundesministeriums fuer Wirtschaft zur Neustrukturierung der Luftfahrtindustrie*, reprinted in Handelsblatt, at 24 (Nov. 3, 1988) (Exhibit US-259).

[653] BT-Drs. 13/8409, at 13-14 (Exhibit US-31). In addition to the equity infusion, the document also lists all of the other elements of the aid package that the United States discussed in Section II.E.

[654] Deutsche Airbus, Annual Report 1990, at 31 (Exhibit US-268). The annual report indicates that the amount of the capital increase was DM 485 million. The reason for the discrepancy between the annual report and the government document is unclear; the United States assumes that the two are the same infusion, however.

542. The publicly available information also suggests that the equity infusion included an agreement that KfW would transfer the shares back to MBB by no later than 1999.[655]

2. The Euro 258 Million Equity Infusion Is a Specific Subsidy to Airbus

a. The Equity Infusion Constitutes a Financial Contribution

543. Article 1.1(a)(1)(i) of the SCM Agreement includes equity infusions among the types of "direct transfers of funds" that constitute financial contributions under Article 1.1(a)(i). By acquiring a 20 percent share in Deutsche Airbus, the German government, through state-owned KfW, provided an equity infusion to the company. Accordingly, the transaction is a financial contribution within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

b. The Equity Infusion Confers a Benefit on Airbus

544. Article 1.1(b) of the SCM Agreement does not establish a standard for determining whether an equity infusion confers a benefit on the recipient. Article 14(a) of the SCM Agreement provides relevant context for determining how to make such a determination, however, as it provides a standard for purposes of Part V of the SCM Agreement:

> {G}overnment provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member.

545. In light of Article 14(a), the United States submits that if a government's decision to provide equity to a company is inconsistent with the usual investment practice of private investors in that Member's territory, the infusion confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

546. The publicly available information indicates that the German government's decision to provide the DM 505,000,000 infusion to Deutsche Airbus was inconsistent with the usual investment practice of private investors in Germany. First, Deutsche Airbus' financial situation at the time of the infusion was exceedingly poor. MBB's total shareholder equity at the end of 1988 amounted to less than DM 900,000,000, while its total liabilities exceeded DM 3,600,000,000.[656] MBB had experienced a consolidated loss of DM 83,300,000 in 1987.[657] The company had significant liabilities on its balance sheet, and it faced continued business risks from the

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[655] Economics Ministry, press release, *Daimler-Benz – MBB / Erklaerung des Bundesministeriums fuer Wirtschaft zur Neustrukturierung der Luftfahrtindustrie*, reprinted in Handelsblatt, at 24 (Nov. 3, 1988) (Exhibit US-259). *See also* BT-Drs. 13/8409, at 14 (Exhibit US-31).

[656] MBB, Consolidated Annual Report 1989, at 51(Exhibit US-267).

[657] MBB, Consolidated Annual Report 1988, at 52 (Exhibit US-269).

DM/dollar exchange rate.[658] In addition, the company warned that it lacked the capital to finance the DM 2,000,000,000 costs of producing the A320, the A321, and the A330/A340, and that it would not be able to borrow the necessary funds unless it first obtained additional equity.[659] Ordinarily, these facts alone would support a conclusion that the German government's decision to invest in Deutsche Airbus was inconsistent with the usual investment practice of private investors in Germany.

547. In the present case, however, there is an additional fact that confirms the non-commercial nature of the German government's investment: the government's aid package – including the equity infusion – was a precondition to Daimler-Benz making an investment it was otherwise unwilling to make.[660] The fact that the private investor – Daimler-Benz – was not willing to invest in the company without an aid package demonstrates that the government's own investment was not consistent with the usual investment practice of private investors in Germany. Moreover, as the United States noted above, the German government itself has admitted that the investment was a subsidy.[661]

c. The Equity Infusion Is Specific Under Article 2 of the SCM Agreement

548. The equity infusion is specific to Airbus within the meaning of Article 2 of the SCM Agreement, as an exercise of discretion by the German government to provide equity to a single company, Deutsche Airbus, as part of a broader aid package for that company.

3. The 1992 Share Transfer to DASA Is a Specific Subsidy to Airbus

549. As the United States noted above, one aspect of the KfW's acquisition of its 20 percent share in Deutsche Airbus was that it would sell the shares back to MBB by not later than 1999.[662]

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[658] Deutsche Airbus, Annual Report 1990, at 18 (Exhibit US-268).

[659] Monopolkommission, para. 124 (describing MBB/Airbus's financial problems at the end of the 1980s) (Exhibit US-30); *see also* Economics Ministry, press release, *Daimler-Benz – MBB / Erklaerung des Bundesministeriums fuer Wirtschaft zur Neustrukturierung der Luftfahrtindustrie*, reprinted in Handelsblatt, at 24 (Nov. 3, 1988) (Exhibit US-259).

[660] As the Monopolkommission explained in its report, Daimler-Benz "linked its stake in MBB to a series of commitments by the federal government" that "significantly limit{ed} any risk to Daimler-Benz which is associated with the acquisition of the German share of Airbus." Monopolkommission, para. 129 (Exhibit US-30).

[661] BT-Drs. 13/8409, at 13-14 (Exhibit US-31).

[662] Economics Ministry, Press Release, reprinted in *Handelsblatt*, November 3, 1988, at 24 (Exhibit US-259); David Marsh, *West Germany Poised to Agree Financing of Stake in Airbus*, Financial Times (Nov. 2, 1988) (noting that Mr. Edzard Reuter, Daimler chairman, had been "adamant in wanting to delay any purchase until the year 2000") (Exhibit US-270). *See also* BT-Drs. 13/8409, at 14 (Exhibit US-31).

The German government subsequently changed the date for the buyback to 1996.[663]

550. In 1992, however, a panel established under the Tokyo Round Subsidy Code found that the exchange rate guarantee scheme that the German government had established as another part of the aid package for Deutsche Airbus was a prohibited export subsidy.[664] Although the EC blocked adoption of the panel report, Germany agreed to eliminate the scheme. Daimler-Benz demanded that it be compensated for the scheme's elimination, and the government agreed to return its 20 percent ownership stake in Deutsche Airbus to DASA in 1992, apparently free of charge. As Daimler-Benz explained in its 1992 annual report:

> Following the decision of the Gatt panel directed against the currency equalisation assistance provided by the German government to Deutsche Airbus, the Federal Republic of Germany and Daimler-Benz AG entered into negotiations with a view to achieving an equally satisfactory solution when the present assistance ceases. In the resulting agreement it was decided that, as one of the compensatory measures, the shares held by the Reconstruction Loan Corporation will be transferred to Deutsche Aerospace at an earlier date than scheduled . . . .[665]

551. In an interview in 2001, the EU's former lead negotiator for the Boeing/Airbus issue, then-head of DG-Trade Peter Carl, described Germany's "compensation" of Deutsche Airbus in the following way:

> We lost the export subsidy case . . . . But it was settled immediately afterwards. We agreed with the Germans that they had to change their system. But what happened in reality was the way the German government simply changed the way in which it handed out very substantial amounts of money to Deutsche Airbus. Instead of going by route A, it went by route B.[666]

552. As Carl's comment indicates, the return of the German government's 20 percent share of Deutsche Airbus to DASA is a specific subsidy within the meaning of Articles 1.1 and 2 of the SCM Agreement.[667]

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[663] The German government changed the due date for the share buy back to 1996 in 1990. *See German Managers near Completion of Deutsche Aerospace Framework*, Aviation Week & Space Technology (Jan. 29, 1990) at 3 (Exhibit US-271).

[664] *See EEC – Airbus*. The United States described the exchange rate guarantee scheme in Section IV.E of this submission.

[665] *See* Daimler-Benz, Consolidated Interim Report, January 1-June 30, 1992, at 7 (Nov. 16, 1992) (emphasis added) (Exhibit US-272).

[666] Stephen Aris, *Close to the Sun*, at 166-67 (2004) (quoting Carl) (Exhibit US-23).

[667] If the Panel finds that the 1992 transaction is in fact a grant (and thus a subsidy) in the amount of DM 505 million, the United States does not believe it would be necessary for the Panel to determine whether the original 1988 share purchase was also a subsidy.

a. The Share Transfer Constituted a Financial Contribution

553. As the United States has repeatedly noted, Article 1.1(a)(1)(i) of the SCM Agreement includes direct transfers of funds among the types of transactions that constitute financial contributions within the meaning of Article 1.1(a)(1)(i). The transfer of KfW's 20 percent share in Deutsche Airbus to DASA constitutes a direct transfer of funds (share capital). Accordingly, the transfer is a financial contribution within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

b. The Share Transfer Conferred a Benefit on Airbus

554. The United States can find no indication in the public record that DASA paid anything to KfW for KfW's 20 percent share in Deutsche Airbus. To the contrary, the publicly available information suggests that DASA received the shares for free, as the purpose of the transfer was to compensate Deutsche Airbus for the termination of the GATT-inconsistent exchange rate guarantee scheme. In the words of Peter Carl: "the German government simply changed the way in which it handed out very substantial amounts of money to Deutsche Airbus. Instead of going by route A, it went by route B." The EC's refusal to provide any information on the transaction during the Annex V process also supports the conclusion that DASA received the shares for free.

555. Accordingly, the share transfer appears to have been, in effect, a DM 505,000,000 (Euro 258,000,000) grant.[668] As the panel stated in *United States – Cotton*, grants "place the recipient in a better position than the recipient otherwise would have been in the marketplace," and thus confer benefits within the meaning of Article 1.1(b) of the SCM Agreement.[669] Accordingly, the DM 505,000,000 (Euro 258,000,000) transfer is a subsidy within the meaning of Article 1.1 of the SCM Agreement.

c. The Share Transfer Is Specific Under Article 2 of the SCM Agreement

556. Finally, the share transfer is specific to Airbus within the meaning of Article 2 of the SCM Agreement. It resulted from a negotiation between the German government and a single company to compensate the company for the effects of withdrawing the exchange rate guarantee scheme that was inconsistent with the Tokyo Round Subsidy Code.

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[668] Stephen Aris, *Close to the Sun*, at 166-67 (2004) (quoting Carl) (Exhibit US-23).

[669] *US – Cotton Subsidies (Panel)*, para. 7.1116; *see also Brazil – Aircraft 21.5 (II)*, para. 5.27 (stating that "{a}s a usual matter, of course, a non-refundable payment will confer a benefit").

G. The Equity Infusions That the French Government Provided to Aérospatiale Are Specific Subsidies

557. Like Deutsche Airbus, the French Airbus company Aérospatiale was failing financially throughout the 1980s and most of the 1990s. The company was chronically undercapitalized,[670] and its capital base eroded further in the 1990s as a result of sustained operating losses.[671] For example, Aérospatiale's shareholders' equity in 1990 was approximately FF 4.7 billion (excluding minority interests), while its borrowings exceeded FF 10.1 billion. Its total liabilities that year exceeded FF 49 billion (excluding deferred income),[672] and its return on equity was negative 7.7 percent.[673] In 1992, its return on equity dropped to a staggering negative 48.5 percent.[674]

558. Aérospatiale's executives recognized that the company's poor financial condition made it an unattractive investment prospect. For example, in 1994, Aérospatiale's chairman Louis Gallois described Aérospatiale as "repellent" from an investor's point of view.[675] Two years later, the new Aérospatiale head Yves Michot stated that the company's "current cash balance (at Fr5 billion, or 10 percent of revenue) is extremely light," and that "to inspire confidence in private investors, this ratio would have to average around one-third of revenue, calling for a balance of around Fr15 billion."[676]

559. The United States has previously discussed how the need to begin A320 production and simultaneously develop the A330/A340 aircraft models put all of the Airbus companies, including Aérospatiale, under severe financial strain in the 1987/88 time period.[677] Although the Airbus governments responded by providing the Launch Aid that the companies needed for the A330/A340 project, Aérospatiale still had to draw on its limited capital reserves and take on increasingly large debt. Therefore, like Germany, France agreed to provide further subsidies to the company.

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[670] *See*, *e.g.*, 1997 Senate Report, at 78 (Exhibit US-18).

[671] 1997 Senate Report, at 76 (Exhibit US-18). The report shows a positive net balance for 1991, then significant losses from 1992-1995.

[672] *See*, *e.g.*, Aérospatiale 1991 Annual Report, at 51 (Exhibit US-273). Aérospatiale's 1991 Annual Report restated the 1990 figures. All references to financial figures come from Aérospatiale Group's consolidated financial statements.

[673] *See* Ratio Comparison Chart (Exhibit US-274).

[674] *Id.*

[675] *EC to review France's Aérospatiale capital injection*, Aerospace Daily, at 217-218 (Feb. 9, 1994) (Exhibit US-275).

[676] *See*, *e.g.*, *Corporate Strategies, France: Aérospatiale Reveals Earnings/Losses by Sector*, Air & Cosmos / Aviation International, at 29 (Sept. 6, 1996) (Exhibit US-276).

[677] *See* Section IV.A.3.C.

560. The French subsidies took the form of equity infusions.[678] First, in 1987 and 1988, the French government made two infusions of FF 1,250,000,000 into Aérospatiale, for a total of FF 2,500,000,000. Then, in 1992, the government injected another FF 1,400,000,000 into Aérospatiale through the state-controlled bank Credit Lyonnais. Two years later, in 1994, the French government provided another FF 2,000,000,000 infusion into Aérospatiale. Finally, in 1998, the French government transferred its 45.76 percent share in the capital of Dassault Aviation S.A. ("Dassault") to Aérospatiale. The share transfer was worth approximately FF 5,280,000,000.

561. Under Article 1.1 of the SCM Agreement, equity infusions are included among the forms of "direct transfers of funds" that constitute financial contributions and, if they confer a benefit, subsidies, within the meaning of Article 1.1. As the United States has previously noted, Article 1.1(b) of the SCM Agreement does not establish a standard for determining whether an equity infusion confers a benefit on its recipient.[679] Article 14(a) of the SCM Agreement provides relevant context for determining how to make such a determination, however, as it sets out a standard for purposes of Part V of the SCM Agreement:

> {G}overnment provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member.

562. Thus, if under the usual investment practice of private investors in the territory of the subsidizing Member, the equity infusion would not have been provided, or if the government equity infusion is on better than commercial terms, then the equity infusion confers a benefit, and constitutes a subsidy.

563. If shares of the company to which the equity infusion is provided are publicly traded, the determination whether there is a benefit can be made by means of a comparison of the price paid by the government to market prices for the equity. If market prices are unavailable, the question whether an equity infusion is consistent with the usual investment practice of private investors in the territory of the Member providing the infusion involves an analysis of the company's financial state and performance to determine whether the government had a realistic expectation of a reasonable return on the investment, or if private investors would have made the investment at all.

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[678] France had already provided smaller equity infusions to Aérospatiale in the late 1970s and early 1980s. *See* Pintat (Jean-Francois), Senate Report No. 62, Projet de Loi de Finances pour 1984, Tome III, Annexe 33 du 21/11/1983, Transports II aviation civile / IV meteorologie, at 46 (referring to capital increases or shareholders' advances of FF 130 million in 1982, FF 142 million in 1981, FF 150 million in 1980, FF 200 million in 1979 and FF 550 million in 1978) (Exhibit US-277). *See also* Fortier (Marcel), Senate Report No. 93, Projet de loi de finances pour 1988, Tome III Annexe n° 20 du 16/11/1987, Equipement, Logement, aménagement du territoire et Transports, IV Transports, 1. Aviation Civile, 3. Météorologie, p. 34 (referring to government equity infusions of FF 75 million in both 1985 and 1986) (Exhibit US-278).

[679] *See* Section IV.F

564. The usual practice of private investors considering whether to invest in a company is to analyze indicators of the company's financial and commercial health and performance, as reflected in financial statements, and to conduct an objective analysis and in-depth due diligence on the firm to determine whether to invest. Contemporaneous independent analyses of the finances and prospects of the company are among the key types of evidence available to show whether an equity infusion was consistent with the usual investment practice of private investors.[680] A government's failure to consider such analyses is indicative that a private investor would not have invested on the same terms, if it would had invested at all.

1. The 1987 and 1988 Equity Infusions Are Specific Subsidies

565. The United States explained above that the French government responded to Aérospatiale's extremely poor financial situation in the second half of the 1980s by providing it with two equity infusions, each for FF 1,250,000,000. As the United States demonstrates in the remainder of this section, each infusion was a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.

a. Factual Background to the 1987 and 1988 Equity Infusions

566. During the Annex V process, the Facilitator asked the EC and France for information about the 1987 and 1988 French equity infusions into Aérospatiale. The EC refused to provide any of the information that the Facilitator requested.[681] According to the publicly available information, however, the two infusions were each in the amount of FF 1,250,000,000. The French government provided the first infusion in 1987, and it was put into effect in January 1988.[682] It provided the second FF 1,250,000,000 infusion in 1988,[683] increasing Aérospatiale's

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[680] *See, e.g., EC – DRAMs*, para. 7.208 (noting that "the banks do not seem to have based this conclusion on independent assessment studies, as could be expected . . . .").

[681] *See Questions 94-95 from the Facilitator to the European Communities and France* (Exhibit US-4; see BCI Annex); *EC Response to Questions 94-95 from the Facilitator* (Exhibit US-5; see BCI Annex). The logical inference to be drawn from the EC's refusal is that the information would have supported the U.S. claim that the measures were specific subsidies. The United States suggests that the Panel draw such a logical inference. In addition, this would appear to be a situation in which, in accordance with paragraph 7 of Annex V, the Panel would be justified in drawing an adverse inference that the withheld information demonstrates that the measures are specific subsidies and the United States respectfully requests that the Panel so infer.

[682] *See* Aérospatiale 1987 Annual Report, Introduction, at 2 ("The need to reestablish a balanced financial position led the government to increase Aérospatiale's capital by FF 1,250 million in 1987. This amount was integrated in the financial statement on December 31, 1987 and paid in at the beginning of 1988.") (Exhibit US-32). *See also* Fortier (Marcel), Fortier (Marcel), Senate Report No. 88, Projet de loi des finances pour 1989, Tome III Annexe 34 du 21/11/1988, Transports et mer II/Aviation civile III/Météorologie, at 33 (Exhibit US-279)}; Fortier (Marcel), Senate Report No. 59, Projet de loi des finances pour 1990, Tome III Annexe 19 du 21/11/1989, Equipement, logement, transports et mer III – Aviation civile IV – Météorologie, at 40 (Exhibit US-280). Aérospatiale's 1987 Annual Report indicates that FF 1.48 billion in new equity was provided to the company, described as "capital stock increase in process." *See* Aérospatiale, 1987 Annual Report, Financial Results, at 20, 27

(continued...)

shareholders' equity to more than FF 5,800,000,000.[684] Aérospatiale's 1988 Annual Report explains that the second infusion "improved considerably" the company's capital structure.[685]

b. The 1987 and 1988 Equity Infusions Constitute Financial Contributions

567. Article 1.1(a)(1)(i) of the SCM Agreement includes equity infusions among the types of "direct transfers of funds" that constitute financial contributions under Article 1.1(a)(i). Therefore, the 1987 and 1988 equity infusions by the French government into Aérospatiale are financial contributions within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

c. The 1987 and 1988 Equity Infusions Confer a Benefit

568. As the United States noted above, if a government's decision to provide equity to a company is inconsistent with the usual investment practice of private investors in that government's territory, the equity infusion confers a benefit. The French government's equity infusions confer benefits on Aérospatiale.

569. By all indications, Aérospatiale was in serious financial trouble in the mid to late 1980s. In 1986, Aérospatiale's total shareholders' equity was slightly greater than FF 3.3 billion, its long-term borrowings amounted to FF 8.7 billion, and its total liabilities amounted to nearly FF 36.7 billion.[686] In 1987, Aérospatiale's total liabilities were FF 39.3 billion.[687]

570. Its financial ratios in 1986-88 were equally poor. For example, Aérospatiale's debt-to-equity ratio in 1986 was 10.9, compared to 6.2 for its Peer Group.[688] In 1987, Aérospatiale's debt-to-equity ratio was 8.2, compared to 4.9 for the Peer Group.[689] Aérospatiale's debt coverage ratio – an indicator of its ability to pay off short term debt – stood at 0.1 and zero in 1986 and

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[682] (...continued)
(Exhibit US-32). We assume that a FF 230 million capitalized advance provided in 1986 was included in this larger amount.

[683] Fortier (Marcel), Senate Report No. 85, Projet de loi de finances pour 1991, Tome III Annexe 19, Equipement, logement, transport et mer, at 46 (Exhibit US-281). Aérospatiale's 1988 Annual Report notes a "capital stock increase in process" in the amount of FF 1.25 billion in 1988. *See* Aérospatiale 1988 Annual Report, Financial Results, at 5, 25 (Exhibit US-282).

[684] *See* Aérospatiale 1988 Annual Report, Financial Results, at 25 (Exhibit US-282).

[685] *Id.*, Introduction, at 2.

[686] *See* Aérospatiale 1987 Annual Report, Financial Results, p. 20 (Exhibit US-32).

[687] *Id.*

[688] *See* Ratio Comparison Chart (Exhibit US-274).

[689] *Id.*

1987, respectively.[690] This is a clear indication that the company was in serious financial trouble, because a ratio of one or above is needed to be able to cover outstanding short-term debt; a lower ratio means that a company is not able to pay debt coming due. By contrast, the average Peer Group debt coverage ratios were 1.1 and 1.6 in 1986 and 1987, respectively.[691] Aérospatiale's own 1987 annual report concedes that the 1987 equity infusion was needed "to reestablish a balanced financial position . . . ."[692]

571. Aérospatiale's return on equity was also poor in the late 1980s in comparison with its Peer Group. In 1986, Aérospatiale's return on equity was 9.8 percent, compared to 45.2 percent for its Peer Group. In 1987, Aérospatiale's return on equity declined to 4.0 percent, compared to 17.2 percent for its Peer Group.[693] In 1988, Aérospatiale's return on equity worsened again, to *negative* 1.3 percent. The Peer Group, by contrast, had an average return on equity of positive 15.4 percent.[694] Given Aérospatiale's finances, its substantial outstanding liabilities and bleak commercial expectations at the time, there was no basis to conclude that its return on equity would improve significantly in the coming years.

572. Finally, the United States noted above that the usual investment practice of private investors is to analyze the financial and commercial position and prospects of a company in which they are considering whether to invest, and that contemporaneous independent financial and market analyses of the company are key in assessing whether an equity infusion is consistent with the usual investment practice of private investors. Although the Annex V Facilitator requested the EC to provide any such analyses for the 1987 and 1988 infusions, the EC neither provided such information nor indicated whether it exists.[695] The logical inference to be drawn from the EC's refusal to provide such analyses is that there are none or that they contained information adverse to the EC.[696]

573. In sum, in 1987 and 1988, Aérospatiale had a liquidity crisis; the investments made were insufficient to resolve the crisis; and it had been a poor investment in the years preceding the equity infusions. Thus, the 1987 and 1988 equity infusions confer a benefit, and thus constitute a subsidy, to Aérospatiale within the meaning of Article 1.1 of the SCM Agreement.

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[690] *Id.*

[691] *Id.*

[692] Aérospatiale, Annual Report 1987, Introduction, at 2 (Exhibit US-32); *see also* Aérospatiale, Annual Report 1988, Message from the Chairman, at 2 ("Aérospatiale's capital structure was improved considerably thanks to a second contribution of FF 1.25 billion by its stockholder.") (Exhibit US-282).

[693] Ratio Comparison Chart (Exhibit US-274).

[694] *Id.*

[695] *See* Question 94(h)-(i) from the Facilitator to the EC (Exhibit US-4; see BCI Annex); EC Reply to Question 94(h)-(i) from the Facilitator (Exhibit US-5; see BCI Annex).

[696] *See* Question 94(h)-(i) from the Facilitator to the EC (Exhibit US-4; see BCI Annex); EC Reply to Question 94(h)-(i) from the Facilitator (Exhibit US-5; see BCI Annex).

d. The 1987 and 1988 Equity Infusions Are Specific

574. The 1987 and 1988 equity infusions are specific to Aérospatiale within the meaning of Article 2 of the SCM Agreement, as they are *ad hoc* infusions by the French government into the company and explicitly limited to Aérospatiale.

2. The 1992 Equity Infusion Through Credit Lyonnais Is a Specific Subsidy

575. In spite of the 1987 and 1988 equity infusions, Aérospatiale's financial condition continued to deteriorate.[697] In order to reduce its debt and finance new investments, Aérospatiale needed additional capital.[698] Therefore, the French government decided to provide another equity infusion in late 1992, this time via the state-owned bank Credit Lyonnais. Like the 1987 and 1988 equity infusions, the 1992 infusion is a specific subsidy within the meaning of the SCM Agreement.

a. Factual Background to the 1992 Equity Infusion

576. The French government implemented the 1992 equity infusion in two steps. First, Aérospatiale increased its share capital by FF 357,000,000, reserved for Credit Lyonnais, with a share premium of FF 1,100,000,000.[699] Credit Lyonnais acquired [ ] shares of Aérospatiale, and Aérospatiale's capital increased by approximately FF 1,400,000,000 (the FF 357,000,000 nominal capital increase plus the FF 1,100,000,000 premium).[700]

577. Second, the French government transferred 4,637,931 of its Aérospatiale shares with a book value of FF 1,800,000,000 to Credit Lyonnais. In return, the French government received an increased stake in the capital of Credit Lyonnais.[701] The combined result of these two transactions was that Credit Lyonnais acquired a 20 percent stake in Aérospatiale, and the French government acquired an additional two percent share in Credit Lyonnais.[702]

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[697] *See generally Accord annonce en juillet dernier – Le Credit Lyonnais finalise son entrée dans Aérospatiale*, Les Echos, at 11 (Jan. 13, 1993) (Exhibit US-283).

[698] *Credit Lyonnais to Buy 20% Stake in Aérospatiale from French Government*, Aviation Week & Space Technology, August 3, 1992, at 29 (Exhibit US-284).

[699] *See* Aérospatiale Annual Report 1992, at 55 (Exhibit US-285).

[700] *See* EC Response to Question 96 from the Facilitator (Exhibit US-5; see BCI Annex); *see also Credit Lyonnais to Buy 20% Stake in Aérospatiale from French Government*, Aviation Week & Space Technology, August 3, 1992, at 29 (Exhibit US-284).

[701] Aérospatiale, Annual Report 1992, at 55 (Exhibit US-285); *Credit Lyonnais to Buy 20% Stake in Aérospatiale from French Government*, Aviation Week & Space Technology, August 3, 1992, at 29 (Exhibit US-284).

[702] *Accord annonce en juillet dernier – Le Credit Lyonnais finalise son entrée dans Aérospatiale*, Les Echos, at 11 (Jan. 13, 1993) ("Depuis le 31 decembre 1992, le Credit Lyonnais figure officiellement dans le tour de table d'Aérospatiale a hauteur de 20%. Annoncee cet ete, l'operation voit la banque nationalisee souscrire a une

(continued...)

578. As a result of the 1992 transaction, Aérospatiale received an equity infusion of FF 1,400,000,000.[703]

b. The 1992 Equity Infusion Constitutes a Financial Contribution

579. As the United States has previously noted, Article 1.1(a)(1)(i) of the SCM Agreement includes equity infusions by governments or public bodies among the types of "direct transfers of funds" that constitute financial contributions under Article 1.1(a)(i). The panel in the *Korea – Shipbuilding* dispute concluded that:

> an entity will constitute a "public body" if it is controlled by the government (or other public bodies). If an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government, and should therefore fall within the scope of Article 1.1(a)(1)(i) of the *SCM Agreement*. We consider that KEXIM is a "public body" because it is controlled by GOK.[704]

580. In the Annex V process, the EC confirmed that Credit Lyonnais was state-controlled at the time of the equity infusion in 1992.[705] Accordingly, the FF 1,400,000,000 infusion into Aérospatiale constitutes a financial contribution by a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement.

c. The 1992 Equity Infusion Confers a Benefit

581. An analysis of Aérospatiale's financial condition and performance in the early 1990s reveals that the decision to invest in the company in 1992 was inconsistent with the usual investment practice of private investors. Therefore, the 1992 equity infusion confers a benefit on Aérospatiale.

582. At the time of the 1992 equity infusion, Aérospatiale's shares were not publicly traded.

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[702] (...continued)
augmentation de capital reservee de 1,4 milliard de francs, representant une participation de 8,5%, et reprendre 11,5% des actions detenues par l'Etat en echange de titres du Lyonnais pour une valeur de 1,9 milliard. En juillet 1992, le groupe aeronautique disposait de 6 milliards de fonds propres pour 12 milliards d'endettement. Ce dernier *atteint, aujourd'hui, 14 milliards de francs.*") (Exhibit US-283); *see also Credit Lyonnais: Gestion par Temps de Crise*, Les Echos, at 14 (Jan. 7, 1993) ("*l'entrée a hauteur de 20% dans Aérospatiale en souscrivant, la encore, a une augmentation de capital de 1,4 milliard de francs et en bénéficiant d'un apport de titres Aérospatiale de la part de l'Etat en échange d'une augmentation de capital du Crédit Lyonnais réservée à l'Etat.*") (Exhibit US-286).

[703] Aérospatiale, Annual Report 1992, at 55 (Exhibit US-285); *Credit Lyonnais to Buy 20% Stake in Aérospatiale from French Government*, Aviation Week & Space Technology, August 3, 1992, at 29 (Exhibit US-284).

[704] *Korea – Commercial Vessels*, para. 7.50.

[705] *See* EC Response to Q99 from the Facilitator (Exhibit US-5; see BCI Annex).

Consequently, there are no market prices against which to measure the infusion. An analysis of the firm's financial health and performance, as reflected in its financial statements, and its commercial outlook, however, demonstrate that the equity infusion was not consistent with the usual investment practice of private investors in the territory of the Member.

583. Despite the equity infusions of 1987 and 1988, Aérospatiale's balance sheet continued to deteriorate. Aérospatiale's liabilities climbed, rising from FF 33.2 billion in 1989[706] to FF 60.2 billion in 1991.[707] Aérospatiale's debt maturing within one year rose from FF 3.6 billion in 1989 to FF 8.4 billion in 1991,[708] and its debt coverage ratio went from 0.1 in 1989 to negative 0.5 in 1990 to 0.2 in 1991.[709] In contrast, the Peer Group had debt coverage ratios of 2.4, 1.5 and 1.3 in each of these three years, respectively.[710] Meanwhile, Aérospatiale's debt-to-equity ratio was 6.5 in 1989, 10.5 in 1990 and 12.3 in 1991.[711] The Peer Group's average debt-to-equity ratios were much more favorable: 4.0 in 1989, 4.3 in 1990 and 3.7 in 1991.[712] Thus, prior to the 1992 decision to provide yet another equity infusion, Aérospatiale was sinking deeper into debt, with less ability to pay its short-term liabilities and with its capital under constant pressure from sustained losses.

584. Aérospatiale sustained a net operating loss in 1990 and had only a very small positive result in 1991.[713] Although the company posted net income in both years, it would have posted a net loss in 1991 if not for two extraordinary income items that were not related to its Airbus operations.[714] At the time of the 1992 infusion, the outlook for the company remained poor. As Aérospatiale's 1992 Annual Report notes:

> The drop in business due to the worldwide recession and reduced defense spending, already felt in 1991, continued and even deepened during 1992. Financial results for 1992 were affected more than expected by the resulting impact on the group's industrial operations and financial position.[715]

585. In addition, Aérospatiale's return on equity in the years preceding the infusion was dismal. In 1989, its return on equity was 2.2 percent; in 1990 it was negative 7.7 percent; in 1991 it was

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[706] Aérospatiale, Annual Report 1989, at 61 (Exhibit US-287).

[707] Aérospatiale, Annual Report 1991, at 51 (Exhibit US-273). This amount does not include deferred income.

[708] Aérospatiale, Annual Report 1989, at 70 (Exhibit US-287); Aérospatiale, Annual Report 1991, at 62 (Exhibit US-288).

[709] *See* Ratio Comparison Chart (Exhibit US-274).

[710] *Id.*

[711] *Id.*

[712] *Id.*

[713] Aérospatiale, Annual Report 1991, at 52 (Exhibit US-273).

[714] Aérospatiale, Annual Report 1990, at 16 (Exhibit US-289).

[715] Aérospatiale, Annual Report 1992, at 3 (Exhibit US-290).

4.5 percent; and in 1992 it was negative 48.5 percent.[716] By contrast, the average return on equity for the Peer Group during this time period were 15.8 percent in 1989, 14.5 percent in 1990, 15.2 percent in 1991, and 13.2 percent in 1992.[717]

586. Given these financial indicators, it is not surprising that contemporaneous press reports questioned how the transaction made sense for Credit Lyonnais:

> For Credit Lyonnais the benefits are less obvious apart from the higher-than-expected stake. Credit Lyonnais investment certificates fell back this morning on the Paris bourse, dropping 5 francs to 505 in thin volume.
>
> However, the move fits in with the French government's strategy of creating closer links between state-controlled banks and nationalised industries.[718]

587. Finally, the Annex V Facilitator specifically requested the EC to provide, *inter alia*:

> (ii) any contemporaneous (at the time of the transfer) reports, studies or analyses of the financial situation of Aérospatiale . . . and the objectives and effects of the transfer, including but not limited to internal Credit Lyonnais, Aérospatiale/Airbus documents, government documents, and any external documents (auditors, accountants, or consultant reports); and
>
> (iii) any report, study, analysis, paper or other document discussing expectations with regard to the rate of return as a result of the transfer.[719]

588. The EC's only response to this question was that "{t}his operation involving the French State and two state-owned companies was carried out consistently with French government's practice and in full respect of the French law."[720] In other words, the infusion was consistent with the French government's practices, not the usual investment practice of private investors in France. The EC's refusal to provide the information that the Annex V Facilitator requested further supports this conclusion.

589. In sum, the economics of Aérospatiale at the time of the 1992 equity infusion would have deterred private investors from injecting further equity into the company. Aérospatiale had a liquidity crisis; the investments were insufficient to resolve this crisis; it had been a poor investment in the years preceding the infusions; and the situation in the aeronautic industry did not indicate that future prospects would soon improve. The French government's decision to

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[716] See Ratio Comparison Chart (Exhibit US-274).

[717] *Id.*

[718] *Follow Up: Credit Lyonnais' Stake in Aérospatiale Exceeds Expectations*, AFX News (July 24, 1992) (Exhibit US-291).

[719] *See* Question 100(g) from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

[720] *See* EC Response to Question 100(g) from the Facilitator (Exhibit US-5; see BCI Annex).

provide the equity infusion to Aérospatiale was inconsistent with the usual investment practice of private investors, and thus confers a benefit – and a subsidy – on the company.

d. The 1992 Equity Infusion Is Specific

590. Like the 1987 and 1988 equity infusions, the 1992 infusion is specific to Aérospatiale within the meaning of Article 2 of the SCM Agreement, as it is an *ad hoc* infusion by a public body and explicitly limited to Aérospatiale.

3. The French Government's 1993-94 Equity Infusion Is a Specific Subsidy

591. Even after the equity infusion by Credit Lyonnais, Aérospatiale continued to struggle financially. The company sustained operating losses of FF 1,200,000,000 and FF 394,000,000 in 1992 and 1993, respectively.[721] Its net loss was approximately FF 2,300,000,000 in 1992, and FF 1,400,000,000 in 1993.[722] At the same time, it continued spending capital on new aircraft development. As a result, its debt-to-equity ratio deteriorated from 16.6 in 1992 to 25.5 in 1993.[723] The French government responded by injecting another FF 2 billion into the company.

592. The European Commission examined the 1994 equity infusion under EC state aid rules. During the Annex V process, the Facilitator requested the EC to provide various types of information with respect to this review, including the EC's conclusion as to whether the infusion was state aid and the reasons for its finding.[724] The EC refused to provide the information the Facilitator requested.

593. In Section IV.A.2.b.vii of this submission, the United States discussed the relevance of EC state aid findings for evaluating whether financial contributions to Airbus confer benefits within the meaning of the SCM Agreement. Accordingly, the United States respectfully requests that the Panel use its authority under Article 13 of the DSU to request the information on the EC's state aid review of the 1994 equity infusion that the EC refused to provide to the Facilitator.

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[721] *See* Aérospatiale, Annual Report 1992, at 52 (Exhibit US-292); Aérospatiale, Annual Report 1994, at 48 (Exhibit US-293). Aérospatiale's 1994 Annual Report restated the 1993 figure.

[722] *See* Aérospatiale, Annual Report 1992, at 52 (Exhibit US-292); Aérospatiale, Annual Report 1993, at 48 (Exhibit US-294); Aérospatiale, Annual Report 1994, at 48 (Exhibit US-293). *See also Aérospatiale posts FFr2.3bn loss*, Financial Times (Mar. 26, 1993) (noting that Aérospatiale reported a FF 2.38 billion loss in 1993) (Exhibit US-295).

[723] *See* Ratio Comparison Chart (Exhibit US-274).

[724] *See* Question 101 from the Facilitator to the EC (Exhibit US-4; see BCI Annex); EC Response to Question 101 from the Facilitator (Exhibit US-5; see BCI Annex).

a. Factual Background to the 1993-94 Equity Infusion

594. On December 31, 1993, the French government made a commitment to inject an additional FF 2,000,000,000 in new capital into Aérospatiale.[725] The government fulfilled its commitment on February 1, 1994, by paying FF 2,000,000,000 to Aérospatiale as an advance on a capital increase.[726] The capital increase took place on April 27, 1994.[727]

595. The equity infusion supplemented the Launch Aid Airbus was receiving for the A330/A340 program, and allowed its shareholders equity to increase to approximately FF 6,000,000,000, in spite of the significant losses it incurred in 1992 and 1993.[728]

b. The 1993-94 Equity Infusion Constitutes a Financial Contribution

596. The United States has already noted that Article 1.1(a)(1)(i) of the SCM Agreement includes equity infusions among the types of direct transfers of funds that constitute financial contributions within the meaning of Article 1.1(a)(1)(i). Accordingly, the 1993/1994 equity infusion constitutes a financial contribution within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

c. The 1993-94 Equity Infusion Confers a Benefit

597. An analysis of Aérospatiale's financial condition and performance prior to the advance capital increase payment reveals that the equity infusion was inconsistent with the usual investment practice of private investors in the territory of the Member. Therefore, the 1993/1994 equity infusion confers a benefit on Aérospatiale.

598. Aérospatiale continued to lose money in the early 1990s. As discussed above, it sustained net losses of approximately FF 2.3 billion in 1992, and FF 1.4 billion in 1993. In 1992, Aérospatiale's shareholders' equity stood at only FF 3.8 billion, while its liabilities amounted to nearly FF 64 billion.[729] In 1993, its shareholders' equity was FF 2.4 billion, and its total liabilities

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[725] According to the EC, the precise amount was FF **[ ]**. *See* DS316-EC-BCI-0000756 (Exhibit US-296; see BCI Annex). See also Laronche Martine, "Face à une conjoncture difficile, Aérospatiale obtient de l'Etat une dotation de 2 milliards de francs," Le Monde, February 4, 1994 (Exhibit US-297).

[726] Aérospatiale, Annual Report 1994, at 51 (explaining that "In line with commitments made on December 31, 1993, on February 1, 1994 the French state, as shareholder, paid the sum of two billion francs as an advance on a capital increase which was carried out on April 27, 1994.") (Exhibit US-293).

[727] Aérospatiale, Annual Report 1994, at 51 (Exhibit US-293).

[728] Aérospatiale, Annual Report 1993, at 48 (Exhibit US-294).

[729] Aérospatiale 1992 Annual Report, at 51 (Exhibit US-292). Shareholders' equity excludes minority interests, and the amount for liabilities does not include prepaid income.

amounted to FF 61.7 billion.[730]

599. In other words, Aérospatiale's financial ratios remained dire. Its debt-to-equity ratio in 1992 was 16.6 and 25.5 in 1993.[731] In contrast, the average Peer Group debt-to-equity ratio was 3.2 in 1992 and 3.1 in 1993.[732] Aérospatiale's debt coverage ratio in 1992 was negative 1.3, and in 1993 it was negative 0.7.[733] Again, these ratios compared unfavorably with the average debt coverage ratios of the Peer Group, which were 1.1 in 1992 and (positive) 0.7 in 1993.[734] Thus, its assets were grossly insufficient to cover current borrowings.

600. Aérospatiale's return on equity during this period was equally dismal. In 1991, Aérospatiale's return on equity was 4.5 percent.[735] In 1992, its return on equity plummeted to negative 48.5 percent, and in 1993 its return on equity was negative 37 percent.[736] At the same time, the Peer Group's returns on equity were 15.2 percent in 1991, 13.2 percent in 1992 and 8.3 percent in 1993.[737]

601. Moreover, Aérospatiale's serious financial condition was common knowledge at the time of the equity infusion in 1994. One press report on the transaction noted that Aérospatiale "has been losing money for two years because of falling commercial-aircraft orders and declining military contracts . . . ."[738] Another publication observed that the European Commission would examine whether the equity infusion into "cash-starved" Aérospatiale was an impermissible subsidy.[739]

602. Most tellingly, Aérospatiale's own chairman, Louis Gallois, described the firm's condition at the time as "repellent" from an investor's point of view.[740]

603. Nor was Aérospatiale's future promising. One report explained that there was "a poor

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[730] Aérospatiale 1993 Annual Report, at 47 (Exhibit US-294). Shareholders' equity excludes minority interests, and the amount for liabilities does not include prepaid income.

[731] *See* Ratio Comparison Chart (Exhibit US-274).

[732] *Id.*

[733] *Id.*

[734] *Id.*

[735] *Id.*

[736] *Id.*

[737] *Id.*

[738] *France Pledges Subsidy to Aerospace Group*, N.Y. Times (Feb. 3, 1994) (Exhibit US-298).

[739] *EC to Review France's Aérospatiale Capital Injection*, Aerospace Daily, at 217 (Feb. 9, 1994) (Exhibit US-275).

[740] *EC to review Aérospatiale capital injection*, Aerospace Daily, at 217-18 (Feb. 9, 1994) (reporting that "Gallois admitted that from an investor's point of view, Aérospatiale is probably still 'repellent,' but added that he didn't see privatization happening this year or even in 1995 anyway") (Exhibit US-275).

outlook for military and civil sales for the next two years. . . ."[741] Aérospatiale's 1993 Annual Report noted that "{e}onomic conditions will remain very difficult in 1994."[742] Under these circumstances, private investors, as a usual matter, would not have injected further capital into Aérospatiale.

604. For all of these reasons, the French government's FF 2,000,000,000 equity infusion into Aérospatiale in 1994 was inconsistent with the usual investment practice of private investors in France, and thus confers a benefit, and a subsidy, on the firm.

d. The 1993-94 Equity Infusion Is Specific

605. The 1993/1994 equity infusion is specific within the meaning of Article 2 of the SCM Agreement because it was an *ad hoc* infusion to Aérospatiale and explicitly limited to Aérospatiale.[743]

4. The French Government's 1998 Share Transfer Is a Specific Subsidy

606. Despite the equity infusions in 1987, 1988, 1992, and 1994, and the Launch Aid that the French government provided to Aérospatiale in 1988 (for the A330/A340), 1995 (for the A330-200), and 1997 (for the A340-500/600), the company remained undercapitalized and continued to carry heavy liabilities in the late 1990s. Like the German government, the French government saw a need to further strengthen Aérospatiale in anticipation of the formation of Airbus SAS; it also wanted to improve the company's position in view of the possible consolidation of the European aerospace and defense industry. Thus, in 1998, the French government provided yet another infusion of funds to the company. This infusion, like all of the previous infusions, was inconsistent with the usual investment practice of private investors in France and constitutes a subsidy within the meaning of Article 1.1 of the SCM Agreement.

a. Factual Background to the 1998 Share Transfer

607. In December 1998, the French government transferred its 45.76 percent share of Dassault's capital to Aérospatiale.[744] In return, the French government received additional Aérospatiale stock. Based upon Dassault's share value at the time, the measure translated into a FF 5,280,000,000 equity infusion that increased Aérospatiale's consolidated total capital by about

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[741] *France rules out Aérospatiale sell-off*, Flight International (Mar. 9, 1994) (Exhibit US-299).

[742] Aérospatiale, Annual Report 1993, Message from the Chairman (Exhibit US-300).

[743] Aérospatiale, Annual Report 1994, at 51 (explaining that "In line with commitments made on December 31, 1993, on February 1, 1994 the French state, as shareholder, paid the sum of two billion francs as an advance on a capital increase which was carried out on April 27, 1994.") (Exhibit US-293).

[744] *See* Aérospatiale, Annual Report (Financial Results) 1998, at Note 9 (Exhibit US-301).

20 percent[745] and that effectively created a corporate tie-up (a partial merger) between Dassault and Aérospatiale.

b. The 1998 Share Transfer Constitutes a Financial Contribution

608. As the United States has repeatedly noted, Article 1.1(a)(1)(i) of the SCM Agreement includes direct transfers of funds among the types of transactions that constitute financial contributions under Article 1.1(a)(1)(i). The 1998 transaction took the form of a transfer by the French government of its Dassault shareholdings to Aérospatiale, and thus is a financial contribution within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

c. The 1998 Share Transfer Confers a Benefit

609. Like all of the previous equity infusions that the French government provided to Aérospatiale, the Dassault share transfer was inconsistent with the usual investment practice of private investors.

610. In the late 1990s, Aérospatiale's financial and commercial outlook remained serious. A 1996 article noted that "Aérospatiale management has been saying for some time that the company is suffering from depleted equity and that a further FF 10 billion is needed to cover financing needs for future programmes."[746] In 1997, its total liabilities amounted to more than FF 56 billion, while its shareholders' equity totaled FF 5.3 billion.[747] In 1998, its total liabilities were FF 65 billion, and its shareholders equity was FF 8.9 billion.[748]

611. In addition, Aérospatiale's financial ratios during this time period were very poor in comparison to its Peer Group. In 1996, its debt-to-equity ratio was 13.5; in 1997 it was 10.7; and in 1998 it was 7.3.[749] The Peer Group's average debt-to-equity ratios, on the other hand, were 2.6 in 1996, 2.1 in 1997 and 2.2 in 1998.[750] Aérospatiale's debt coverage ratios were 0.6 in 1996, 1.5

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[745] Collin (Yvon), Senate Report No. 89 Projet de Loi de Finances pour 2000, Tome III, Annexe No. 25, Équipment, Transport et Logement: III. - Transports: Transport Aérien et Météorologie et Aviation Civile, at 50-54 (Exhibit US-302); Collin (Yvon), Senate Report No. 414 (1998-1999), "l'Industrie Aéronautique Européenne ou l'Impératif de l'Union," at 128 (Exhibit US-303). *See also* press release of the French Finance Ministry, *Transfer des Actions par l'Etat au capital de Dassault Aviation* (May 15, 1998) (Exhibit US-304).

[746] *New alliances emerge from French aerospace shakeup*, Interavia Business & Technology, at 3 (Aug. 18, 1996) (Exhibit US-305).

[747] Aérospatiale, Annual Report 1997, Financial Reports, at 17 (Exhibit US-306). Total liabilities exclude prepaid income and shareholders' equity excludes minority interests.

[748] Aérospatiale, Annual Report 1998, Financial Reports, at 15 (Exhibit US-301). Total liabilities exclude prepaid income and shareholders' equity excludes minority interests.

[749] *See* Ratio Comparison Chart (Exhibit US-274).

[750] *Id.*

in 1997 and 1.1 in 1998.[751] In contrast, the Peer Group's average debt coverage ratios were 4.3 in 1996, 7.7 in 1997 and 6.5 in 1998.[752] A 1997 French Senate Report confirmed that the company did "not have sufficient equity for its development."[753]

612. When it became apparent that the French government was considering privatization of the company, market observers reacted accordingly. A press report at the time noted that Standard and Poor's had placed Aérospatiale on CreditWatch with negative implications, and explained that this "decision is due to the likelihood that the French state's stake in the company will fall from the current 100 pct, and the current ratings are based on the government's implicit financial support for Aérospatiale."[754]

613. Rather than a privatization, the government therefore decided to pursue a partial merger between Dassault Aviation and Aérospatiale through the transfer of its Dassault shareholding to Aérospatiale. Doing so led to a considerable benefit to Aérospatiale.

614. As described above, Aérospatiale was in a dire financial state and entirely unattractive as an investment target, or indeed a candidate for privatization. The share transfer significantly improved this situation to the benefit of the company. A French Senate Report discussing the transaction noted the "reinforcement of the financial position of Aérospatiale resulting from its participation in the capital of a company with clearly superior operating margins".[755] The report also notes the benefit Aérospatiale derived from the 20 percent increase in its equity that resulted from the share transfer.[756]

615. Moreover, the evidence surrounding the French government's decision to transfer the shares indicates that the transfer was motivated by political and industrial policy considerations, and not by an interest in receiving a commercial return on its investment. At the time of the transfer, the French government foresaw the creation of Airbus SAS and it wanted to strengthen Aérospatiale's balance sheet and thus its position in the negotiations with the other members of the Airbus consortium.[757] In addition, the government also wanted to protect French interests in the upcoming consolidation of the European defense industry.[758]

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[751] *Id.*

[752] *Id.*

[753] 1997 Senate Report, at 78 (Exhibit US-18).

[754] *Aérospatiale on CreditWatch negative - S&P*, AFX News (May 29, 1998) (Exhibit US-307).

[755] Senate Report No. 89, supra, at 55 (Exhibit US-302).

[756] Id., at 54-55.

[757] Adam Sage, *France makes first move in European defence shake-up*, The Times (May 16, 1998) (Exhibit US-312).

[758] *Dassault and Aérospatiale one step closer*, Financial Times News Wire (November 14, 1998) (Exhibit US-308)

616. The inconsistency of the French government's share transfer with usual investment practice is also clear from the deal it agreed to with Dassault. As an – at least partially – private company, Dassault was not immediately willing to agree to a tie-up with Aérospatiale. It its efforts to persuade Dassault to agree with the share transfer (in the hope of one day convincing it to consent to a full merger between the two companies),[759] the French government not only agreed to significant Dassault participation in the newly merged entity, but also renounced its double voting rights, and with them, the government's sole control over Aérospatiale.[760]

617. The French Senate Report mentioned above stated the following with respect to the transaction:

> a first fundamental question is what the State received in return for renouncing its particular prerogatives. In other words, what was the value of its double voting rights, what price did it receive? The response to that question is far from clear. Was the only return it received Dassault's consent to the transfer that was realized for the benefit of Aérospatiale (...)? And was it then a sufficient and equitable price?[761]

618. The report itself answers these questions a few paragraphs later, noting that "{i}t seems that the agreement was hardly burdensome for Dassault Aviation {footnote omitted} while for the State its loss of double voting rights and the accounting treatment of the tie up with Aérospatiale that was achieved raise certain questions."[762] As one insider was quoted as saying:

> the double voting rights are worth whatever control of a defense company with a FF 20 billion turnover is worth . . .[763]

619. In sum, in light of Aérospatiale's serious financial condition at the time of the share transfer, the French government's motivations for making the transfer, and the rights the government relinquished in addition to the transfer itself, the French government's decision to

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[759] See, *e.g.*, Vago Muradian, *Lagardere Seeks Consolidation Role, but on its Terms*, Defense Daily (June 16, 1998) (Exhibit US-313).

[760] Collin (Yvon), Senate Report No. 89, supra, at 53 (Exhibit US-302); Jean-Pierre Neu, *Fort de l'avis du Conseil d'Etat validant ses droits de vote double, le gouvernement est en mesure de negocier l'abandon de son privilege d'actionnaire*, Les Echos (October 5, 1998) (Exhibit US-309).

[761] Collin (Yvon), Senate Report No. 89, supra, at 53 (Exhibit US-302).

[762] *Id.* at 54 ("Sur le plan financier, cette question est celle du bilan de l'opération pour les trois acteurs. Elle renvoie aux questions relatives à la substance même de ce qui a été échangé et à son évaluation pour les uns et les autres.").

[763] Jean-Pierre Neu, *Fort de l'avis du Conseil d'Etat validant ses droits de vote double, le gouvernement est en mesure de negocier l'abandon de son privilege d'actionnaire*, Les Echos (October 5, 1998) (Exhibit US-309). See also, Anne Marie Rocco, *Le gouvernement scelle le marriage entre Aérospatiale et Dassault*, Le Monde (November 12, 1998) (Exhibit US-310) (noting that the shareholders' agreement provides for equal representation in the company's board, joint decision-marking on important issues, and the abandonment of the government's double voting rights which gave it a 55% majority); Jacques Isnard, *L'Etat et la famille Dassault etudient un schema pour rapprocher l'avionneur et Aérospatiale*, Le Monde (January 17, 1998) (Exhibit US-311).

transfer the shares to Aérospatiale was inconsistent with the usual investment practice of private investors in the territory of the Member.

d. The 1998 Share Transfer Is Specific

620. The 1998 Dassault share capital transfer is specific within the meaning of Article 2 of the SCM Agreement as an *ad hoc* transfer from the French government explicitly limited to Aérospatiale.[764]

H. The Research and Development Funding That the European Commission and the Member States Provide to Airbus Are Specific Subsidies

621. In addition to the subsidies the United States has already discussed, the European Commission and the Airbus governments also subsidize Airbus by helping to fund its research and development efforts. The subsidies primarily take the form of straight cash grants, although in some cases they have taken the form of non-commercial loans. The primary vehicles for the subsidies at the European Commission level are the so-called EC Framework Programs, which the EC has maintained for many years. At the member State level, and at the sub-national level, the vehicles are dedicated programs that the governments have established for the specific purpose of funding aeronautics research.

622. In the remainder of this section, the United States will first demonstrate that the EC Framework Programs provide specific subsidies to Airbus within the meaning of the SCM Agreement. The United States will then demonstrate that the funding the Airbus governments provide under their programs, at both the national and sub-national levels, are also specific subsidies within the meaning of the SCM Agreement.

1. The Research and Development Funding That the European Commission Provides to Airbus Under the EC "Framework Programs" Are Specific Subsidies

a. Factual Background on the Framework Programs

623. For many years, the EC has provided grants to Airbus under the so-called EC Framework Programs to assist the company in funding its research and development efforts. The EC disburses the grants from budgets that it establishes specifically for aeronautics research.[765] The EC provides the grants to research consortia that Airbus leads or in which it is a key participant

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[764] *See* Aérospatiale, Annual Report 1998, at 28 (Exhibit US-301).

[765] The Second, Third, and Fourth Framework Programs funded aeronautics-related research and development through specific "Areas" of the BRITE-EURAM program. The Fifth Framework Program funded aeronautics-related research in the "New Perspectives in Aeronautics Program." Similarly, the Sixth Framework Program clustered aeronautics-related research in a separate, dedicated budget.

("Airbus research consortia"). Each grant is for an individual, discrete research project focusing on a particular aeronautics technology or production process. A primary goal of the grants, according to the EC, is to "improv{e} the competitiveness of the European aeronautical industries . . . ."[766]

624. The total amount of the grants has increased markedly in recent years. In the upcoming Seventh Framework Program, which begins in 2007, the EC is proposing to spend Euro 2.5 billion on aeronautics and air transport research projects.[767]

625. In the remainder of this section, the United States will first establish that the funding the EC provides under the Framework Programs constitutes subsidies to Airbus within the meaning of Article 1.1 of the SCM Agreement. Next, the United States will establish the amounts of the subsidies the EC has provided to Airbus under the Second through Sixth Framework Programs. Finally, the United States will demonstrate that the subsidies to Airbus are specific within the meaning of Article 2 of the SCM Agreement.

b. The Framework Program Grants Provide Financial Contributions to Airbus

626. All of the funding that the EC provides to Airbus under the Framework Programs takes the form of grants.[768] Article 1.1(a)(1)(i) of the SCM Agreement includes grants among the types of "direct transfers of funds" that constitute financial contributions within the meaning of the SCM Agreement. Accordingly, the funding that the EC has provided to Airbus under the Framework Programs constitutes financial contributions under Article 1.1(a)(1) of the SCM Agreement.

c. The Framework Program Grants Confer Benefits on Airbus

627. As the United States has already discussed, a financial contribution that confers a benefit on the recipient constitutes a subsidy within the meaning of Article 1.1 of the SCM Agreement. It is well established that a grant confers a benefit because, as the panel stated in *United States – Cotton*, a grant "place{s} the recipient in a better position than the recipient otherwise would have been in the marketplace."[769] Therefore, since the funding that the EC provides to Airbus under

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[766] *See, e.g.*, European Commission, Fourth Framework Programme, Aeronautics Related Research, Synopses of Current Projects Selected Under the 1995 Call for Proposals (1996) (Area 3A Aeronautics Technologies), at xx (Exhibit US-314).

[767] *See, e.g., EC Sets Out Aerospace Priorities in Seventh Framework*, Flight International (May 24, 2005) (Exhibit US-315).

[768] The EC confirmed in the Annex V process that "{a}ll EC Framework funding for research projects is provided in the form of grants." *See* EC Reply to Question 135 from the Facilitator (Exhibit US-5; see BCI Annex).

[769] *US – Cotton Subsidies (Panel)*, para. 7.1116; *see also Brazil – Aircraft (Article 21.5 II)*, para. 5.27 (stating that "{a}s a usual matter, of course, a non-refundable payment will confer a benefit").

the Framework Programs takes the form of grants, it necessarily confers benefits – and thus constitutes subsidies – under Article 1.1 of the SCM Agreement.

i. The EC provided at least Euro 19 million in subsidies to Airbus under the Second Framework Program

628. In the Second Framework Program, the EC established a separate research budget for aeronautics topics and allocated Euro 35,000,000 to aeronautics-related research projects.[770] Publicly available information confirms that Airbus participated in 15 of the 28 research projects that the EC funded under the Second Framework Program.[771] The publicly available information does not, however, indicate the total value of the grants that the EC provided for these 15 projects.

629. During the Annex V process, the Facilitator asked the EC to provide a project-by-project breakdown of the Second Framework Program budget, including a project-by-project breakdown with respect to any projects in which Airbus participated.[772] The EC refused to provide any of the information that the Facilitator requested.[773] As the United States noted above, however, the EC did confirm that all Framework Program funding takes the form of grants. Grants necessarily constitute subsidies within the meaning of Article 1.1 of the SCM Agreement. Therefore, it is indisputable that the grants that Airbus and its fellow consortia members received under the 15 research projects are subsidies.

630. In light of the EC's refusal to provide the information that the Facilitator requested, the United States respectfully requests the Panel to find, in accordance with paragraph 7 of Annex V, that the EC provided Euro 18,750,000 in subsidies to Airbus under the Second Framework Program.[774]

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[770] *See* Commission of the European Communities, BRITE/EURAM Area 5, Specific Activities Relating to Aeronautics, Synopses of Projects Supported Under the 1989 Call for Proposals (1990), at viii (Exhibit US-317).

[771] *Id.* For the panel's convenience, the United States has compiled and provided a complete list of these aeronautics-related research projects as Exhibit US-318.

[772] *See* Questions 153 and 154 from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

[773] *See* EC Replies to Questions 153 and 154 from the Facilitator (Exhibit US-5; see BCI Annex). The basis for the EC's refusal was its assertion that Airbus received the funding prior to 1992, and that the funding was therefore beyond the "outer temporal scope" of this dispute. As the United States explained in its response to the EC's request for preliminary rulings, the EC's position is baseless.

[774] In other words, the Panel should allocate 15/28ths of the total Second Framework Program budget to the projects involving Airbus. Euro 35,000,000 multiplied by 15/28 equals Euro 18,750,000.

ii. The EC provided at least [Euro] million in subsidies to Airbus under the Third Framework Program

631. In the Third Framework Program, the EC established a separate research budget for aeronautics and allocated Euro 56,000,000 to aeronautics-related research projects.[775] Publicly available information confirms that Airbus participated in 18 of the 27 aeronautics-related research projects that the EC funded under the Third Framework Program.[776] The publicly available information does not, however, indicate the total value of the grants that the EC provided for those 18 projects.

632. During the Annex V process, the Facilitator asked the EC to provide a project-by-project breakdown of the Third Framework Program budget, including a project-by-project breakdown with respect to any projects in which Airbus participated.[777] The EC stated in response that Airbus research consortia participated in **[ ]** projects that received a total of Euro **[ ]** in grants, including Euro **[ ]** paid directly to Airbus entities.[778] As the United States noted above, grants necessarily constitute subsidies within the meaning of Article 1.1 of the SCM Agreement. Thus, the EC concedes that Airbus research consortia received at least Euro **[ ]** in subsidies under the Third Framework Program, including Euro **[ ]** that Airbus received directly.

633. The EC refused to provide any information with respect to the remaining projects it funded and it made no attempt to reconcile the discrepancy between the publicly available information (which demonstrates that Airbus participated in 18 research projects) and the information it provided in the Annex V process (which asserts that Airbus participated in only **[ ]** research projects). The EC also refused to provide any information regarding the amount of funding that it provided for the **[ ]** research projects involving Airbus that it did not report.

634. In addition, the EC stated that it was only providing information with respect to "R&D projects related to LCA, in which 'Airbus entities' (as the EC understands it) participate or participated."[779] The EC did not explain how it determined whether a project was "related to LCA," and it did not explain what it "understood" the term "Airbus entities" to mean (it was a defined term in the Annex V questionnaire). It also did not identify the other participants in the projects at issue, or the amounts that the other participants received.

635. The qualifications in the EC's responses and the discrepancies between the public

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[775] *See* European Commission, Industrial and Materials Technologies Programme: Area 3, Aeronautics: Synopses of Current Aeronautics Projects (1993), at xxxii-xxxiii (Exhibit US-319).

[776] *Id.* For the panel's convenience, the United States has compiled and provided a complete list of these aeronautics-related research projects as Exhibit US-318.

[777] *See* Questions 156-157 from the Facilitator to the EC (Exhibit US-4; *see* BCI Annex).

[778] *See* DS316-EC BCI-0000815-816 (Exhibit US-320; *see* BCI Annex).

[779] *See* EC Reply to Question 132 from the Facilitator (Exhibit US-5; *see* BCI Annex).

information and the information it reported suggest that the EC has not reported all of the funding that Airbus entities received under the Third Framework Program. It also leaves the Panel with insufficient information to determine how much of the funding that the EC reported as having been provided to Airbus research consortia was provided to Airbus entities (as defined in the Annex V questionnaire), and how much was provided to consortia members who are not Airbus entities (as defined in the Annex V questionnaire). Therefore, the United States respectfully requests that the Panel either request the EC to provide the additional information that would allow a precise calculation of the amount that was provided to Airbus entities (as defined in the Annex V questionnaire) or else find, in accordance with paragraph 7 of Annex V, that Airbus participated in 18 research projects under the Third Framework Program and that it received **[**Euro **]** in subsidies under that Program.[780]

iii. The EC provided at least [Euro] million in subsidies to Airbus under the Fourth Framework Program

636. In the Fourth Framework Program, the EC established a separate research budget for aeronautics and allocated Euro 245,000,000 to aeronautics-related research projects.[781] Publicly available information confirms that Airbus participated in 71 of the 139 research projects that the EC funded under the Fourth Framework Program.[782] The publicly available information does not, however, indicate the total value of the grants that the EC provided for those 71 projects.

637. During the Annex V process, the Facilitator asked the EC to provide a project-by-project breakdown of the Fourth Framework Program budget, including a project-by-project breakdown with respect to any projects in which Airbus participated.[783] The EC stated in response that Airbus research consortia participated in **[ ]** projects that received a total of Euro **[ ]** in grants, including **[**Euro **]** paid directly to Airbus.[784] As the United States noted above, grants necessarily constitute subsidies within the meaning of Article 1.1 of the SCM Agreement. Thus, the EC concedes that Airbus research consortia received at least **[**Euro **]** in subsidies under the Fourth Framework Program, including **[**Euro **]** that the company received directly.

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[780] The EC admits that Airbus participated in **[ ]** projects that received **[**Euro **]** in subsidies. Thus, the average grant amount for each of these projects was **[**Euro **]**. If one assumes that the other **[ ]** projects also averaged **[**Euro **]** (a reasonable assumption in the absence of the actual data), then Airbus research consortia received **[**Euro **]** for those projects, or a total of **[**Euro **]** overall. If the EC refuses to provide sufficient information to allow a precise division between the amount provided to Airbus entities and the amount provided to other consortia members, the United States respectfully requests that the entire amount be attributed to Airbus.

[781] *See* European Commission, Fourth Framework Programme, Aeronautics Related Research, Synopses of Current Projects Selected Under the 1995 Call for Proposals, at xix, xxi (Area 3A Aeronautics Technologies) (1996) (Exhibit US-314).

[782] *Id.*; *see also* on-line project synopses, at cordis.europa.eu. For the Panel's convenience, the United States has compiled and provided a complete list of these aeronautics-related research projects as Exhibit US-318.

[783] *See* Question 161 from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

[784] *See* DS316-EC-BCI-0000819/820 (Exhibit US-321; *see* BCI Annex).

638. The EC refused to provide any information with respect to the remaining projects it funded and it made no attempt to reconcile the discrepancy between the publicly available information (which demonstrates that Airbus participated in 71 research projects) and the information it provided in the Annex V process (which asserts that Airbus participated in only **[ ]** research projects). The EC also refused to provide any information regarding the amount of funding that it provided for the other **[ ]** research projects that involved Airbus.

639. In addition, the EC stated that it was only providing information with respect to "R&D projects related to LCA, in which 'Airbus entities' (as the EC understands it) participate or participated."[785] The EC did not explain how it determined whether a project was "related to LCA," and it did not explain what it "understood" the term "Airbus entities" to mean (it was a defined term in the Annex V questionnaire). It also did not identify the other participants in the projects at issue, or the amounts that the other participants received.

640. The qualifications in the EC's responses and the discrepancies between the public information and the information it reported suggest that the EC has not reported all of the funding that Airbus entities received under the Fourth Framework Program. It also leaves the Panel with insufficient information to determine how much of the funding that the EC reported as having been provided to Airbus research consortia was provided to Airbus entities (as defined in the Annex V questionnaire), and how much was provided to consortia members who are not Airbus entities (as defined in the Annex V questionnaire). Therefore, the United States respectfully requests that the Panel either request the EC to provide the additional information that would allow a precise calculation of the amount that was provided to Airbus entities (as defined in the Annex V questionnaire) or else find, in accordance with paragraph 7 of Annex V, that Airbus participated in 71 research projects under the Fourth Framework Program and that Airbus research consortia received **[**Euro **]** in subsidies under that Program.[786] In addition, If the EC refuses to provide sufficient information to allow a precise division between the amount provided to Airbus entities and the amount provided to other consortia members, the United States respectfully requests that the entire amount be attributed to Airbus.

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[785] *See* EC Reply to Question 132 from the Facilitator (Exhibit US-5; *see* BCI Annex).

[786] The EC admits that Airbus participated in **[ ]** projects that received Euro **[ ]** in subsidies. Thus, the average grant amount for each project was Euro **[ ]**. If one assumes that the other **[ ]** projects also averaged Euro **[ ]** (a reasonable assumption in the absence of the actual data), then Airbus research consortia received Euro **[ ]** for those projects, or a total of Euro **[ ]** overall. If the EC refuses to provide sufficient information to allow a precise division between the amount provided to Airbus entities and the amount provided to other consortia members, the United States respectfully requests that the entire amount be attributed to Airbus.

iv. The EC provided Euro 509 million in subsidies to Airbus under the Fifth Framework Program

641. In the Fifth Framework Program, the EC established a separate research budget for aeronautics topics and allocated Euro 700,000,000 to aeronautics-related research projects.[787] Publicly available information confirms that Airbus research consortia received Euro 509,000,000 in grants under 72 research projects.[788]

642. During the Annex V process, the Facilitator asked the EC to provide a project-by-project breakdown of the Fifth Framework Program budget, including a project-by-project breakdown with respect to any projects in which Airbus participated.[789] The EC stated in response that Airbus research consortia participated in **[ ]** projects that received a total of **[**Euro **]** in grants, including **[**Euro **]** paid directly to Airbus.[790] As the United States noted above, grants necessarily constitute subsidies within the meaning of Article 1.1 of the SCM Agreement. Thus, the EC concedes that Airbus research consortia received at least **[**Euro **]** in subsidies under the Fifth Framework Program, including **[**Euro **]** that Airbus received directly.

643. The EC refused to provide any information with respect to the remaining projects it funded and it made no attempt to reconcile the discrepancy between the publicly available information (which demonstrates that Airbus research consortia received Euro 509,000,000 under 72 research projects) and the information it provided in the Annex V process (which asserts that Airbus research consortia received **[**Euro **]** in subsidies under **[ ]** research projects).

644. In addition, the EC stated that it was only providing information with respect to "R&D projects related to LCA, in which 'Airbus entities' (as the EC understands it) participate or participated."[791] The EC did not explain how it determined whether a project was "related to LCA," and it did not explain what it "understood" the term "Airbus entities" to mean (it was a defined term in the Annex V questionnaire). It also did not identify the other participants in the projects at issue, or the amounts that the other participants received.

645. The qualifications in the EC's responses and the discrepancies between the public information and the information it reported suggest that the EC has not reported all of the funding that Airbus entities received under the Fifth Framework Program. It also leaves the Panel with insufficient information to determine how much of the funding that the EC reported as having

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[787] *See* The Competitive and Sustainable Growth Programme, 1998-2002 Project Synopses: New Perspectives in Aeronautics, 2003, at xi (Exhibit US-322).

[788] *Id.*; *see also* on-line synopses, at cordis.europa.eu. For the Panel's convenience, the United States has compiled and provided a complete list of these aeronautics-related research projects as Exhibit US-318.

[789] *See* Question 162 from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

[790] *See* DS316-EC-BCI-0000821, 0000824 (Exhibit US-323; *see* BCI Annex).

[791] *See* EC Reply to Question 132 from the Facilitator (Exhibit US-5; *see* BCI Annex).

been provided to Airbus research consortia was provided to Airbus entities (as defined in the Annex V questionnaire), and how much was provided to consortia members who are not Airbus entities (as defined in the Annex V questionnaire). Therefore, the United States respectfully requests that the Panel either request the EC to provide the additional information that would allow a precise calculation of the amount that was provided to Airbus entities (as defined in the Annex V questionnaire) or else find, in accordance with paragraph 7 of Annex V, that the public information is correct and that Airbus research consortia received Euro 509,000,000 in subsidies under the Fifth Framework Program. In addition, if the EC refuses to provide sufficient information to allow a precise division between the amount provided to Airbus entities and the amount provided to other consortia members, the United States respectfully requests that the entire amount be attributed to Airbus.

v. The EC has provided at least Euro 450 million in subsidies to Airbus under the Sixth Framework Program

646. In the Sixth Framework Program, the EC established "Aeronautics and Space" as a priority research area and allocated Euro 840,000,000 specifically to aeronautics research projects.[792] Since the Sixth Framework Program is still ongoing, an exhaustive list of all of the research projects funded under the program is not yet available. The public information that is currently available does, however, demonstrate that the EC has already committed at least Euro 525,000,000 for aeronautics-related research and that Airbus research consortia have already received at least Euro 450,000,000 pursuant to 61 research projects funded under the first two calls for proposals.[793]

647. During the Annex V process, the Facilitator asked the EC to provide a project-by-project breakdown of the amounts that the EC committed and provided for aeronautics projects under the Sixth Framework Program, including a project-by-project breakdown with respect to any projects in which Airbus participated.[794] The EC stated in response that Airbus research consortia have participated in **[ ]** projects that have received a total of **[**Euro **]** in grants, including **[**Euro **]** paid directly to Airbus.[795] As the United States noted above, grants necessarily constitute subsidies within the meaning of Article 1.1 of the SCM Agreement. Thus, the EC concedes that Airbus research consortia have received at least **[**Euro **]** in subsidies under the Sixth Framework Program, including **[**Euro **]** that Airbus received directly.

648. The EC refused to provide any information with respect to the remaining projects it

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[792] *See* EC Reply to Question 164(b) from the Facilitator (Exhibit US-5; see BCI Annex).

[793] *See* European Commission, Aeronautics Research 2003-2006 Projects, Project Synopses – Volume 1, Research Projects from the First and Second Calls (2006) (Exhibit US-324); *see also* on-line project synopses at cordis.europa.eu. For the Panel's convenience, the United States has compiled and provided a complete list of these aeronautics-related research projects as Exhibit US-318.

[794] *See* Question 164 from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

[795] *See* DS316-EC-BCI-0000825 (Exhibit US-325; *see* BCI Annex).

funded and it made no attempt to reconcile the discrepancy between the publicly available information (which demonstrates that Airbus research consortia have received Euro 450,000,000 under 61 research projects) and the information it provided in the Annex V process (which asserts that Airbus research consortia have received **[**Euro **]** in subsidies under **[ ]** research projects).

649. In addition, the EC stated that it was only providing information with respect to "R&D projects related to LCA, in which 'Airbus entities' (as the EC understands it) participate or participated."[796] The EC did not explain how it determined whether a project was "related to LCA," and it did not explain what it "understood" the term "Airbus entities" to mean (it was a defined term in the Annex V questionnaire). It also did not identify the other participants in the projects at issue, or the amounts that the other participants received.

650. The qualifications in the EC's responses and the discrepancies between the public information and the information it reported suggest that the EC has not reported all of the funding that Airbus entities received under the Sixth Framework Program. It also leaves the Panel with insufficient information to determine how much of the funding that the EC reported as having been provided to Airbus research consortia was provided to Airbus entities (as defined in the Annex V questionnaire), and how much was provided to consortia members who are not Airbus entities (as defined in the Annex V questionnaire). Therefore, the United States respectfully requests that the Panel either request the EC to provide the additional information that would allow a precise calculation of the amount that was provided to Airbus entities (as defined in the Annex V questionnaire) or else find, in accordance with paragraph 7 of Annex V, that the public information is correct and that Airbus research consortia received Euro 450,000,000 in subsidies under the Sixth Framework Program. In addition, if the EC refuses to provide sufficient information to allow a precise division between the amount provided to Airbus entities and the amount provided to other consortia members, the United States respectfully requests that the entire amount be attributed to Airbus.

d. The Framework Program Grants Are Specific Within the Meaning of Article 2 of the SCM Agreement

651. Finally, the grants that the European Commission provides to Airbus under the EC Framework Programs are specific to Airbus and/or the aeronautics industry within the meaning of Article 2 of the SCM Agreement.

652. The subsidies are specific "in law" because each Framework Program has a sub-budget that is specific to the aeronautics industry:

- In the Second Framework Program, the EC established a separate sub-budget within BRITE/EURAM for aeronautics research, called "Area 5 - Specific

[796] *See* EC Reply to Question 132 from the Facilitator (Exhibit US-5; *see* BCI Annex).

Activities Relating to Aeronautics."

- In the Third Framework Program, the EC again established a separate sub-budget within BRITE/EURAM for aeronautics research, called "Area 3, Aeronautics."

- In the Fourth Framework Program, the EC again established a separate sub-budget within BRITE/EURAM for aeronautics research, called "Area 3, Aeronautics Technologies."

- In the Fifth Framework Program, the EC established "New Perspectives for Aeronautics," an aeronautics-specific research initiative.

- In the Sixth Framework Program, the EC designated aeronautics research as a "priority" area, with a separate and dedicated budget.

653. Furthermore, under these sub-budgets, the EC publishes calls for project proposals, which provide that the research proposals must be aeronautics-related in order to be eligible for the budgeted funding.[797] The subsidies are also specific "in fact," because the predominant users of the grants are aeronautics companies, as the project synopses that the United States is providing with this submission demonstrate.

2. The Research and Development Funding That German Federal Authorities Provide to Airbus Under Their Research and Development Programs Are Specific Subsidies

654. For many years, the German Federal Government and the sub-federal ("Länder") governments of Hamburg, Bremen, and Bavaria have provided grants to Airbus to help fund its civil aeronautics research and development efforts. The total amount of the grants is at least **[ ]**, including Euro 695,000,000 from the Federal government and **[ ]** from the Länder governments.

655. All of the civil aeronautics research and development funding that the German governments provide to Airbus takes the form of grants.[798] Article 1.1(a)(1)(i) of the SCM Agreement includes grants among the types of "direct transfers of funds" that constitute financial contributions within the meaning of the SCM Agreement. Accordingly, all of the funding constitutes financial contributions under Article 1.1(a)(1) of the SCM Agreement.

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[797] *See, e.g.*, Calls for proposals for indirect RTD actions under the specific programme for research, technological development and demonstration: 'Integrating and strengthening the European Research Area,' OJ C 315/1, Annex 7 ("Areas Called") (Dec. 17, 2002) (Exhibit US-316).

[798] The EC confirmed in the Annex V process that German Federal Government research and development funding "is given only in the form of grants" and that "{a}ll Länder funding takes the form of grants." See EC Replies to Question 170(y) and 182 from the Facilitator (Exhibit US-5).

656. As the United States has already discussed, a financial contribution that confers a benefit on the recipient constitutes a subsidy within the meaning of Article 1.1 of the SCM Agreement. It is well established that a grant confers a benefit on its recipient because, as the panel stated in *United States – Cotton*, a grant "place{s} the recipient in a better position than the recipient otherwise would have been in the marketplace."[799] Therefore, since the research and development funding that the Federal and Länder governments have provided to Airbus takes the form of grants, it necessarily confers benefits – and thus constitutes subsidies – under Article 1.1 of the SCM Agreement.

657. Finally, Germany disburses the subsidies pursuant to programs that are dedicated specifically to aeronautics. Therefore, they are specific under Article 2 of the SCM Agreement.

658. In the remainder of this section, the United States will first discuss the funding that Airbus receives from the German federal government. The United States will then discuss the funding that Airbus receives from the Länder governments, Hamburg, Bremen, and Bavaria.

a. Factual Background on German Federal Government R&D Funding

659. Since 1973, the German Federal Government has provided DM 1,360,000,000 (Euro 695,000,000) in grants to Airbus for civil aeronautics research and development.[800] From 1973 until 1994, the German Federal Government disbursed the grants to Airbus pursuant to the "Gesamtprogramm Luftfahrtforschung und –technologie" ("Second Joint Aeronautics Research and Technology Program") (1979 through 1982), the "Gesamtprogramm Luftfahrtforschung und –technologie" ("Joint Aeronautics Research and Technology Program") (1983 through 1985), and the "Fachprogramm Luftfahrtforschung und –technologie" ("Special Aeronautics Research and Technology Program") (1986 through 1994).[801] From 1995 until the present, the German Federal Government disbursed its civil aeronautics research and development grants under a series of Aeronautics Research Programs ("Luftfahrtforschungsprogramme" or "Lufo") – Lufo 1, Lufo 2, and Lufo 3.[802]

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[799] *US – Cotton Subsidies (Panel)*, para. 7.1116; *see also Brazil – Aircraft (Article 21.5 II)*, para. 5.27.

[800] *See* data from Förderkatalog website (Exhibit US-326). The United States used the official bound rate of DM 1.95583 = Euro 1 for its conversion.

[801] *See* Federal Budget, Budget Plan 30 (Ministry for Research and Technology), Part 06, Chapter 06, Line Items 685 02 and 893 02 (Exhibit US-327) (chapter numbering changes to 05 in 1985, 07 in 1987, and 04 in 1989).

[802] For LuFo 1, *see* Federal Budgets 1995 through 1998, Budget Plan 30 (Ministry for Research and Technology), Part 06, Chapter 06, Line Items 685 02 and 893 02 and Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Items 683 94. For Lufo 2, *see* Federal Budgets Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Items 683 94-634 for years 1999 and 2000 and line item 683 94-169 for 2001 and 2002. For Lufo 3, *see* Federal Budgets 2003 through 2005, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, line item 683 94-169 (Exhibit US-327).

b. The German Federal Government R&D Grants Are Subsidies

660. During the Annex V process, the Facilitator asked the EC to provide the amount of funding Airbus received from German Federal Government sources for civil aeronautics research and development between 1970 and July 2005.[803] The EC stated in response that Airbus has received a total of Euro [ ] since 1992.[804] The EC refused, however, to provide any information for the period prior to 1992.[805]

661. Nevertheless, as the United States noted above, the EC did confirm that all German Federal Government research and development funding takes the form of grants. Because grants necessarily constitute subsidies within the meaning of Article 1.1 of the SCM Agreement, the EC thus concedes that Airbus has received at least Euro [ ] in R&D subsidies from the German Federal Government since 1992.

662. In addition, the German Federal Government's Förderkatalog states that Airbus has received a total of DM 1,360,000,000 (Euro 695,000,000) in grants under the German Federal Government's civil aeronautics research and development programs since 1973.[806] Accordingly, since the EC concedes that Airbus has received at least Euro [ ] in grants under these programs since 1992, Airbus must have received the remaining Euro [ ] in grants between 1973 and 1992.

663. In addition, the Förderkatalog states that the German government has committed Euro 217,000,000 to Airbus under LuFo 1, LuFo 2, and LuFo 3.[807]

664. The United States has decided to limit its claims with respect to this issue to the subsidies that Airbus received under the LuFo programs. Therefore, the United States respectfully requests the Panel to find, consistent with the information in the Förderkatalog, that Airbus has received Euro 217,000,000 in subsidies since 1995 under the LuFo programs.

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[803] *See* Question 167(a) from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

[804] *See* EC Reply to Question 167(a) from the Facilitator (Exhibit US-5; see BCI Annex).

[805] *See id.* The basis for the EC's refusal was its assertion that Airbus received the funding prior to 1992, and that the funding was therefore beyond the "outer temporal scope" of this dispute. As the United States explained in its response to the EC's request for preliminary rulings, the EC's position is baseless.

[806] The Förderkatalog is an electronic R&D subsidy catalog maintained by the German government. It records R&D funding provided by the German Federal Ministry for Research and Technology and the German Federal Economics Ministry. It records the funding on a company-specific and project-specific basis.

[807] German Federal Government R&D Funding to Airbus under the Luftfahrtforschungsprogramms 1, 2, and 3 (1995-2007) (based on data in Förderkatalog as of April 2005).

c. The German Federal Government R&D Grants Are Specific Within the Meaning of Article 2 of the SCM Agreement

665. The German Federal Government's R&D grants to Airbus are specific to Airbus and/or the aeronautics industry within the meaning of Article 2 of the SCM Agreement. The German Federal Government disburses the grants from budgets that are specific to the civil aeronautics industry,[808] and access to the grants is explicitly limited to the civil aeronautics industry.[809] The Directorate IVA (Aerospace Industry and Aeronautics Research) has oversight responsibility for aeronautics research and development grants, and the Program Management office for Aeronautics Research and Technology (Projekträger Luftfahrtforschung und technologie) administers the programs.[810]

666. In addition, the European Commission has found under its state aid rules that, at least with respect to Lufo 3, the German government selectively provides the grants to aeronautics companies, thus confirming that they are specific within the meaning of Article 2 of the SCM Agreement.[811]

3. The Research and Development Funding That German Länder Governments Provide to Airbus Under Their Research and Development Programs Are Specific Subsidies

667. In addition to the research and development subsidies that Airbus has received from the German Federal Government, Airbus has received at least **[**Euro **]** in civil aeronautics R&D subsidies from the German sub-federal ("Länder") governments. The **[**Euro **]** total includes **[**Euro **]** from Bavaria, **[**Euro **]** from Hamburg, and Euro 11,000,000 from Bremen.

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[808] For LuFo 1, *see* Federal Budgets 1995 through 1998, Budget Plan 30 (Ministry for Research and Technology), Part 06, Chapter 06, Line Items 685 02 and 893 02 and Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Items 683 94. For Lufo 2 *see* Federal Budgets Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Items 683 94-634 for years 1999 and 2000 and line item 683 94-169 for 2001 and 2002. For Lufo 3, *see* Federal Budgets 2003 through 2005, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, line item 683 94-169 (Exhibit US-327).

[809] Companies submit project proposals that must be "in accordance with the objective of the Lufo programme" in order to receive funding. See EC Reply to Question 173 from the Facilitator (Exhibit US-5; see BCI Annex).

[810] *See* EC Reply to Question 170(e) from the Facilitator (Exhibit US-5; see BCI Annex).

[811] *See e.g.*, European Commission, State Aid Decision, N 741/2002 - Bundesrepublik Deutschland, Luftfahrtforschungsprogramm 2003 - 2007, C (2003) 193, at 9 (Lufo 3 is "selective because it favors companies that are active in the aviation industry") (Exhibit US-328).

a. The Government of Bavaria's R&D Grants Are Specific Subsidies

i. Factual background on Government of Bavaria R&D grants

668. Since 1990, the Government of Bavaria has administered various civil aeronautics and space research and development programs, including the "Offensive Zukunft Bayern" (established in 1995); the "Offensive Zukunft Bayern II (established in 1996); and the Bayerisches Luftfahrtforschungsprogramm, or "Bavarian Aeronautics Research Program" (established in 2000). Airbus has received at least **[**Euro **]** in research and development grants under these programs.

ii. The Government of Bavaria R&D grants are subsidies

669. During the Annex V process, the Facilitator asked the EC to provide the amount of funding Airbus received from the Government of Bavaria for civil aeronautics research since 1990.[812] The EC stated in response that Airbus has received **[**Euro **]**.[813] As the United States has already noted, the EC has confirmed that all Länder government research and development funding, including that of Bavaria, takes the form of grants. Therefore, because grants necessarily constitute subsidies within the meaning of Article 1.1 of the SCM Agreement, the EC concedes that Airbus has received at least **[**Euro **]** in R&D subsidies from the Government of Bavaria since 1990.

iii. The Government of Bavaria R&D grants are specific within the meaning of Article 2 of the SCM Agreement

670. The Bavarian government explicitly limits access to its civil aeronautics R&D grants to "{c}ompanies from Bavaria's aviation industry."[814] Therefore, the grants are specific to Airbus and/or the aeronautics industry within the meaning of Article 2 of the SCM Agreement.

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[812] *See* Question 188(d) from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

[813] *See* EC Replies to Questions 188(c) and 191(b) from the Facilitator (Exhibit US-5; see BCI Annex); *see also* DS316-EC-BCI-0003266 (Exhibit US-329; *see* BCI Annex).

[814] *See*, *e.g.*, Bayerische Luftfahrtforschungs- und Technologieförderung, 2006 (Exhibit US-330). Funding under the Offensive Zukunft Bayern I and II is limited to "aircraft building and support for aerospace technology projects." See Bayerischer Landtag, Drs. 14/2210, at 20 (Exhibit US-331).

b. The Government of Hamburg's R&D Grants Are Specific Subsidies

i. Factual background on Government of Hamburg R&D grants

671. Between 2001 and 2005, the Land (and City) of Hamburg administered the Hamburger Luftfahrtforschungsprogram, or "Aeronautics Research Program."[815] The Government of Hamburg disbursed at least **[**Euro **]** in aeronautics-specific research and development grants to Airbus under the program.

ii. The Government of Hamburg R&D grants are subsidies

672. During the Annex V process, the Facilitator asked the EC to provide the amount of funding Airbus received from the Government of Hamburg for civil aeronautics research between 2001 and 2005.[816] In response, the EC stated that Airbus received **[**Euro **]**.[817] As the United States has already noted, the EC has confirmed that all Länder government research and development funding, including that of Hamburg, takes the form of grants. Because grants necessarily constitute subsidies within the meaning of Article 1.1 of the SCM Agreement, the EC thus concedes that the Government of Hamburg has provided at least **[**Euro **]** in R&D subsidies to Airbus since 2001.

iii. The Government of Hamburg R&D grants are specific within the meaning of Article 2 of the SCM Agreement

673. Civil aeronautics research and development grants from the Government of Hamburg to Airbus are specific to Airbus and/or the aeronautics industry within the meaning of Article 2 of the SCM Agreement. The government explicitly limits access to the subsidies to Hamburg-based companies operating in the aerospace and supply industry.[818]

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[815] *See* EC Replies to Questions 185(a) and 185(d) from the Facilitator (Exhibit US-5; see BCI Annex).

[816] *See* Question 185(b)(iii) from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

[817] *See* DS316-EC-BCI-0003268 (Exhibit US-332; *see* BCI Annex).

[818] *See* Freie und Hansestadt Hamburg Förderung der Luftfahrtforschung- und Technologie (Exhibit US-333). Universities in Hamburg are also eligible. *Id.*

c. The Government of Bremen's R&D Grants Are Specific Subsidies

i. Factual background on Government of Bremen R&D grants

674. Since 1999, the Land (and City) of Bremen has administered the Airbus Materials & System Technology ("AMST") program,[819] pursuant to which it has disbursed aeronautics-specific research and development grants to Airbus. The first phase of the program, AMST I, ran from 1999 to 2005.[820] A second phase of the program, AMST II, overlapped with the first phase and ran from 2002 to 2006.[821] Under AMST I and II, the Government of Bremen agreed to provide a total of Euro 11,000,000 in grants to Airbus.[822]

ii. The Government of Bremen's R&D grants are subsidies

675. During the Annex V process, the Facilitator asked the EC to provide the amount of funding Airbus received from the Government of Bremen for civil aeronautics research and development under AMST I and II.[823] In response, the EC acknowledged that Airbus received Euro **[ ]** under these programs.[824] As the United States has already noted, the EC has confirmed that all Länder government research and development funding, including that of Bremen, takes the form of grants. Because grants necessarily constitute subsidies within the meaning of Article 1.1 of the SCM Agreement, the EC thus concedes that Airbus has already received at least Euro **[ ]** in R&D subsidies from Bremen since 1999.

676. Furthermore, the United States already noted that Bremen agreed to provide a total of Euro 11,000,000 in grants to Airbus. The EC did not explain the discrepancy between the Euro **[ ]** it concedes Airbus has received and the Euro 11,000,000 Bremen has agreed to provide. Therefore, in accordance with paragraph 7 of Annex V, the United States respectfully requests the Panel to find that Bremen has provided Euro 11,000,000 in subsidies to Airbus under AMST I and II.

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[819] *See* Bremische Bürgerschaft, Drucksache 15/1115, April 16, 2002, Mitteilung des Senats vom 16. April 2002 - Technologieoffensive für das Land Bremen, Annex, InnoVision 2010 - Bremer Innivationsoffensive, April 2002, p. 20 (Exhibit US-334).

[820] *See* EC Reply to Question 186(d) from the Facilitator (Exhibit US-5; see BCI Annex).

[821] *Id.*

[822] *See* Freie Hansestadt Bremen, Wirtschaftssenator Dr. Peter Gloystein: "Luftfahrzeugbau eine der Schlüsselindustrien in Bremen," press release of October 8, 2004 (Exhibit US-335).

[823] *See* Question 186(d) from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

[824] *See* EC Reply to Question 186(d) from the Facilitator (Exhibit US-5; see BCI Annex).

iii. The Government of Bremen's R&D grants are specific within the meaning of Article 2 of the SCM Agreement

677. Civil aeronautics research and development grants from the Government of Bremen to Airbus are specific to Airbus and/or the aeronautics industry within the meaning of Article 2 of the SCM Agreement. The Government of Bremen explicitly limits access to grants under AMST I and II to Airbus and other entities that contribute to establishing Airbus competence centers in Bremen.[825]

4. The Research and Development Funding That French Authorities Provide to Airbus Under Their Research and Development Program Are Specific Subsidies

a. Factual Background on French R&D Funding

678. Between 1986 and 2005, the French Government budgeted over Euro 1.2 billion in grants to the aeronautics industry for civil aeronautics research and development ("recherche amont de l'aéronautique").[826] The Direction des Programmes Aéronautiques et de la coopération ("DPAC") administered the programs.[827] Based on public information, DPAC budgeted Euro 391,000,000 from 1986 to 1993, and Euro 809,000,000 from 1994 to 2005.[828]

679. During the Annex V process, the EC acknowledged that Airbus received at least **[ ]** of the Euro 809,000,000 that DPAC budgeted from 1994 to 2005.[829] The EC refused to provide any information regarding grants Airbus received from 1986 to 1993, however.

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[825] *See* Freie Hansestadt Bremen, Wirtschaftssenator Dr. Peter Gloystein: "Luftfahrzeugbau eine der Schlüsselindustrien in Bremen", press release of October 8, 2004 (Exhibit US-335); IFAM, Jahresbericht 2000, Technologiebroker, p. 3 (Exhibit US-336).

[826] *See* French Government Funding for Civil Aeronautics Research and Development (yearly budgets) (Exhibit US-337).

[827] *See* EC Reply to Question 247(e) from the Facilitator (Exhibit US-5; see BCI Annex).

[828] *See* French Government Funding for Civil Aeronautics Research and Development (yearly budgets) (Exhibit US-337).

[829] *See* DS316-EC-BCI-0003482 (Exhibit US-338; *see* BCI Annex). According to the EC, French authorities provided **[**Euro **]** in aeronautics research and development funding from 1995 to 2005. *See id.* The EC, however, made no attempt to reconcile this figure with the public budgeted amount of Euro 809,000,000 for the same period.

b. The French Government's R&D Funding Provides a Financial Contribution to Airbus

680. All of the research and development funding that French authorities provide to Airbus takes the form of grants.[830] Article 1.1(a)(1)(i) of the SCM Agreement includes grants among the types of "direct transfers of funds" that constitute financial contributions within the meaning of the SCM Agreement. Accordingly, the French government's R&D funding to Airbus constitutes a financial contribution under Article 1.1(a)(1) of the SCM Agreement.

c. The French Government's R&D Funding Confers a Benefit on Airbus

681. As the United States has already discussed, a financial contribution that confers a benefit on the recipient constitutes a subsidy within the meaning of Article 1.1 of the SCM Agreement. A grant confers a benefit on its recipient because, as the panel stated in *United States – Cotton*, it "place{s} the recipient in a better position than the recipient otherwise would have been in the marketplace."[831] Therefore, since the research and development funding that French authorities provides to Airbus takes the form of grants, it necessarily confers benefits – and thus constitutes subsidies – under Article 1.1 of the SCM Agreement.

682. During the Annex V process, the Facilitator asked the EC to provide a full breakdown of the projects, amounts, and recipients of all civil aeronautics research and development grants that the French Government provided between 1986 and 2005.[832] The EC stated in response that Airbus received **[**Euro **]** in grants from 1994 to 2005. It refused to provide the other information that the Facilitator requested.

683. Since the EC has confirmed that French Government research and development funding takes the form of grants, its statement that Airbus received **[**Euro **]** in R&D grants from the French government from 1994 to 2005 is an admission that Airbus received subsidies of at least that amount during that time period. In addition, the United States demonstrated with respect to the EC Framework Programs that the EC's responses during the Annex V process appear consistently to understate the actual amounts of R&D subsidies that Airbus received. Therefore, the United States respectfully requests that the Panel use its authority under Article 13 of the DSU to ask the EC to provide the full breakdown of the Euro 809,000,000, by project, amount, and recipient, that the Facilitator requested.[833] In this way, the Panel will have the information it needs to establish the precise amount of the subsidies that Airbus has received.

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[830] The EC has confirmed that French research and development funding takes the form of grants. *See* EC Reply to Question 247(n) from the Facilitator (Exhibit US-5; see BCI Annex).

[831] *US – Cotton Subsidies (Panel)*, para. 7.1116; see also *Brazil – Aircraft (Article 21.5 II)*, para. 5.27.

[832] *See* Question 247 from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

[833] *See* EC Reply to Question 248 from the Facilitator to the EC (Exhibit US-5; see BCI Annex).

684. Furthermore, the EC refused to provide any of the funding information that the Facilitator requested for the period 1986 to 1993.[834] As discussed above, public information shows that French authorities budgeted Euro 391,000,000 in civil aeronautics research and development grants to the aeronautics industry during that period. Therefore, the United States respectfully requests that the Panel either request the EC to provide the information for the grants that Airbus received during this period, or else find, in accordance with paragraph 7 of Annex V, that Airbus received Euro 391,000,000 in civil aeronautics R&D grants from the French government for the period 1986 to 1993.

d. The French Government's R&D Funding Is Specific Within the Meaning of Article 2 of the SCM Agreement

685. The civil aeronautics research and development grants that the French Government provide to Airbus are specific to Airbus and/or the aeronautics industry within the meaning of Article 2 of the SCM Agreement. The French government provides the grants pursuant to a budget that is dedicated to "aeronautic construction," and the government limits access to the grants to aeronautics manufacturing companies.[835]

5. The Research and Development Funding That UK Authorities Provide to Airbus Under Their Research and Development Programs Are Specific Subsidies

a. Factual Background on UK R&D Grants

686. For many years, the UK Department of Trade and Industry ("DTI") has provided aeronautics-related research and development grants to Airbus research consortia that Airbus leads or in which it is a key participant. Since 1992, DTI has agreed to provide approximately **[**£ **]** in grants to Airbus research consortia under the Civil Aircraft Research and Demonstration ("CARAD") program (subsequently renamed the Aeronautics Research Programme ("ARP")). It has already disbursed **[**£ **]** of that amount.[836]

687. In addition, the UK government replaced the CARAD program with a new program, the

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[834] *See* EC Statement before EC Reply to Question 247 from the Facilitator (Exhibit US-5; see BCI Annex). The basis for the EC's refusal was its assertion that Airbus received the funding beyond the "outer temporal scope" of this dispute. As the United States explained in its response to the EC's request for preliminary rulings, the EC's position is baseless.

[835] *See*, e.g., Sénat, No. 73 (session ordinaire de 2003-2004), Rapport Général, Commission des Finances, du Contrôle Budgétaire et des Comptes Économiques de la Nation sur le projet de loi de finances pour 2004, Tome III, Annexe No. 18 Équipement, Transport et Logement. III. - Transports et Sécurité Routière: Aviation et Aéronautique Civiles, p. 37 (Exhibit US-337F).

[836] *See* DS316-EC-BCI-0003361-0003370 (summarized in Exhibit US-339; *see* BCI Annex).

so-called "Technology Program" ("TP"), in 2004.[837] DTI has committed an additional **[**£ **]** to Airbus research consortia under the TP program.[838] Thus, since 1992, DTI has agreed to provide at least **[**£ **]** to Airbus research consortia under these R&D programs.

b. The UK Government's R&D Grants Provide Financial Contributions to Airbus

688. All of the funding the DTI has agreed to provide to Airbus research consortia under CARAD/ARP and TP has taken the form of grants.[839] Article 1.1(a)(1)(i) of the SCM Agreement includes grants among the types of "direct transfers of funds" that constitute financial contributions within the meaning of the SCM Agreement. Therefore, the funding that DTI has committed or provided to Airbus research consortia under CARAD/ARP and TP constitutes financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement.

c. The UK Government's R&D Grants Confer Benefits on Airbus

689. A financial contribution that confers a benefit on the recipient constitutes a subsidy within the meaning of Article 1.1 of the SCM Agreement.[840] It is well established that a grant confers a benefit on its recipient because it "place{s} the recipient in a better position than the recipient otherwise would have been in the marketplace."[841] Therefore, since the funding that DTI provides to Airbus under CARAD/ARP and TP takes the form of grants, it necessarily confers benefits – and thus constitutes subsidies – under Article 1.1 of the SCM Agreement.

690. During the Annex V process, the Facilitator asked the EC to provide the amount of funding Airbus received from DTI under CARAD/ARP and TP since 1992.[842] As discussed above, the EC stated in response that the DTI has agreed to provide Airbus research consortia with **[**£ **]**. Thus, the EC concedes that Airbus research consortia have received or will receive at least **[**£ **]** in R&D subsidies from the DTI. The EC has not provided sufficient information for the Panel to determine how much of the funding that the EC reported as having been provided to Airbus research consortia was provided to Airbus entities (as defined in the Annex V questionnaire), and how much was provided to consortia members who are not Airbus entities (as defined in the Annex V questionnaire). Therefore, the United States respectfully requests that the Panel either request the EC to provide the additional information that would allow a precise calculation of the amount that was provided to Airbus entities (as

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[837] *See* EC Reply to Question Q219(b) from the Facilitator (Exhibit US-5; *see* BCI Annex).

[838] *See* DS316-EC-BCI-0003461 ([ ]) (Exhibit US-340; *see* BCI Annex).

[839] The EC confirmed in the Annex V process that CARAD/ARP and TP funding "is always in the form of grants." *See* EC Replies to Questions 212(v) and 220(y) from the Facilitator (Exhibit US-5; *see* BCI Annex).

[840] SCM Agreement, Art. 1.1.

[841] *US – Cotton Subsidies (Panel)*, para. 7.1116; see also *Brazil – Aircraft (Article 21.5 II)*, para. 5.27.

[842] *See* Questions 213 and 221 from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

defined in the Annex V questionnaire) or else, in accordance with paragraph 7 of Annex V, attribute the entire **[**£ **]** in R&D subsidies to Airbus.

d. The UK Government's R&D Grants Are Specific Within the Meaning of Article 2 of the SCM Agreement

691. The DTI's civil aeronautics research and development grants are specific to Airbus and/or the aeronautics industry within the meaning of Article 2 of the SCM Agreement. The CARAD/ARP grants are limited to entities carrying out research in aeronautics technologies.[843] As for the TP grants, they are awarded through calls for proposals that are limited to aeronautics-related technologies.[844] The scope of each call is determined by a narrow set of industry-specific criteria.[845] The EC's admission that TP is a continuation of CARAD/ARP is further confirmation that TP is specific.

6. The Research and Development Funding That Spanish Authorities Provide to Airbus Under Their Research and Development Program Are Specific Subsidies

692. Like the German, French, and UK governments, the Spanish Government provides subsidies to Airbus to help underwrite Airbus's R&D efforts. The subsidies take the form of loans with better than commercial terms. The Spanish government disburses the subsidies through two programs, the Plan Tecnológico Aeronáutico ("PTA"), and the Programa de Fomento de Innovación Técnica ("PROFIT").

a. The Plan Tecnológico Aeronáutico ("PTA") Loans Are Specific Subsidies

i. Factual background on PTA R&D loans

693. Between 1993 and 2003, the Spanish Government provided Airbus with below-market loans in the amount of **[**Euro **]** under the two phases of the Plan Tecnológico Aeronáutico ("PTA"), an aeronautics research and development program.[846] The EC confirmed

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[843] *See* DS316-EC-BCI-0003401 (Exhibit US-341; *see* BCI Annex) ([

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[844] *See* DTI, The Technology Program, April 2005 Competition for Funding, Frequently Asked Questions, at 2, 3 (Exhibit US-342).

[845] *See, e.g.*, DTI, Second Call of the Technology Program, Technologies to Support Environmentally Friendly Transport, April 2004, at 2, stating that "Priority will be given to proposals giving substance to the National Aerospace Technology Strategy or the Low Carbon Vehicle Partnership's objectives" (Exhibit US-343).

[846] Under the first phase, PTA I, which ran from 1993 to 1998, Airbus received below-market loans in the amount of **[** **]**, based on a conversion at 1m pts = 6010 euros. See PTA I

(continued...)

during the Annex V process that all of the PTA loans were **[ ]**.[847] The PTA I loans, which Airbus received between 1993 and 1998, carry a **[ ]** year repayment term,[848] and the government agreed to delay the start of the repayment period for the loans **[ ]**.[849] The PTA II loans, which Airbus received between 1999 and 2003, carry a **[ ]** year repayment term. [850] The government agreed to delay the repayment obligations on those loans **[ ]**.[851]

ii. The PTA R&D loans provide financial contributions to Airbus

694. All of the PTA funding that the Spanish Government provides to Airbus takes the form of loans.[852] Article 1.1(a)(1)(i) of the SCM Agreement includes loans among the types of "direct transfers of funds" that constitute financial contributions within the meaning of the SCM Agreement. Accordingly, the funding that the Spanish Government provided to Airbus under the PTA program constitutes financial contributions under Article 1.1(a)(1) of the SCM Agreement.

iii. The PTA R&D loans confer benefits on Airbus

695. As the United States has previously discussed, when a financial contribution is provided to a recipient on terms that are better than those available in the commercial marketplace, a benefit is conferred.[853] The PTA loans confer a benefit on Airbus because the government provides them **[ ]**. The lengthy repayment periods and their deferred repayment schedules further increase the benefit to Airbus.[854] Thus, the loans are subsidies within the

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[846] (...continued)
Funding and Projects Breakdown 1993-1998, DS316-EC-BCI-0003598, 0003599 (Exhibit US-344; *see* BCI Annex). In the second phase, PTA II, which ran from 1999 to 2003, Airbus received **[ ]**. See PTA II Funding and Projects Breakdown 1999-2003, DS316-EC-BCI-0003600 (Exhibit US-344; *see* BCI Annex).

[847] *See* PTA I (**[ ]**), DS316-EC-BCI-0003598-3599 (Exhibit US-344; *see* BCI Annex); PTA II **[ ]** ("PTA II Agreement") ("Segundo") (**[ ]**), DS316-EC-BCI-0003573-0003574 (See Exhibit US-345; *see* BCI Annex)).

[848] *See* PTA I, DS316-EC-BCI-0003598, 0003599 (Exhibit US-344; *see* BCI Annex).

[849] *See* PTA I, DS316-EC-BCI-0003599 (Exhibit US-344; *see* BCI Annex).

[850] *See* PTA II Agreement at 6, DS316-EC-BCI-0003578 (Exhibit US-345; *see* BCI Annex).

[851] *See id.*

[852] *See* EC Reply to Question 271(m) from the Facilitator (Exhibit US-5; see BCI Annex).

[853] *Canada – Aircraft (AB)*, para. 157.

[854] In addition, the European Commission found that PTA II constitutes state aid under EC state aid rules. European Commission, State Aid N 135/99, Plan Tecnológico Aeronáutico II, decision of May 5, 1999, SG(99) D/3208, (Exhibit US-346); European Commission, State Aid N 432/2000 España, Modificación del régimen N 135/1999 - Plan Tecnológico Aeronáutico II, decision of August 7, 2000, SG(2000)D/106018, (Exhibit US-347). As the United States explained in Section IV.A. 2.b.vii, a finding by the Commission that a particular measure is state (continued...)

meaning of Article 1.1 of the SCM Agreement.

iv. The PTA R&D loans are specific within the meaning of Article 2 of the SCM Agreement

696. The subsidies are specific to Airbus and/or the aeronautics industry within the meaning of Article 2 of the SCM Agreement because the government explicitly limited access to funding under PTA I to aeronautics companies involved in the manufacturing, design, supply and maintenance of aircraft and aircraft parts, and to engineering services companies and research institutions and universities developing specific technologies with aeronautics use.[855] The government applied similar restrictions to PTA II.[856]

b. The Programa de Fomento de Innovación Técnica ("PROFIT") Loans are Specific Subsidies

i. Factual background on PROFIT loans

697. In 2000, the Spanish Government established the "Programa de Fomento de Innovación Técnica" ("PROFIT"). The first phase, PROFIT 2000-2003, included the "Programa Nacional de Aeronáutica," or "National Aeronautics Program."[857] The second phase, PROFIT 2004-2007, includes the "Subprograma Nacional de Transporte Aéreo."[858] Under these programs, the Spanish Government provides below market loans for research and development to Airbus and the aeronautics industry. The loans under PROFIT II were, in fact, interest-free; PROFIT I allowed for interest-free loans. Repayment periods under both PROFIT programs were favorable. PROFIT II loans carried 15-year repayment terms. Similarly, PROFIT I loans had 17-year repayment terms. Finally, loans under both programs allowed for delayed-start repayment

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[854] (...continued)
aid is tantamount to an admission that the measure is a subsidy within the meaning of the SCM Agreement, because a measures is only state aid if it "confers an economic advantage on the recipient." See *Rules Applicable to State Aid: Introduction* (Exhibit US-88).

[855] PTA I, Ministerio de Industria, Turismo y Comercio, Secretary of State for Industry, Plan I+D para el Sector Aeronautico (undated), p. 13. (Exhibit US-348).

[856] *See* European Commission, State Aid N 135/1999, Plan Tecnológico Aeronáutico II, decision of May 5, 1999, SG(99) D/3208, pp. 2,3 (Exhibit US-346).

[857] Orden de 7 de marzo de 2000 por la que se regulan las bases, el régimen de ayudas y la gestión del Programma de Fomento de la Investigación Técnica (PROFIT), incluido en el Plan Nacional de Investigación Cientfíca, Desarrollo e Innovación Tecnologíca (2000-2003), BOE núm. 59 (March 9, 2000), at 9855-62 ("Order of March 7, 2000") (Exhibit US-349). The Aeronautics Program can be found at Capítulo III, Sección 1.a, at p. 9862.

[858] Orden PRE/690/2005, de 18 marzo, par la que se regulan las bases, el régimen de ayudas y la gestión del Plan Nacional de Investigación Cientifíca, Desarrollo e Innovación Tecnológica (2004-2007) en la parte dedicada al fomento de la investigación técnica, BOE núm. 67 (March 19, 2005), at 9670 ("Order of March 18, 2005") (Exhibit US-350). The Aeronautics Subprogram is part of Sec. 14 (p. 9671).

schedules.[859]

698. Public information demonstrates that Airbus received loans under the National Aeronautic Program in the amount of Euro 1,500,000.[860] In addition to this amount that went directly to Airbus, the aeronautics industry received an additional Euro 6,500,000.[861] The aeronautics industry also received Euro 55,500,000 in loans under the Subprograma Nacional de Transporte Aéro.[862]

699. During the Annex V process, the Facilitator asked the EC to provide recipient-specific funding information for all projects carried out under the PROFIT programs.[863] The EC refused to provide any of the information the Facilitator requested.[864]

ii. The PROFIT loans provide financial contributions to Airbus

700. All of the funding that the Spanish Government provides to Airbus under PROFIT takes the form of "subsidies" or loans.[865] Article 1.1(a)(1) of the SCM Agreement includes loans among the types of "direct transfers of funds" that constitute financial contributions within the meaning of the SCM Agreement. Accordingly, the funding that the Spanish Government has provided to Airbus under the PROFIT programs constitutes financial contributions under Article 1.1(a)(1) of the SCM Agreement.

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[859] Order of March 7, 2000, Article 7.4 paras. a) to c) (Exhibit US-349); Order of March 18, 2005, Article Noveno paras. a) to c) (Exhibit US-350).

[860] The loans were received by Airbus affiliate Compañia Española de Sistems Aeronauticos S.A. ("CESA"). *See* PROFIT 2003. Comites de Evaluación de 21 y 22/4/03, Proyectos y entidades con propuesta favorable de ayuda, P.N. Aeronáutico (Exhibit US-351).

[861] *See* Javier Alfonso Gil, Antonia Sáez Cala and Maricruz Lacalle Calderón, EADS y las Estrategias Territoriales del Sudoeste Europeo: Informe de la Región de Madrid, Universidad Autonoma de Madrid (undated), at 70 (detailing the amounts distributed through the PROFIT programs) (Exhibit US-352).

[862] Ramon Herrero, Ministerio de Industria, Turismo y Comercio, Aeronautics Research and Development in Spain, ACARE AeroDays, March 31, 2005, at 25 (Exhibit US-353).

[863] *See* Questions 279(f), (g) and 280(g) from the Facilitator to the EC (Exhibit US-4; see BCI Annex).

[864] *See* EC Reply to Questions 279(f) and Q280(f) from the Facilitator (Exhibit US-5; see BCI Annex).

[865] PROFIT 2000-2003: Article 7.1 of the Order of March 7, 2000, BOE núm. 59 (March 9, 2000), p. 9858, refers to "subvenciones y anticipios reembolsables." (Exhibit US-349); PROFIT 2004-2007: Article Octavo (1) of the Order of March 18, 2005, BOE núm. 67 (March 19, 2005), p. 9672, refers to "Subvenciones" (subsidies) and "Préstamos" (loans) (Exhibit US-350). *See also* Ramon Herrero, Ministerio de Industria, Turismo y Comercio, Aeronautics Research and Development in Spain, ACARE AeroDays, March 31, 2005, p. 22 (Exhibit US-353).

iii. The PROFIT loans confer benefits on Airbus

701. As the United States discussed above, when a loan is provided to a recipient on terms that are better than those available in the marketplace, a benefit is conferred.[866] The PROFIT loans confer benefits on Airbus because the government has provided them interest-free. The lengthy repayment periods and deferred repayment schedules further increase the benefit to Airbus. Thus, the loans are subsidies within the meaning of Article 1.1 of the SCM Agreement.

702. As discussed above, the EC refused the Annex V Facilitator's request to provide recipient-specific funding information for the PROFIT loans. Therefore, the United States is unable to determine the precise amount of subsidies that Airbus received under these programs. The United States respectfully requests that the Panel either request the EC to provide the information the Facilitator requested so the Panel can determine the precise amount of the subsidies, or else find, in accordance with paragraph 7 of Annex V, that the Spanish government provided the entire Euro 63,500,000 to Airbus.

iv. The PROFIT loans are specific within the meaning of Article 2 of the SCM Agreement

703. The research and development loans the Spanish Government provides to Airbus under PROFIT are specific to Airbus and/or the aeronautics industry within the meaning of Article 2 of the SCM Agreement. The Spanish government explicitly limits access to the loans to aeronautics companies by virtue of its topic-specific calls for research proposals.[867]

I. The Subsidies Have Caused Adverse Effects to the Interests of the United States

704. As the United States has demonstrated above, the EC and the governments of France, Germany, Spain and the United Kingdom have provided Airbus with subsidies that are carefully tailored to the economics of LCA production, giving Airbus a significant structural advantage in competition with U.S. producers. These subsidies have worked as intended. Since Airbus delivered its first LCA in 1974, it has steadily won key orders at low prices, increased its share of

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[866] *Canada – Aircraft (AB)*, para. 157.

[867] For PROFIT 2000-2003, *see* for example RESOLUCIÓN de 10 de mayo de 2001, de la Secretaría de Estado de Política Científica y Tecnológica, por la que se efectúa la convocatoria del año 2001 para la concesión de las ayudas del Programa Nacional de Aeronáutica del Programa de Fomento de la Investigación Técnica (PROFIT), incluido en el Plan Nacional de Investigación Científica, Desarrollo e Innovación Tecnológica (2000-2003), BOE núm. 128 (May 29, 2001) (Exhibit US-354). For PROFIT 2004-2007, see for example Order ITC/1038/2005, de 14 de abril, por la que se efectúa la convocatoria del año 2005, para la concesión de las ayudas del Programa de Fomento de la Investigación Tecnológica dentro del Plan Nacional de Investigación Científica, Desarrollo e Innovación Tecnológica (2004-2007), en la parte dedicada al fomento de la investigación técnica, BOE núm. 95 (April 21, 2005), p. 13756, at Sección 14. Programa Nacional de Medios de Transporte, Apartado cuarto.- Subprograma Nacional de Transporte Aéreo (Exhibit US-355).

the global LCA market, and suppressed global LCA prices, all to the detriment of the U.S. LCA industry.

705. Two U.S. producers (Lockheed and McDonnell Douglas) were driven from the market, and in 2003 Airbus displaced Boeing as the world's largest LCA producer. By 2005, Airbus's share of the world market had increased to 57 percent while Boeing's fell to 43 percent – a drop of 25 percentage points over the last decade and 19 percentage points in the last five years.

Table 1. Worldwide LCA deliveries, 2001-2005 (Airclaims CASE database)[868]

(A) Quantity of LCA delivered

	2001	2002	2003	2004	2005
Airbus	324	300	300	319	376
Boeing	518	377	273	280	284

(B) Market share (quantity of LCA delivered)

	2001	2002	2003	2004	2005
Airbus	38%	44%	53%	53%	57%
Boeing	62%	56%	47%	47%	43%

706. As demonstrated in detail below, subsidies have played an indispensable role in Airbus's market share gains. The EC and the Airbus governments have given Airbus subsidies to develop and bring to market a full family of LCA at a scale and pace that would otherwise have been impossible. With the exit of the other U.S. producers, Airbus now competes head to head with Boeing for LCA sales throughout the world, and Airbus's gains have thus been Boeing's losses. In short, as French Prime Minister Lionel Jospin asserted, the effect of the subsidies has been "to give Airbus the means to win the battle against Boeing."[869]

707. Article 5 of the SCM Agreement provides that "No Member should cause, through the use of any subsidy . . . , adverse effects to the interests of other Members." Such adverse effects may include "(a) injury to the domestic industry of another Member" and "(c) serious prejudice to the interests of another Member." The provision of these subsidies to Airbus by the EC and the Airbus governments is inconsistent with Article 5 because, as demonstrated in this section, they have caused both injury to the U.S. domestic LCA industry within the meaning of Article 5(a) and serious prejudice to the interests of the United States within the meaning of Article 5(c).

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[868] Airclaims CASE database, data query as of August 14, 2006.

[869] *Jospin Pledges to Aid Airbus in Fight Against Boeing*, Reuters (Mar. 8, 2000) (quoting French Prime Minister Lionel Jospin in address to Parliament) (Exhibit US-1).

708. The EC and the Airbus governments have also demonstrated that they fully intend to continue to provide subsidies to Airbus that will perpetuate the adverse effects to the interests of the United States. Although customers have responded favorably in recent months to Boeing's newest aircraft, the B787 Dreamliner, as well as the fuel efficient B777, the subsidization of Airbus jeopardizes the durability of any recent improvement in Boeing's competitive situation. Indeed, the Airbus governments have "reaffirmed their agreement to support Airbus to continue to innovate and to develop programmes in the context of international competition."[870] To this end, they have committed $1,700,000,000 for yet another new aircraft, the A350.[871] The A350 is being designed both to compete against the B787 and to be a "777-200ER killer,"[872] and is intended to be "not just a competitive airplane, but a dominant airplane."[873]

709. EADS currently anticipates that it will take $12,000,000,000 to deliver the A350; it has also just completed a Euro 2,750,000,000 buyout of the 20 percent share of Airbus owned by BAE Systems and is currently predicting Euro 6,300,000,000 of losses due to A380 development and production problems.[874] In this context, the financial cushion of existing subsidies (in particular, the deferral of Launch Aid repayments during A380 delivery delays and slow A340-500/600 sales) as well as the availability of additional Launch Aid, frees Airbus from limitations that the market would otherwise place on the pace and the scale of its product development.

710. This section of the U.S. submission details the evidence of the adverse effects to U.S. interests within the meaning of Article 5 of the SCM Agreement that have resulted from the subsidies provided by the EC and the Airbus governments. The United States begins, however, with a discussion of the basic economic structure of the LCA industry. This background puts into context the way in which, and the extent to which, Launch Aid and the other subsidies before the Panel have distorted competition in the LCA market and, in doing so, are adversely affecting the interests of the United States.

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[870] Communiqué from Airbus Ministerial Meeting at Farnborough International Air Show, issued July 17, 2006, *reprinted in* U.K. House of Commons Hansard Written Answers, pt. 1989, Column 1014W (July 24, 2006) (Exhibit US-63).

[871] EADS Financial Statements and Corporate Governance (2005), Registration Document – Pt. 1, Risk Factors, Availability of Government Financing, at 11 ("{C}ertain E.U. countries have already committed to fund the development of the A350 commercial aircraft program.") (Exhibit US-77).

[872] *Counterattack; Airbus fights back. The manufacturer redefines A350, eyes 100-plus orders at the Paris air show,* Aviation Week & Space Technology (May 23, 2005) (quoting A350 program manager Olivier Andries) (Exhibit US-140).

[873] Ameet Sachdev, *Airbus Denies Trouble in Sky Competition*, Chicago Tribune (Apr. 8, 2006) (quoting Airbus North America chairman Allan McArtor) (Exhibit US-371).

[874] *EADS Board Puts Off Decision on Airbus A350 Project*, AFP (Nov. 7, 2006) (Exhibit US-372); EADS, Press Release, *EADS Is 100 Percent Owner of Airbus*, (Oct. 13, 2006) (Exhibit US-13); EADS, Ad Hoc Release, *EADS and Airbus Finalise A380 Review* (Oct. 29, 2006) (Exhibit US-66).

1. Conditions of Competition in the LCA Market

a. The Economics of LCA Demand

711. Boeing and Airbus are the world's only remaining LCA producers.[875] Both companies currently produce and sell a full range of LCA. As a result, both companies compete head to head for virtually every LCA sale in the world in a largely "zero sum" competition – a win for one producer is almost always a loss for the other.[876] Thus, to the extent that subsidies provide Airbus with a material advantage in this competition, the U.S. LCA producer – Boeing – inevitably suffers the adverse effects.

712. LCA customers – primarily airlines and a handful of large aircraft leasing companies – tend to place very large, but relatively infrequent, orders for aircraft to be delivered over a number of years.[877] Customers choose among the various LCA models suitable for their route structure, defined both by range and capacity, with a view to minimizing costs and maximizing revenues. Some airlines purchase a mix of LCA models to serve a variety of routes, while others limit themselves to one LCA model because of the efficiencies generated by the operation of a single aircraft type.[878] Once an airline orders a particular LCA type, however, scale efficiencies (including those related to spare parts, maintenance and training) favor follow-on orders of the same type, as well as orders of other aircraft types from the same manufacturer in order to take advantage of commonalities across an LCA fleet.[879]

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[875] Two other U.S. producers, Lockheed and McDonnell Douglas, were forced out of the LCA market in 1981 and 1997, respectively. Thomas L. Boeder & Gary J. Dorman, *The Boeing/McDonnell Douglas Merger: The Economics, Antitrust Law, and Politics of the Aerospace Industry*, Antitrust Bulletin (Spring 2000), at 119, 132-33 (hereafter Boeder & Dorman, *Merger*) (Exhibit US-373). Very limited LCA production has also continued in Russia, but difficulties in obtaining the necessary funding for the development of LCA that can meet international airworthiness certification standards have prevented Russian LCA producers from seriously competing with Boeing and Airbus for LCA sales outside the former Soviet bloc. See U.S. International Trade Commission, The Changing Structure of the Global Large Civil Aircraft Industry and Market, Inv. No, 332-384 (Nov. 1998) at Ch. 4 (Exhibit US-374); Commission Decision 97/816/EC, O.J. 1997 L336 at 16, para. 30 (hereafter, *EC Merger Analysis*) (Exhibit US-375). Even Aeroflot – the Russian national airline – has limited its solicitation of bids for new LCA purchases to Airbus and Boeing. Andrew E. Kramer, *Russian Aircraft Industry Seeks Revival Through Merger*, N.Y. Times (Feb. 22, 2006) (Exhibit US-376).

[876] Industry analysts recognize that lower prices for LCA do not significantly increase LCA demand – or, in economic terms, "the price elasticity of demand for aircraft in general will most likely be rather small." Gernot Klepper, *Entry into the Market for Large Transport Aircraft*, 34 Euroepan Econ. Rev., 775, 786 (1990) (hereafter Klepper, *Market Entry*) (Exhibit US-377); *see also* Dorman Report at 8 (Exhibit US-70; see BCI Annex). This is because demand for LCA is generally derived from demand for air travel services, and the cost of the aircraft itself is only a small portion of total airline operating costs. *E.g.*, Klepper, *Market Entry* at 785-86 (Exhibit US-377).

[877] *EC Merger Analysis*, para. 25 (Exhibit US-375).

[878] *See* discussion of the "subsidized product," below.

[879] For example, AirAsia purchased 40 Airbus A320s and took options on 40 more in December 2004 after a vigorous competition between Boeing and Airbus. AirAsia's subsequent orders – an additional 20 A320s in 2005, followed by a firm order for 40 more A320s in July 2006 (plus 30 additional options) – flowed directly from the

(continued...)

713. When choosing between Boeing and Airbus, airlines evaluate the economics of the competing aircraft, and how those factors impact the revenues that the aircraft can be expected to generate over its economic life of approximately 30 years.[880] In doing so, customers quantify and weigh the various costs, including (1) price, net of concessions such as cash discounts, caps on price escalation,[881] and guarantees related to performance, maintenance, or residual value;[882] (2) financing, net of manufacturer concessions such as direct financing support and pre-delivery payment deferrals; and (3) operating costs, such as fuel efficiency.[883] Each customer has different cost-related concerns, and so different aspects of a transaction – such as pre-delivery cash requirements, financing, and risk-shifting guarantees – may be valued differently by different customers. Competition between Boeing and Airbus is thus driven by the performance characteristics of the aircraft that the two manufacturers have developed and the price (net of all concessions) at which they offer their respective LCA. Because Boeing and Airbus both offer aircraft to serve any customer mission, sales campaigns are often decided on the basis of price.

b. The Economics of LCA Production

714. Boeing and Airbus develop, produce, and market families of aircraft to supply the demand for LCA that operate efficiently over a variety of different routes. The long-term viability of an LCA producer depends on continued innovation and periodic launches of new aircraft as

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[879] (...continued)
choice the airline made in the 2004 campaign, rather than from a new competition between the producers. AirAsia Press Release: *AirAsia Firms Up Option for 40 More Airbus A320s and Signs Another 30 Options* (July 20, 2006) (Exhibit US-378).

[880] Airbus North America Holdings Inc., *Key Determinants of Competitiveness in the Global Large Civil Aircraft Market: An Airbus Assessment* (Mar. 2005) at 17-18 ("Airbus, *Key Determinants*") (Exhibit US-379; see BCI Annex).

[881] Because LCA are often delivered years after the original order, both Airbus and Boeing generally apply a standard "price escalation" formula that adjusts the order price (in order year dollars) for inflation in aircraft manufacturing costs to determine the price payable for the aircraft on delivery (in delivery year dollars). The impact of price escalation on sales campaigns is discussed in the context of the "lost sales" section below, specifically with respect to AirAsia.

[882] Residual value refers to the value of the aircraft upon resale by the original customer. For example as part of its sale of 120 aircraft to easyJet in 2002, Airbus guaranteed the residual value of those Boeing aircraft by offering to purchase the Boeing aircraft itself, if necessary, at a predetermined minimum price. Airbus also guaranteed that the cost of maintenance would not exceed easyJet's cost of maintaining its existing Boeing aircraft. EasyJet, Proposed Purchase of Airbus Aircraft and Notice of Extraordinary General Meeting at 8-9 (Feb. 25, 2003) (Exhibit US-380). An additional discussion of residual value guarantees offered by Airbus to win an order is included in the context of the "lost sales" section below, specifically with respect to Iberia Airlines).

[883] Operating costs can be impacted by price concessions. For example, when Airbus determined that its four-engine A340 was losing sales to Boeing's more fuel-efficient two-engine 777 during recent periods of high jet fuel prices, Airbus announced that the additional fuel burn penalty could be "traded off" by financial compensation to A340 operators. Andrea Crisp, *Squaring Up*, Airline Business (Apr. 1, 2006) (Exhibit US-381).

technological advances and market conditions allow.[884] Moreover, bringing to market new aircraft models with improved performance characteristics can give an LC producer a competitive advantage. Yet to do so, the producer must incur enormous up-front designing, engineering, and testing costs over a period of years before a single aircraft can be delivered to a customer. These costs often approach the entire market capitalization of the LCA producer itself.[885] A relatively large number of aircraft must be sold – assuming normal levels of profit per aircraft, many hundreds is a common estimate – before these initial costs are fully recouped.

715. For an LCA manufacturer, then, decisions with respect to product launches drive its subsequent pricing and production decisions. LCA producers try to produce and sell aircraft in sufficient volume, and at a sufficient pace and price, to recover their development costs as quickly as possible. Static and dynamic (*i.e.*, "learning curve"[886]) economies of scale are an important part of the economics of production; additional sales of an aircraft not only give the LCA producer additional units over which to recover its fixed costs, but also advance the producer further down the learning curve, reducing its marginal costs on future production. Lost sales represent not only lost revenues and profits, but also lost scale and learning efficiencies and, therefore, increased production costs.

716. An LCA producer gains a significant structural advantage over its competition if, because of subsidies, it can bring new aircraft with enhanced performance characteristics to market with far less risk, and at lower cost, than its competitor. Moreover, to the extent subsidies allow a producer to develop each of its LCA models without depleting its own funds, the producer can expand and improve its product line and enjoy a financial cushion that allows it to undercut prices in order to win sales and gain market share.

2. The Airbus LCA Family Is the "Product Under Consideration" and Boeing's LCA Production Is the Corresponding "Like Product"

717. To demonstrate that the identified subsidies have caused adverse effects to the interests of the United States within the meaning of Article 5 of the SCM Agreement, it is first necessary to

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[884] In some cases, LCA producers can reduce costs (and thus risks) to a certain extent by developing "derivative" aircraft that incorporate new technology or meet specific customer needs by adapting existing designs rather than creating an all-new model. For example, as the EC has observed, a significant reason for the ultimate demise of McDonnell Douglas was its limited product line, all "derivatives of earlier Douglas models, rather than entirely new designs" (in contrast to the "broader and more modern families of aircraft offered by Boeing and Airbus"), and "the perception of airlines that {McDonnell Douglas} is no longer committed to the commercial aircraft business and may leave the market over time." *EC Merger Analysis*, para. 59 (Exhibit US-375); *see also* Boeder & Dorman, *Merger*, at 137-38 (Exhibit US-373).

[885] As noted above, EADS as a whole currently has a market value of 16.6 billion Euro, not much greater than the anticipated projected development cost for either the A380 or the A350.

[886] Damien Neven & Paul Seabright, *European Industrial Policy: The Airbus Case* (1995) at 15, *available at* http://www.hec.unil.ch/deep/textes/9509.pdf (hereafter "Neven & Seabright, *Airbus Case*") (explaining that LCA production "involves the coordination of thousands of tasks{,} and this process can be improved as experience accumulates") (Exhibit US-382).

identify the "subsidized product," and a corresponding U.S. "like" product.[887]

- Article 5(a) defines "injury to the domestic industry" by reference to Part V of the SCM Agreement, which in turn refers to the volume and price effects of "subsidized imports" (that is, imports of a subsidized product) on "domestic producers of {like} products."[888]

- Article 6.3(a) provides that serious prejudice in the sense of Article 5(c) may arise if "imports of a like product" into the market of the subsidizing Member are displaced or impeded as a result of the subsidy.

- Article 6.3(b) provides that serious prejudice in the sense of Article 5(c) may also arise if "exports of a like product" into a market of a third country Member are displaced or impeded as a result of the subsidy.

- Article 6.3(c) provides that serious prejudice in the sense of Article 5(c) may arise when there is "significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market."

In addition, even though Article 6.3(c) does not refer to a "like product" in providing that serious prejudice in the sense of Article 5(c) may arise when there is "price suppression, price depression, or lost sales in the same market," the panel in *Korea – Commercial Vessels* recognized that a complaining Member alleging, for example, price suppression or price depression will logically have to identify "some product or products in particular, of interest to the complainant," the prices of which it alleges have been suppressed or depressed by subsidies.[889] Thus, even though the identification of a "like product" is not strictly required for claims under Article 6.3(c), the logical structure of Article 6.3(c) similarly requires the identification of a product of the complaining Member, the prices of which have been adversely affected by the subsidies.

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[887] Even where the provisions of Article 6 do not explicitly mention a subsidized product, the term like product is defined, in footnote 46, by reference to the "product under consideration" – *i.e.*, the subsidized product.

[888] SCM Agreement, Art. 15.1.

[889] *Korea – Commercial Vessels*, para. 7.559; *see also US – Cotton Subsidies (Panel)*, para. 7.1216 n.1333.

a. The Subsidized Product Is the Airbus LCA Family

718. In this case, the "subsidized product" is the Airbus LCA family.[890] From its earliest days, Airbus has used Launch Aid and the other subsidies at issue in this dispute to further its strategic objective of developing an LCA family to compete with the U.S. producers:

> Since Airbus was established for the precise purpose of becoming a viable, profitable, long term enterprise, it was necessary to plan for a family of aircraft. As early as 1973, Airbus Industrie proposed the development over time of five related aircraft types. With the recent launch of the A330 and A340 programs, these five types are now in place.[891]

As Gernot Klepper similarly explains, after Airbus launched the A300,

> It became clear that Airbus had to supply a complete family of aircraft in order to stay in the market in the long run. This also meant a new commitment of the participating governments to finance the new types of aircraft, since the A300 and later the A310 were not even close to their break-even point.
>
> The political decision in the 1960s to support a European civil aircraft industry by subsidizing the development of one new aircraft, the A300, has over time turned into the need to subsidize the market entry of a producer of a complete family of aircraft.[892]

719. And the EC and the Airbus governments have stepped forward to meet Airbus's need by subsidizing the development of a complete LCA family. Airbus received subsidies to build its first plane, the A300, and each additional "related aircraft type." For example, at the time it received Launch Aid for the A320, Airbus viewed the model as "an essential and integral element

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[890] The Airbus family today includes the A300/310, A320, A330/340, and A380 model groups, although Airbus plans to discontinue the A300/310 in July 2007. Airbus Press Release: *A300/A310 Final Assembly to Be Completed by July 2007* (Mar. 7, 2006) (Exhibit US-383). Airbus launched and is recording orders for the A350. *See* EADS Earnings Conference Call. Presentation (Nov. 8, 2006) at 12 (Exhibit US-384)*; see also*, Susanna Ray, *FinnAir Sticks with Airbus A350, Is "Happy" with Revised Plane*, Bloomberg (July 17, 2006) (Exhibit US-385).

Somewhat confusingly, both Airbus and Boeing use the term "family" to describe not only their entire product line of LCA but also the particular models and their derivatives (*e.g.*, the A330/340 "family" or the B737 "family"). In this submission, the United States will reserve the term "family" for each producer's LCA product offering as a whole.

LCA include both passenger and freighter versions of certain models, which are produced on the same manufacturing lines and sold in the same manner. Indeed, older passenger aircraft are often converted into freighters. It is generally accepted, however, that smaller "regional aircraft" are a distinct product. *E.g.*, *EC Merger Analysis*, para.15 (Exhibit US-375).

[891] "Competitiveness of U.S. Commercial Aircraft Industry," Hearing before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the Committee on Energy and Commerce, House of Representatives, 100th Congress, June 23, 1987, Serial No. 100-59, at 34 (statement of Mr. Boyd, Chairman, Airbus Industrie North America) (Exhibit US-386).

[892] Klepper, *Market Entry*, at 780 (emphasis added) (Exhibit US-377).

in our objective to develop a family of products which in the future will also include a high-capacity twinjet {the A330}. . . and a four-engined, very long-range aircraft {the A340}."[893] Similarly, the A340-500/600 Launch Aid agreement recognized that the model was launched "**[**

]."[894] And, as Airbus's ambitions (and the supporting subsidies) grew to include the A380, BAE Systems (then an Airbus co-owner) recognized that the A380 represented the culmination of Airbus's strategy to "build a family of aircraft and secure a strong position in the large commercial jet market."[895]

720. The EC and the Airbus governments have subsidized, and Airbus has developed, a family of aircraft in order to compete against the family of aircraft offered by Boeing. Most LCA customers require a range of aircraft that can operate efficiently over a variety of routes, and most of them see efficiencies and other advantages in operating fleets that contain LCA from a single supplier.[896] In some cases, Boeing and Airbus may even be asked to bid to supply a range of aircraft to a customer as part of a single transaction. For example, British Airways has recently requested proposals for a mix of A330, A350, and A380 aircraft from Airbus and a mix of B747, B777, and B787 aircraft from Boeing.[897] To compete against U.S. LCA producers for these customers, therefore, Airbus had to develop a full LCA family.

721. Airbus's business strategy has, accordingly, focused heavily on its integrated family:

> To achieve its market success, Airbus has pursued a consistent product strategy to offer competitive airliners across the market. The family of aircraft concept has enabled a high degree of commonality to be offered in all aspects of the aircraft operation from flight and cabin crew training to maintenance and spares.[898]
>
> {E}very Airbus aircraft belongs to a single family, sharing the same cockpit, flight deck and spare parts, thus saving time and money for operators in terms of pilot training and

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[893] *A320 is a reality*, Business Wire (Mar. 2, 1984) (Exhibit US-15).

[894] Spanish A340-500/-600 Launch Aid Contract (Dec. 28, 1998), DS316-EC-BCI-0000534, -0000535 [

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(Exhibit US-37; see BCI Annex).

[895] BAE Systems Annual Report 2004 at 7, DS316-EC-NON-BCI-0002807, -0002828 (Exhibit US-387).

[896] As noted above, the failure of McDonnell Douglas to continue offering a full family of aircraft was cited by many, including the EC, as a key factor in its exit from the LCA market. *EC Merger Analysis*, para. 59 (Exhibit US-375); *see also* Boeder & Dorman, *Merger*, at 137-38 (Exhibit US-373).

[897] *British Airways Looking to Purchase New Planes*, Manufacturing.Net (Oct. 17, 2006) (Exhibit US-443).

[898] BAE Systems Annual Report 1999 at 15 (Exhibit US-388).

maintenance as well as in other areas.[899]

722. Producing a full LCA family also allows Airbus to achieve production efficiencies. Increasing production of one aircraft type reduces the marginal cost of producing related aircraft types "due to the transferability of some production methods between different models in a manufacturer's range."[900] As Airbus has recognized, the development of new aircraft (funded by subsidies) also supports the development of production facilities and technologies across its LCA family.

> In the 1980s, we were able to widen our family by launching the A310 that incorporated many systems and power plant improvements that had occurred in the years since the A300 was designed," an Airbus executive said. "Then we turned around and put many of the A310 improvements back into the A300 and came up with an updated aircraft that we designated the A300-600. The same philosophy will be followed with our new aircraft. Additionally, there is a strong possibility that the A320/A330/A340 technology can be used as well to create an advanced A300 and/or A310 in the 1990s.[901]

> But the A350 is going to be the sistership of the A380 so it's technology you can already touch and see. It's tangible because the A380 is flying.[902]

723. Airbus similarly manages its LCA production activities on a family basis. For example, Airbus is currently planning to offset some of the effects of the delay in deliveries of the A380 by ramping up production of the A320.[903] Thus, the production and sales of one type of LCA supports the development of another LCA type.

724. Thus, because subsidies are provided to Airbus for the development of an LCA family, and because subsidies for the development of each major Airbus LCA model benefit the production and marketing of its full LCA family, the "subsidized product" is the Airbus LCA family as a whole.

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[899] EADS Annual Report 2000 at 22 (Exhibit US-389); *see also* Airbus, *Excellence Runs in the Family*, *available at* http://events.airbus.com/img/media/multimedia/advertising/press/excellence.pdf (visited Sept. 20, 2006) (Exhibit US-390) ("Rarely does having a family save you money; the Airbus Family does."); Airbus, *Key Determinants*, at 21-25 (Exhibit US-379; see BCI Annex).

[900] Neven & Seabright, *Airbus Case*, at 23 n.11 (Exhibit US-382).

[901] Jeffrey Lenorovitz, *Airbus Industrie Launching Production for New A330/A340 Simultaneously*, Aviation Week & Space Technology (Feb. 24, 1986) (Exhibit US-391).

[902] Jason Neely, *Airbus Top Challenge Is Keeping up with Demand*, Reuters (Nov. 22, 2005) (quoting Airbus CEO Gustav Humbert) (Exhibit US-392).

[903] In response to an analyst's question as to whether increased production of other models could "offset the pain on the A380 delays," EADS CEO Thomas Enders commented that sustained higher production rates for the A320 would provide "upside" to offset the costs of the A380 delays. EADS Investor Conference Call, at 1:27:40 (Oct. 3, 2006), available on EADS web site, relevant portion transcribed in Exhibit US-393.

b. The Like Product Is the Boeing LCA Family

725. Just as the "subsidized product" in this dispute is the Airbus LCA family, the "like product" produced in the United States is the Boeing LCA family.[904] As noted above, the United States has identified LCA as the "product . . . of interest to the complainant" for the purpose of its claims related to price suppression, depression and lost sales.

726. The SCM Agreement defines the term "like product" as:

> a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.[905]

727. There is no product that is identical to Airbus's LCA family "in all respects." The Boeing and Airbus LCA families, however, have "characteristics closely resembling" one another. This is unsurprising, given that Airbus has purposely developed its LCA family to compete directly with the Boeing LCA family.

- *Physical Characteristics.* Both Boeing and Airbus LCA are large "tube and wing" aircraft, with turbofan engines carried under low-set wings, designed for subsonic flight. Each is configured to be flown by a pilot and co-pilot (seated alongside one another in the flight deck) and staffed with multiple flight attendants.

- *End Uses.* Both the Airbus and Boeing LCA families are designed for transporting 100 or more passengers and/or a proportionate amount of cargo across a similar range of distances serviced by airlines and air freight carriers.

- *Consumer Perceptions.* Consumers view the Airbus and Boeing LCA families as substitutes. When airlines are in the market for new LCA, they typically solicit bids from both Boeing and Airbus. Industry analysts recognize that Airbus and Boeing are direct (and the only) competitors in the LCA market.[906]

- *Tariff Classification.* All LCA are covered by the same tariff classification, heading 8802.40 of the Harmonized System ("Airplanes and other aircraft, of an

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[904] The Boeing LCA family today includes the B737, B747, B767, B777, and B787 major model groups. The B757 was discontinued in April 2005 and the 717 was discontinued in May 2006. Boeing Press Release: *Boeing Closes Chapter in Aviation History with Final 757 Delivery* (Apr. 29, 2005) (Exhibit US-394); Boeing Press Release: *Boeing Delivers Final 717s* (May 23, 2006) (Exhibit US-395).

[905] SCM Agreement, footnote 46.

[906] *E.g.*, Credit Suisse First Boston Sector Review: European/United Kingdom – Aerospace & Defense at 52 (June 11, 2003) ("Supported by European government launch aid, Airbus has developed an extremely competitive product range, competing with Boeing in all segments following the launch of the A380 super jumbo, including the B747.") (Exhibit US-396).

unladen weight exceeding 15,000 kg"). All Boeing and Airbus LCA have an unladen weight well over 15,000 kilograms.

728. That the Airbus family competes against the Boeing family is underscored by the existence of demand substitution among different Airbus and Boeing models for the same routes. A few examples will suffice to demonstrate the point:

- British Airways flies from London Heathrow to Los Angeles International with the B747-400; United Airlines, American Airlines, and Air New Zealand fly the same route with the B777, and Virgin uses both the A340-300 and the A340-600.

- Lufthansa flies from Frankfurt to John F. Kennedy International Airport in New York with the B747-400, A330-300, and A340-300; Delta Airlines uses a B767 on the same route.

- SAS flies from Newark to Stockholm with the A330-300 while Continental flies the same route with the B757-200.

- Continental flies from New York to Houston with the B757, B737-500, B737-800, and the B767-200 during the course of the same day; Northwest and JetBlue both fly A319s on the same route.

- On the Bangkok to Singapore route, Cathay Pacific uses a B747-400, Swiss uses an A340, Thai Airways International uses B777s and A330-300s, Singapore Airways uses B777-200s, Tiger Airways and Jet Star Asia use A320s, Garuda Indonesia and Thai Air Asia use B737s, and Biman Bangladesh uses an A310.[907]

729. As a prior panel report found in interpreting the identical provision in Article 2.6 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement"),[908] the "like product" is defined with reference to the "product under consideration."[909] Just as the "product under consideration" may include a range of specific goods, the "like product" may also contain a range of specific goods, provided that the "like product" is "identical to" or "closely resembles" the "product under consideration" or subsidized product within the meaning of footnote 46 of the SCM Agreement.[910] Here, the full Boeing LCA family is the product that most closely resembles the family of Airbus LCA that is the "product

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[907] *See* listings in *Official Aircraft Guide* (Oct. 2006).

[908] The definition of "like product" in Article 2.6 of the Antidumping Agreement is identical to that in note 46 of the SCM Agreement. *See, e.g.*, *Indonesia – Autos*, para. 14.171.

[909] *US – Softwood Lumber Dumping (Panel)*, para. 7.153.

[910] *Id.* paras. 7.156-7.157; *see also Indonesia – Autos*, para. 14.164 (definition of like product flows from allegation by the complaining parties that the subsidies in question were conferred only on one type of passenger automobile).

under consideration" in this dispute.

3. Subsidized Imports of Airbus LCA Have Caused Injury Within the Meaning of Article 5(a)

730. One type of adverse effect described in Article 5 of the SCM Agreement is "injury to the domestic industry of another Member."[911] The Agreement further clarifies that the "term 'injury to the domestic industry' is used in the same sense as it is used in Part V of the Agreement."[912]

731. Article 16.1 of the SCM Agreement defines the "domestic industry" as "the domestic producers as a whole of the like products" to the imported subsidized product. In this case, the only LCA producer in the United States at the present time is Boeing. The question for the Panel under Article 5(a), then, is whether the subsidized imports of Airbus LCA into the United States have caused injury to Boeing's LCA production in the United States within the meaning of Part V – specifically, as defined in Article 15 – of the SCM Agreement. Injury, in this sense, can include "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry."[913]

732. The Appellate Body has explained that Article 3.1 of the Antidumping Agreement – which parallels Article 15.1 of the SCM Agreement – "is an overarching provision that sets forth" the fundamental aspects of an injury analysis and "informs the more detailed obligations in succeeding paragraphs."[914] In particular, Article 15.1 provides that a determination of injury

> shall be based on positive evidence and involve an objective examination of both (*a*) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (*b*) the consequent impact of these imports on the domestic producers of such products.[915]

An examination of the Article 15.1 factors demonstrates that subsidized imports of Airbus LCA into the United States have caused injury to the U.S. domestic LCA industry. Further, an examination of the additional factors set forth in Article 15.7 demonstrates that subsidized imports threaten additional injury to the domestic industry.

a. The Volume of Subsidized Imports Is Significant and Increasing

733. With respect to the volume of subsidized imports, Article 15.2 provides for consideration of "whether there has been a significant increase in subsidized imports, either in absolute terms or

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[911] SCM Agreement, Art. 5(a).

[912] *Id.* Art. 5(a) footnote 11. Part V of the SCM Agreement includes Articles 10-23.

[913] *Id.* Art. 15 footnote 45.

[914] *Thailand – H-Beams (AB)*, para. 106.

[915] SCM Agreement, Art. 15.1 (footnote omitted).

relative to production or consumption in the importing Member." Since 2001, Airbus has significantly increased its share of the LCA market relative to total U.S. demand, despite a decline in absolute demand over the period. As shown in Table 2, in the last five years Airbus has increased its share of U.S. LCA deliveries by 18 percentage points, from 30 percent in 2001 to 48 percent in 2005.[916]

Table 2. LCA Deliveries to U.S. Customers, 2001-2005[917]

(A) Quantity of LCA delivered

	2001	2002	2003	2004	2005
Airbus	122	91	60	60	71
Boeing	280	126	75	88	78

(B) Market share (quantity of LCA delivered)

	2001	2002	2003	2004	2005
Airbus	30%	42%	44%	41%	48%
Boeing	70%	58%	56%	59%	52%

734. It is also useful to consider trends in market share by value as well as by volume. Although the record does not contain comparable data on the actual delivered price of Boeing and Airbus aircraft, net of all concessions,[918] market share by value can be approximated by measuring each producers' share at the nominal list prices of the delivered aircraft.[919] Although

[916] The DSB established this Panel on July 20, 2005 with standard terms of reference, which call for the Panel to examine "the matter referred to the DSB by the United States" in the U.S. panel request of May 31, 2005. In its panel request, the United States stated that the EC subsidies "appear to be causing adverse effects to its interests" (WT/DS316/2), thus establishing that the Panel's terms of reference encompass those adverse effects that were occurring, or that were threatening to occur, at the time the Panel was established. Nonetheless, for the sake of simplicity, the United States presents the quantitative data relevant to its adverse effects claims for the full calendar years 2001 to 2005, as partial-year data for 2005 would in many instances be difficult to obtain. We believe that data for all of 2005 are reflective of the period from January 1 to July 20, 2005, and that if separate data for that period were fully available, the analysis and conclusions would not differ in any meaningful way.

[917] Airclaims CASE database, data query as of August 14, 2006.

[918] The inadequacies of the available pricing data for these purposes are discussed more fully below in the context of the U.S. price undercutting claim under Article 6.3(c).

[919] Specifically, the United States multiplied the number of deliveries of each major model by the average nominal list price for that model.

imperfect,[920] this estimate demonstrates broad trends over a period of years. In addition, the similarity of estimated market shares by value and by volume suggests that the companies are selling relatively similar mixes of high-value and low-value aircraft at any given time.

735. As shown in Table 3, this estimated market share by value also demonstrates a significant increase in Airbus's market share in the United States. Airbus's market share by value increased from 28 percent in 2001 to 53 percent in 2005, or by 25 percentage points over the period.

Table 3. Market Share of LCA Deliveries to U.S. Customers, Value at List Price, 2001-2005[921]

	2001	2002	2003	2004	2005
Airbus	28%	34%	44%	50%	53%
Boeing	72%	64%	56%	50%	47%

736. By any measure, this increase in the relative volume of LCA imports is significant, even after taking into account the overall decline in U.S. demand during the period. For example, based on the data in Table 3, if Boeing had simply been able to maintain its 2001 share of the U.S. LCA market by value, its LCA sales in the United States would have been 54 percent greater in 2005 alone than they actually were.

b. The Price Effects of Subsidized Imports Are Significant

737. Article 15.2 further provides that, with respect to "the effect of the subsidized imports on prices," it is relevant

> whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree.

Although the record does not contain comparable LCA pricing data for all U.S. sales, significant publicly available evidence demonstrates that Airbus has achieved its growth in the U.S. market by undercutting Boeing on price and that the subsidized imported LCA have depressed prices or prevented price increases for Boeing LCA in the U.S. market.[922]

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[920] For example, measuring market share based on list price may overstate Airbus's market share by not accounting for differences resulting from its price undercutting.

[921] Airclaims CASE database, data query as of August 14, 2006.

[922] "Price suppression" refers to a situation in which prices either do not rise when they would have, but for the subsidized imports, or rise by an amount smaller than they would have, but for those imports, while "price depression" refers to a situation in which prices actually fall, due to the effect of the subsidized imports. *See US – Cotton Subsidies (AB)*, para. 423; *US – Cotton Subsidies (Panel)*, para. 7.1277.

738. ***Price Undercutting by Airbus.*** A significant share of the Airbus LCA delivered in the U.S. market during the 2001-2005 period were sold to customers new to Airbus, including both start-up airlines and previous Boeing customers. For example, JetBlue (75 deliveries), Frontier (49), and America West (35), together accounted for nearly 40 percent of Airbus's 404 deliveries during this period. All three of these airlines placed their first Airbus orders in 1999 and then made substantial additional follow-on orders with Airbus through 2005.[923] In each case, Boeing was a strong competitor for the initial order. Although the actual price that each airline paid to Airbus, taking into account all concessions on the sale, is not available to the United States, publicly available information indicates that Airbus price undercutting played a key role in winning these customers.

739. Frontier Airlines, for example, decided to replace its all-Boeing fleet with new Airbus LCA in October 1999. Boeing withdrew from the competition in the face of aggressive Airbus discounting. Its CEO at the time explained: "There are places where there is very intense price competition. We've always said we're in business to make money, and if that gets too intense we don't go there – that's what happened at Frontier, for example."[924] Asked whether Boeing's claims of Airbus's price undercutting were accurate, Frontier's chief financial officer replied: "We seem to be hearing that from people around us – we're pretty pleased."[925] W.A. Franke, the chairman of America West Holdings, explained his company's October 1999 Airbus order, saying that the Airbus aircraft were "very competitively priced."[926] Likewise, JetBlue's CEO David Neeleman stated publicly that his new airline "fully expected to choose the {Boeing} 737" until the low A320 price offered by Airbus got its attention.[927]

740. The majority of U.S. orders for new LCA in the 2001-2005 period were follow-on orders stemming from earlier campaigns, such as the JetBlue campaign described above. However, Boeing also lost the most significant campaigns that did occur in the U.S. market during this period on the basis of price undercutting by Airbus. For example, the head of Virgin America explained his new start-up airline's choice of Airbus over Boeing for an initial purchase and options totaling nearly 100 aircraft, saying: "While we had very compelling proposals from two world-class aircraft manufacturers, we are pleased with the favorable economic terms we achieved" from Airbus.[928]

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[923] Airclaims CASE database, data query as of August 14, 2006.

[924] Chris Kjelgaard, *Boeing's Condit Reveals Frontier Airbus Deal*, Air Transport Intelligence (Oct. 14, 1999) (Exhibit US-397).

[925] Chris Kjelgaard, *Frontier Plans to Complete Airbus Transition by 2005*, Air Transport Intelligence (Oct. 18, 1999) (Exhibit US-398).

[926] *America West Places Orders for A318s, A320s*, Aerospace Daily (Oct. 22, 1999) (Exhibit US-399).

[927] Laurence Zuckerman, *New Low-Fare Airline to Buy Airbus Industrie Jets*, N.Y. Times (Apr. 21, 1999) (Exhibit US-400).

[928] Virgin America Press Release: *"Virgin America" Announces Name, Executive Team, Airbus Order*, (June 15, 2004) (Exhibit US-401).

741. ***Price Depression and Suppression.*** The pricing pressures of these campaigns has had a direct and measurable impact on the prices Boeing has been able to obtain for those sales that it has made in the U.S. market. Figure 1[929] shows the trend in the sales price, net of all discounts and concessions, obtained by Boeing from its U.S. sales, of B737 aircraft. The blue line in Figure 1 represents the average actual prices for orders placed in each year of the 2001-2005 period, indexed to the 2001 price.[930] This line shows that the average price for B737s fell by **[ ]** during this period.

– U.S. BCI FIGURE 1 DELETED –

742. In addition, while the price of each LCA is contractually agreed at the time of a firm order, Boeing had to reduce prices on undelivered aircraft for certain major customers because of downward trends in market pricing under pressure from Airbus. The green line in Figure 1 shows how retroactive price decreases over the period have further lowered Boeing's actual prices. For example, Boeing was forced to reduce the price of B737s ordered in 2001 by **[ ]** percent before those aircraft were actually delivered. These reductions **[ ]**. Adjusted prices for B737 aircraft ordered in 2005 are now **[ ]** below their original 2001 levels, and to the extent that many of these aircraft have not yet been delivered, they remain subject to possible additional repricing.

743. Finally, the red line in Figure 1 represents increases in the U.S. Aircraft Manufacturing Producer Price Index, which rose by nearly 17 percent from 2001 to 2005.[931] Ordinarily, one would expect that in the absence of price suppression, producers would over time increase prices generally in line with increases in their costs. Indeed, as previously noted, both Airbus and Boeing typically include price escalation clauses in their sales contracts to reflect inflation – *i.e.*, cost increases – from the year of order to the year of delivery. As Figure 1 shows, however, Boeing has been unable to maintain its U.S. pricing for B737s in line with cost increases.

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[929] Included in text below and reproduced in Exhibit US-444; see BCI Annex.

[930] Although aircraft deliveries are the best measure of market share, aircraft orders are the best measure of pricing trends in the LCA market. Because aircraft ordered in a single year may be delivered over a period of many years, the average price of aircraft delivered in any given year would represent a mix of the prices at which aircraft were sold in many different years.

[931] U.S. Department of Labor, Bureau of Labor Statistics Producer Price Index Industry Data: Aircraft Manufacturing 2001-2005 (as of Oct. 13, 2006), available at http://data.bls.gov (Exhibit US-402).

744. Figures 2 and 3[932] show similar trends for B747 and B777 sales in the U.S. market.[933] Although the number of sales is small, it is clear that prices for the B747 **[ ]**, while prices for the B777 **[ ]**.

– U.S. BCI FIGURES 2 AND 3 DELETED –

745. These data in Figures 1 through 3 demonstrate that Boeing has experienced price depression (actual price decreases) and price suppression (price increases lower than what would be expected) for its U.S. LCA sales. Given the evidence of aggressive Airbus pricing in U.S. sales campaigns, the price depression and price suppression shown in these figures are plainly attributable to the subsidized imports.

c. The Subsidized Imports Have Injured the Domestic Industry

746. Article 15.4 of the SCM Agreement provides that an examination of injury within the meaning of Article 15

> shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, {and} ability to raise capital or investments . . . . This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

Table 4 provides data on the Article 15.4 factors for Boeing's U.S. production of LCA not already discussed above.[934]

[932] Included in text below and reproduced in Exhibit US-444; see BCI Annex.

[933] There were insufficient sales of the 767 in the U.S. market during the period to generate data to show average price trends. The Airclaims CASE database shows U.S. orders for 17 767s in 2001, followed by just one order in 2002 and none thereafter.

[934] Inventories are not included because, with rare exceptions, Boeing produces to order and does not carry inventories of unsold aircraft. The evolution of Boeing's credit ratings in recent years, which relates to Boeing's "ability to raise capital or investments," is set forth separately in Exhibit US-403.

Table 4. Trends in Boeing's LCA Operations[935]

	2001	2002	2003	2004	2005	Change (2001-05)
Production (aircraft)	518	377	273	280	284	– 45%
Capacity Utilization	[ ]%	[ ]%	[ ]%	[ ]%	[ ]%	– 45%
Sales (US dollars, millions)	35,056	28,387	22,408	21,037	22,651	– 35%
Operating income (US dollars, millions)	1,911	2,107	707	753	1,432	– 25%
Return on assets	[ ]%	[ ]%	[ ]%	[ ]%	[ ]%	– [ ]%
Cash flow (US dollars, millions)	[ ]	[ ]	[ ]	[ ]	[ ]	– [ ]%
Employees	[ ]	[ ]	[ ]	[ ]	[ ]	– [ ]%
Wages paid (US dollars, millions)	[ ]	[ ]	[ ]	[ ]	[ ]	– [ ]%
Productivity (US dollars, thousands)	[ ]	[ ]	[ ]	[ ]	[ ]	+[ ]%

747. As the data in Table 4 show, the decline in the financial results of Boeing's LCA business over the past five years has occurred despite deep cuts in costs and steady gains in productivity. The cost-cutting effort led to a rise in operating income in 2002 over 2001, even though Boeing's sales and capacity utilization were lower in 2002 than they had been in 2001. The cost cutting and efficiency gains continued in succeeding years, but could no longer offset the bottom-line impact of declining production, capacity utilization, and sales revenue. In absolute terms, Boeing's income on its LCA operations fell by nearly two-thirds in 2003 and 2004, as compared with 2002. Further, the partial recovery in Boeing's LCA income in 2005 is due almost entirely to improved productivity, as revenues increased only slightly from their 2004 levels.

748. To be sure, much of the decline in the condition of Boeing's LCA operations may be attributed to the post-2000 drop in LCA demand, particularly in the United States. Nonetheless, any injury resulting from decreased demand is clearly distinguishable from the injury resulting from the loss of market share to Airbus. The data in Tables 2 and 3 show that if Boeing's share by volume of the U.S. market had held constant at its 2001 level during 2002-2005, Boeing would

[935] Sources: Production from Airclaims CASE database, data query as of August 14, 2006; capacity utilization based on historic capacity of [ ] LCA per month; sales and operating income based on published annual reports of The Boeing Company for its Boeing Commercial Aircraft ("BCA") division; cash flow estimated as operating income, plus depreciation, less capital expenditures; return on assets estimated as BCA operating income per assets (including Boeing corporate assets allocated to BCA); employment based on Boeing proprietary data for all BCA employees, excluding non-U.S. subsidiaries, contract labor, and executives as of January 1 each year; wages are average base salary for reported employees; productivity calculated as sales per reported employee.

have delivered 23 percent more aircraft than it actually did over the period. Likewise, if Boeing's share by value of the U.S. market had held constant at its 2001 level, its U.S. sales would have been 54 percent greater in 2005. To this must be added the negative price impact of Airbus sales on the aircraft that Boeing did deliver during this period. Thus, the direct impact of subsidized Airbus sales in the U.S. market on Boeing's operating performance is "material" by any reasonable standard.

d. Subsidized Imports Are Causing Material Injury to Boeing's U.S. LCA Production

749. Finally, Article 15.5 provides that "{i}t must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury," with the relevant "effects" being those set forth in Article 15.2 and Article 15.4 as discussed above.

750. Airbus's gains in its share of the U.S. market (*i.e.*, the relative increase in the volume of subsidized imports) have come at the expense of Boeing, thus linking the subsidized imports to the significant adverse impact on Boeing's LCA production and sales figures. Moreover, the decline in the prices Boeing has been able to command (or failure of those prices to increase commensurate with production costs) for the LCA it has been able to sell in the U.S. market is a function of the pricing of subsidized imports from Airbus. The deterioration in the other relevant indicators of the economic health of Boeing's LCA operations follows directly from this loss of market share and loss of revenue. The temporal correlation of this deterioration with Boeing's loss of market share to Airbus, both in the U.S. market and worldwide, is further evidence of the causal relationship between imports of subsidized Airbus LCA and the injury to the U.S. LCA industry.[936]

751. Article 15.5 also cautions that, in making a determination of injury, it is necessary "to examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to imports." As the Appellate Body has explained, the application of the parallel provision in Article 3.5 of the *Antidumping Agreement* requires both (1) an examination of all other "known factors" that may be causing injury to the domestic industry "at the same time" as the subject imports and (2) an analysis that ensures that any injury caused by such other factors is not "attributed" to the imports.[937]

752. As noted above, injury resulting from the decline in total demand – a factor that affected both Airbus and Boeing – is clearly distinguishable from injury resulting from loss of market share to Airbus. Airbus itself recognized this distinction when demand began to fall at the end of

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[936] The Appellate Body has recognized that a temporal correlation between a claimed cause and its effect, while not in itself decisive, is relevant evidence that "one would normally expect" to find in examining the effects of a subsidy. *E.g.*, *US – Cotton Subsidies (AB)*, para. 451.

[937] *US – Hot-Rolled Steel (AB)*, paras. 222-223.

2001:

> Airbus is entering the current recession in a more favourable situation than its American competitor because our market share is increasing strongly and that trend, to a great extent, compensates for the shrinking of the whole market. For our competitor, the effects of loss of market share and the contraction of the market itself are cumulative.[938]

753. There are no other factors that have caused the injury on which the U.S. complaint is based, let alone any factors that break the causal link between subsidized imports and the material injury sustained by Boeing.

e. Subsidized Imports Threaten Material Injury

754. Footnote 45 to the SCM Agreement defines material injury to include, in addition to present injury, a threat of material injury. The Agreement sets out a list of factors to be considered in assessing the threat of material injury. Those relevant to this dispute are discussed in detail below.[939] As is evident from this discussion, the threat of material injury is "clearly foreseen and imminent"[940] within the meaning of the Agreement.

i. Nature and effects of the subsidies

755. The EC and the Airbus governments have tailored their Airbus subsidies to the economics of the LCA industry for the express purpose of giving Airbus a structural advantage over Boeing. As discussed in more detail below, Launch Aid and other subsidies transfer much of the cost and risk of LCA development from Airbus to the EC and the Airbus governments, and the continued effects of these subsidies give Airbus flexibility that it would not otherwise have to launch new aircraft and price all models to gain market share.[941]

756. Subsidies already bestowed, including the enormous subsidies for the development of the A380 (for which repayment has not yet begun) – not to mention the $1,700,000,000 in Launch Aid already committed for the A350 and even more subsidies anticipated – are perpetuating and amplifying Airbus's structural advantages in the U.S. LCA market. These subsidies are giving Airbus the financial flexibility to capture additional orders at aggressively discounted prices,

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[938] EADS Aero-notes: Letter to Shareholders, No. 3 (Nov. 2001) at 5 (interview with Airbus CEO Noël Forgeard) (Exhibit US-404).

[939] As previously noted, LCA manufacturers generally do not produce aircraft for inventory, and therefore inventories are not a relevant factor in this case.

[940] SCM Agreement, Art. 15.7.

[941] Dorman Report at 6-10 (Exhibit US-70; see BCI Annex). The Dorman Report is discussed in more detail below in the context of the causation analysis.

while absorbing loss-making A380 sales and designing the A350.[942]

ii. Rate of increase of subsidized imports

757. Article 15.7(ii) of the SCM Agreement contemplates the examination of whether there has been "a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation." Not only has Airbus significantly increased its share of LCA deliveries in the U.S. market in recent years, but the strength of its firm order backlog for new LCA deliveries confirms that the volume of imports will remain high for the forseeable future.

758. The sales campaigns Boeing lost to Airbus in recent years have only begun to be reflected in actual deliveries. Taking the specific airlines discussed above as examples, the Airclaims CASE database recorded a total of 198 firm orders yet unfilled as of August 2006 from JetBlue (89), U.S. Airways (49), America West (26), Virgin America (19), and Frontier (15).[943] Each of these orders, without exception, is for Airbus LCA. These scheduled deliveries are already contracted for and are therefore "clearly foreseen and imminent."[944] In addition, Airbus has not yet even begun to deliver its two most recent models – the A380 and the A350. Currently, there are 20 A380s and 41 A350s on order from U.S. customers,[945] and more such orders can be anticipated in the near future as these programs advance.

759. Further, as already discussed, once an airline has chosen one LCA manufacturer over the other, it tends to make additional follow-on orders from that same manufacturer in order to enhance its efficiency and minimize its operating costs. Thus, Airbus's increased share of the U.S. market inevitably places Airbus in a stronger position to win additional follow-on sales and capture a higher share of orders and deliveries in future years.

iii. Additional capacity

760. Article 15.7 further provides that a threat determination must consider whether there is "sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's

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[942] EADS, Ad-hoc Release: *EADS and Airbus Finalise A380 review* (Oct. 3, 2006) (Exhibit US-66); AFP, *EADS Board Puts Off Decision on Airbus A350 Project* (Nov. 7, 2006) (Exhibit US-372); EADS, Earnings Conference Call presentation (Nov. 8, 2006) at 12 (Exhibit US-384); Interview with Airbus CEO and EADS co-chairman Louis Gallois, Europe 1 (Oct. 10, 2006), available at http://www.europe1.fr/informations/chronique-t1.jsp?idboitier=620768 (Exhibit US-406).

[943] Airclaims CASE database, data query as of August 14, 2006.

[944] SCM Agreement, Art. 15.7.

[945] Airclaims CASE database, data query as of August 14, 2006, adjusted for cancellation of FedEx A380 order in November 2006.

market."[946] Airbus is increasing its LCA capacity by adding two entirely new LCA production lines for the A380 and the A350, and a substantial number of both aircraft have already been ordered by U.S. customers. Airbus has also announced that it is increasing its capacity to produce its other aircraft and is considering even further increases.[947]

761. From this, it is clear that Airbus is substantially increasing its LCA production capacity. At least some of this capacity can be expected to be available to supply additional LCA to the U.S. market, even taking into account expected growth of Airbus LCA sales in other markets as well.

iv. Continued price depression and suppression

762. All available data indicate that Airbus has systematically priced its aircraft below Boeing's prices. This has been especially evident when Airbus is seeking initial customers for new aircraft, trying to capture a Boeing account, or trying to win business at a new airline. Recent Airbus sales, both in the U.S. market and elsewhere, have driven global LCA prices to new lows. Each new campaign is conducted in the prevailing price environment, and LCA prices are therefore likely to remain depressed or suppressed for the foreseeable future.

763. In sum, imports of subsidized Airbus LCA have both caused material injury and threaten to cause additional material injury to the U.S. industry producing LCA within the meaning of Article 15. Accordingly, by providing the subsidies that have caused this injury, the EC and the Airbus governments have breached their obligation under Article 5(a) of the SCM Agreement not to use subsidies to cause "injury to the domestic industry of another Member."

4. The Subsidies Have Caused Serious Prejudice to the Interests of the United States

764. Adverse effects from subsidies include not only injury to a domestic industry within the meaning of Article 5(a) of the SCM Agreement, but also "serious prejudice to the interests of another Member" as provided in Article 5(c). Article 6.3 further provides that serious prejudice "may arise in any case where one or several" particular market effects of the subsidy are demonstrated.

765. As shown in detail below, several of the effects of the subsidies described in Article 6.3 apply in the circumstances of this dispute:

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[946] SCM Agreement, Art. 15.7(iii).

[947] EADS Investor Conference Call at 1:27:40 (Oct. 3, 2006), available at http://www.eads.com/web/lang/en/1024/content/OF00000000400004/6/03/31000036.html, relevant portion transcribed at Exhibit US-393.

- Displacement or impedance of imports of Boeing LCA into the market of the subsidizing Member (the EC) within the meaning of Article 6.3(a).

- Displacement or impedance of exports of Boeing LCA into third-country markets within the meaning of Article 6.3(b), as further elaborated in Article 6.4.

- Significant price undercutting of Boeing LCA by Airbus LCA and lost sales of Boeing LCA to Airbus LCA in the world market within the meaning of Article 6.3(c), as further elaborated in Article 6.5.

- Price depression or price suppression for Boeing LCA in the world market within the meaning of Article 6.3(c).

Subsections (1) through (4) demonstrate the existence of each of these circumstances in turn. Then, in subsection (5), the United States will show that all of these circumstances are the "effects of the subsidy" that the EC and the Airbus governments have provided to Airbus.

a. Subsidized Airbus LCA Have Displaced or Impeded Imports of U.S.-Produced LCA in the EC Market

766. Serious prejudice may arise within the meaning of Article 5(c) and Article 6.3(a) of the SCM Agreement if the effect of subsidies is "to displace or impede the imports of a like product of another Member into the market of the subsidizing Member." The panel in *Indonesia – Autos* interpreted this provision to require a finding that "some imports that would have occurred did not occur as a result of the subsidies."[948] In other words, based on an analysis of market share and sales data, the Panel must determine whether "but for the introduction of the subsidized {product}, sales of the {imported like product} would have been greater than they were."[949]

767. The data clearly demonstrate that Airbus has increased its market share in the EC LCA market[950] at the expense of Boeing in recent years. As Table 5 shows, Airbus increased its share of the EC LCA market by 9 percentage points from 2001 to 2005 when measured by total volume of LCA delivered.

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[948] *Indonesia – Autos*, para. 14.215.

[949] *Id.* para. 14.218.

[950] In order to provide a proper comparison, sales of LCA in EC member States that became members of the EC during the 2001-2005 period are included in data provided for all years of this period, whether or not a given country was an EC member State during a given year. Including or excluding sales in these member States would not materially affect the analysis.

Table 5. LCA Deliveries to EC Customers, 2001-2005[951]

(A) Quantity of LCA delivered

	2001	2002	2003	2004	2005
Airbus	114	114	98	109	103
Boeing	81	69	67	77	50

(B) Market share (quantity of LCA delivered)

	2001	2002	2003	2004	2005
Airbus	58%	62%	59%	59%	67%
Boeing	42%	38%	41%	41%	33%

As Table 6 shows, the data show a similar increase in Airbus market share when measured by list price of the delivered aircraft.

Table 6. Share of Value of LCA Deliveries to EC Customers, List Prices, 2001-2005[952]

	2001	2002	2003	2004	2005
Airbus	54%	61%	57%	56%	66%
Boeing	46%	39%	43%	44%	34%

The growth in Airbus's market share – and concomitant decline in Boeing's share – demonstrates that Airbus LCA have displaced Boeing LCA in the EC market.

768. A significant portion of the shift in EC market share is attributable to two particular campaigns in which Airbus "displaced" Boeing as an airline's LCA supplier. In 2002, easyJet, a U.K. low-cost carrier, placed an order for 120 Airbus aircraft, which was supplemented in 2005 by an order for an additional 20 Airbus LCA. In 2004, Air Berlin, Germany's second largest airline, ordered 60 Airbus aircraft. As described in more detail below in the context of the "lost sales" analysis, both airlines were Boeing customers looking to expand and upgrade their fleets, the competitions were directly between Boeing and Airbus, and the wins for Airbus were losses for (and significant displacements of) Boeing.

769. The displacement of Boeing LCA sales into the EC market as a result of these two

[951] Airclaims CASE database, data query as of August 14, 2006.

[952] *Id.*

particular campaigns has only begun to register in the LCA delivery data. As shown in Table 7, easyJet was still receiving deliveries of Boeing LCA as late as 2004 (based on earlier orders), and at the end of 2005 had received only 59 of the 140 Airbus LCA it has ordered.

Table 7. LCA Deliveries to easyJet, Quantity, 2001-2005[953]

	2001	2002	2003	2004	2005
Airbus	0	0	5	21	33
Boeing	6	11	7	6	0

Boeing deliveries to Air Berlin also continued through 2004, while Airbus deliveries to Air Berlin had hardly begun at the end of 2005, as shown in Table 8, with 58 of its 60 Airbus LCA orders yet to be delivered.

Table 8. LCA Deliveries to Air Berlin, Quantity, 2001-2005[954]

	2001	2002	2003	2004	2005
Airbus	0	0	0	0	2
Boeing	7	4	4	1	0

770. While the campaigns at easyJet and Air Berlin are the two largest EC sales that Boeing lost to Airbus over the past several years, other lost sales campaigns have resulted in additional displacement of Boeing LCA in the EC market. For example, significant Airbus wins at Iberia Airlines and Czech Airlines are discussed in some detail in the context of the "lost sales" analysis below. This capture of significant market share by subsidized Airbus LCA at the direct expense of Boeing constitutes the displacement or impedance of imports of Boeing LCA into the EC market, and the large number of yet-unfilled orders alone indicates a substantial threat of additional displacement or impedance of U.S. imports in the EC market.[955] As will be demonstrated further below, this displacement or impedance in the EC market is an effect of the subsidies previously demonstrated.

[953] *Id.*

[954] *Id.*

[955] As of August 2006, EC airlines had ordered 32 A350s and 31 A380s, in addition to their orders of aircraft already in production. *Id.*

b. Subsidized Airbus LCA Have Displaced or Impeded Exports of U.S.-Produced LCA in Third-Country Markets

771. Serious prejudice also may arise within the meaning of Article 5(c) and Article 6.3(b) of the SCM Agreement if the effect of subsidies is "to displace or impede the exports of a like product of another Member from a third-country market." Article 6.4 explains that displacement or impeding of exports within the meaning of Article 6.3(b) "shall include any case in which it has been demonstrated that there has been a change in relative shares of the market" to the detriment of the like product of the exporting Member.[956] Article 6.4 further defines such change in relative market shares as including "any of the following situations: (*a)* there is an increase in the market share of the subsidized product; (*b)* the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; {and} (*c*) the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy."

772. Most individual third-country markets import only a small number of LCA in any given year, and it is therefore sometimes difficult to identify a "representative period sufficient to demonstrate clear trends in the development of the {LCA} market"[957] in those countries. Nonetheless, as Table 9 shows, Airbus has significantly increased its share in markets other than the United States and the EC, including a 20 percentage point increase from 2001 to 2005.

Table 9. LCA Deliveries to Customers Other than United States and EC-25, 2001-2005[958]

(A) Quantity of LCA delivered

	2001	2002	2003	2004	2005
Airbus	88	95	142	150	202
Boeing	159	182	131	115	156

(B) Market share (quantity of LCA delivered)

	2001	2002	2003	2004	2005
Airbus	36%	34%	52%	57%	56%
Boeing	64%	66%	48%	43%	44%

As Table 10 shows, the data show a similar increase in Airbus's market share when measured by

[956] None of the exceptions to this provision listed in Article 6.7 apply in the circumstances of this dispute.

[957] SCM Agreement, Art. 6.4.

[958] Airclaims CASE database, data query as of August 14, 2006.

list price of delivered aircraft.

Table 10. Share of Value of LCA Deliveries to Customers Outside the U.S. and EC, 2001-2005[959]

	2001	2002	2003	2004	2005
Airbus	34%	33%	50%	54%	53%
Boeing	66%	67%	50%	46%	47%

773. These aggregate data are, of course, the sum of data from individual third country markets. To identify specific third country markets in which Airbus has increased its market share at Boeing's expense, one need look no further than the two largest third-country markets in the 2001-2005 period, China and Australia, in which Airbus made significant gains at Boeing's expense.

Table 11. LCA Deliveries to Customers in China, 2001-2005[960]

(A) Quantity of LCA delivered

	2001	2002	2003	2004	2005
Airbus	9	7	22	35	56
Boeing	22	31	28	20	50

(B) Market share (quantity of LCA delivered)

	2001	2002	2003	2004	2005
Airbus	29%	18%	44%	64%	53%
Boeing	71%	82%	56%	36%	47%

[959] *Id.*

[960] *Id.*

Table 12. LCA Deliveries to Customers in Australia, 2001-2005[961]

(A) Quantity of LCA delivered

	2001	2002	2003	2004	2005
Airbus	2	4	11	12	6
Boeing	7	30	19	12	9

(B) Market share (quantity of LCA delivered)

	2001	2002	2003	2004	2005
Airbus	22%	12%	37%	50%	40%
Boeing	78%	88%	63%	50%	60%

Airbus also increased its market share from 2001 to 2005 in countries such as Singapore (11% to 73%), Korea (17% to 44%), Brazil (50% to 86%), Chinese Taipei (38% to 56%), Mexico (29% to 50%), and India (0% to 76%). A number of the specific campaigns included in the "lost sales" discussion below also involved customers in particular third countries.

774. In addition, Airbus has recently captured large new orders in third-country markets that threaten additional displacement of Boeing exports to these markets for years to come. This is most evident in India, in which several new airlines chose Airbus over Boeing for their operations. The extent of the likely future displacement is shown in Table 13.

Table 13. LCA Orders by Customers in India, 2001-2005[962]

(A) Quantity of LCA ordered

	2001	2002	2003	2004	2005
Airbus	0	0	0	2	225
Boeing	0	0	1	0	98

[961] *Id.*

[962] *Id.*

(B) Market share (quantity of LCA ordered)

	2001	2002	2003	2004	2005
Airbus	N/A	N/A	0%	100%	70%
Boeing	N/A	N/A	100%	0%	30%

775. Thus, it is clear that Airbus LCA have increased their market share in various third country markets, resulting in the displacement or impedance of exports of U.S. LCA into those markets. These shifts in market share are the effect of subsidies, as discussed below.

c. Subsidized Airbus LCA Have Undercut Prices and Taken Sales of Boeing LCA

776. Serious prejudice also may arise within the meaning of Article 5(c) and Article 6.3(c) of the SCM Agreement if the effect of subsidies is "significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or . . . lost sales in the same market." In a general sense, a "lost" sale is any sale that is captured by the subsidized product instead of the product of the complaining Member.[963] In this section, the United States will demonstrate that Boeing has lost sales to Airbus in specific campaigns in which both producers competed for sales to particular customers and that these lost sales have been "significant." Moreover, the United States will show that Airbus captured these sales primarily by significantly undercutting the prices offered by Boeing.[964] Because, as will be shown later, both the price undercutting and the lost sales are effects of the subsidies, they constitute serious prejudice.

777. That Airbus uses price undercutting to increase its share of the LCA market is well

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[963] "Lost" is the past participle of "lose," which means "to suffer the privation of," "to fail to obtain," and "to be defeated in." New Shorter Oxford English Dictionary, vol. 1, p. 1632.

[964] As for the other U.S. claims, the subsidized product for purposes of the Article 6.3(c) analysis is all Airbus LCA, while Boeing LCA represents the U.S. like product (for the price undercutting claim) and the comparable "product of interest" to the United States (for the lost sales claim). In addition, as the EC itself has found, the world market is the appropriate market for evaluating competitive conditions in this industry:

> Large commercial jet aircraft are sold and operated throughout the world under similar conditions of competition. Relative transportation costs of delivery are negligible. Therefore, the Commission considers that the geographic market for large commercial jet aircraft to be taken into account is a world market.

EC Merger Analysis, para. 20 (Exhibit US-375). The Appellate Body has confirmed that a world market analysis is permissible for purposes of evaluating claims under Article 6.3(c) of the SCM Agreement. *US – Cotton Subsidies (AB)*, para. 410.

recognized in the industry.[965] In the 2005 *Airfinance Journal* poll, investors and operators rated Boeing ahead of Airbus in all categories but one, including "confidence in products," "residual value strategy," "product support," and "ease in financing products." Airbus ranked ahead of Boeing only in "financial support offered."[966] Indeed, Airbus itself admits that retaining its targeted market share is more important to it than profitability, stating that "one percent in profitability matters more than one percent in market share, provided it remains at an average 50 percent market share."[967]

778. In each of the sales campaigns discussed below, the customer was in the market for new aircraft, invited Boeing and Airbus to bid against one another, chose the Airbus LCA over an equally qualified Boeing LCA, and did so because of the Airbus price.

779. **easyJet.** The 2002 easyJet order was the largest single lost sale for Boeing during the 2001-2005 period. As briefly described above, easyJet was an exclusive Boeing customer until 2002, when it announced an order for 120 Airbus A319s, with options for 120 more. Senior officials at easyJet attributed the company's decision to the lower price offered by Airbus:

> Stelios Haji-Ioannou, founder of easyJet who is to leave as chairman next month, said the price difference between the bids left the company with no choice: "The difference was so substantial we would have been in breach of our fiduciary duty; it would have been an offence to buy Boeing."[968]

easyJet CEO Ray Webster recalled that "it surprised all of us to see just how aggressive Airbus was in the final round of sealed bids."[969] Webster noted that the speculation that Airbus won the sale by offering a 60 percent discount off list prices "is 'a bit ambitious, but not far off. . . . I've been buying aircraft for 20 years and I've never seen anything like it.'"[970]

780. Detailed public disclosures by easyJet provide an unusual window into some of the specifics of the price at which Airbus won this major sale. For example, easyJet's 2005 annual report states that the only aircraft delivered to it in 2005 were 12 A319s,[971] for which it paid

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[965] *E.g.*, Bernstein Research Call, *Aerospace & Defense* (Jan. 4, 2005) at 10 ("Most customers bought from their existing supplier. Airbus, however, has moved aggressively to gain share by capturing large deals with Boeing-aligned airlines, with the most significant being easyJet, South African Airways, and Air Berlin. These deals can be costly because they normally require buying the customer out of its switching costs.") (Exhibit US-440).

[966] *The Real Battleground*, Airfinance Journal (Sept. 2005) at 34 (Exhibit US-430).

[967] Airbus Annual Review 2005 (Jan. 2006) at 18 (emphasis added) (Exhibit US-441).

[968] Kevin Done, *Airbus Beats Boeing in War over Big Order*, Fin. Times (Oct. 15, 2002) (Exhibit US-407).

[969] *Id.*

[970] Colin Baker, *Easy Does It*, Airline Business (Dec. 1, 2002) (Exhibit US-408).

[971] easyJet plc, Annual Report and Accounts 2005 at 19 (Exhibit US-409).

£167.7 million.[972] Dividing £167.7 million by the 12 delivered aircraft yields a per-aircraft price of £13.98 million. According to easyJet, this is the actual price, net of concessions, paid to Airbus in 2005:

> The cost of new Airbus aircraft comprises the invoiced price of the aircraft from the supplier less the estimated value of other assets received by easyJet for no consideration in connection with the transaction to purchase aircraft. . . . Advance payments and option payments made in respect of aircraft purchase commitments and options to acquire aircraft are recorded at cost and separately disclosed. On acquisition of the related aircraft, these payments are included as part of the cost of aircraft and are depreciated from that date.[973]

781. Both Boeing and Airbus generally negotiate the sales price of LCA at the time the order is placed in order-year U.S. dollars, and then "escalate" the price of each aircraft to delivery-year U.S. dollars payable at the time of delivery. As the easyJet A319 order was originally made in the course of a campaign commenced in 2001, the campaign therefore would have been conducted in 2001 U.S. dollars. The delivery price of £13.98 million in 2005 British pounds sterling thus corresponds to an estimated order price of $19.36 million in 2001 U.S. dollars – a discount of 56 percent off the $44 million list price for the A319 as of January 2001.[974]

782. Not only did Airbus discount the price of each aircraft sold to easyJet by more than 50 percent, it also granted easyJet additional concessions to offset the cost to easyJet of switching its fleet from Boeing to Airbus. The letter from easyJet to its shareholders seeking approval of the transaction spells out some of these concessions:

> Airbus has agreed to provide extensive support to the Company, especially with regard to training for easyJet's pilots, cabin crew and maintenance personnel;
>
> Airbus has undertaken to put in place arrangements, in keeping with a low cost operation, to provide that the cost to easyJet of maintenance of the Airbus A319 aircraft shall not exceed the cost of maintenance for its Boeing 737-700 aircraft;
>
> Airbus has agreed to assist in reducing the residual value risk on the remaining 10 Boeing 737-300 aircraft owned by easyJet (including by agreeing to grant to the Company the right to sell such aircraft to Airbus if, inter alia, the aircraft meets the contractual delivery conditions on a specified sale date, the required period of notice is given and the other general conditions precedent are met); and

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[972] *Id.* at 67.

[973] *Id.* at 67.

[974] easyJet, *Proposed Purchase of Airbus Aircraft and Notice of Extraordinary General Meeting* (Feb. 25, 2003) at 7, http://www.easyjet.com/EN/News/20030225_01.html (Exhibit US-380). Calculated by multiplying the 2005 price of £13.98 million by the U.S. dollar-U.K. pound exchange rate of 1.719 (exchange rate as of December 31, 2005) and deflating to 2001 dollars using the U.S. Bureau of Labor Statistics Aircraft Manufacturer Producer Price Index (from Dec. 2005 to Jan. 2001– 0.80545; see Exhibit US-402).

> Airbus has agreed to provide a guarantee as to the technical dispatch reliability of the A319 aircraft.[975]

With all of these guarantees and additional services to be provided by Airbus, easy Jet concluded that "the offer received from Airbus . . . was significantly better value than the offer received from Boeing."[976]

783. Indeed, easyJet estimated that the per-seat cost of the Airbus A319 was about one-third lower than the per-seat cost of the Boeing 737 it had purchased just two years earlier.[977] Based on this low price, easyJet calculated that the deal would reduce its overall operating costs by 10 percent.[978] As an industry publication noted at the time:

> {T}he offer made by Airbus had to be sufficiently attractive to prise easyJet away from Boeing. A near equal bid between Airbus and Boeing would have inevitably resulted in a decision favoring the latter. Clear water between the two manufacturers was necessary to tempt easyJet away from the traditional source of equipment for low-cost carriers.[979]

784. Even taken by itself, the easyJet sale represents a "significant" lost sale. At 120 firm orders for aircraft, and not including the additional 120 aircraft options, this single transaction accounted for 35 percent of Airbus's 346 total world orders in 2002; had Boeing won the sale, its order book for 2002 would have had 50 percent larger than the 242 world orders it actually had, and it would have been positioned for additional follow-on orders in subsequent years.[980] However, easyJet is just one of many sales lost due to Airbus price undercutting, as shown by the transactions described below.

785. **Air Berlin/NIKI.** Available information indicates that, after the easyJet sale, Airbus again undercut Boeing's price in the campaign at Air Berlin and its Austrian affiliate, NIKI,

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[975] easyJet, *Proposed Purchase of Airbus Aircraft and Notice of Extraordinary General Meeting* (Feb. 25, 2003) at 4 (Exhibit US-380). The "residual value risk" that Airbus assumed with regard to the Boeing aircraft refers to the possibility that easyJet would not be able to dispose of its existing Boeing aircraft at an acceptable price; Airbus agreed to purchase the used Boeing aircraft from easyJet, if necessary, at a guaranteed price. "Technical dispatch reliability" refers to the proportion of scheduled flights that are delayed because of repair, maintenance, or other technical difficulties.

[976] *Id.* at 3.

[977] *Id.* at 2.

[978] *Id.* at 8.

[979] *Stiff Competition Sees A319 Price to Fall to $25 Million*, Aircraft Value News (Oct. 21, 2002) (Exhibit US-410).

[980] As the United States was finalizing this submission, press reports indicated that easyJet has placed an order for 52 additional A319s by exercising options received in the 2002 sale and taken options on 75 additional Airbus LCA. *EasyJet Profits Soar 56 Percent*, CNN International (Nov. 14, 2006), http://edition.cnn.com/2006/BUSINESS/11/14/easyjet.profits.reut/. This brings to 192 the number of Airbus aircraft that easyJet purchased as a result of the 2002 campaign, with 48 of the 120 2002 options remaining along with the reported 75 additional options received in the most recent transaction.

which led Boeing to lose that sale for 70 firm orders in 2004. During the campaign, Air Berlin executives said "that the total package offered by Boeing and Airbus, including the price of the planes and how to finance them, would determine who won the competition."[981] Air Berlin managing director Joachin Hunold confirmed that "{p}rice is always an issue, but we also looked at the delivery schedule that was possible and at financing."[982] Air Berlin, like easyJet, had operated only Boeing LCA until this campaign, and Airbus met this challenge in the same way that it did at easyJet: "According to people familiar with the deals, Airbus trumped Boeing by offering steep discounts and other financial guarantees that {Boeing} was unwilling to match."[983]

786. **AirAsia.** Following its success in winning orders from easyJet and Air Berlin through price undercutting, Airbus used price to persuade AirAsia, another major low-cost carrier, to switch its entire fleet from Boeing to Airbus. Press reports cited knowledgeable persons during the campaign as saying that "the offer from Airbus is priced well below Boeing's."[984] As part of the "attractive pricing package," Airbus reportedly offered to cap the "price escalation" on the 40 firm orders and 40 firm options for A320s at 1.8 percent per year for 10 years.[985]

787. This reported price escalation cap represents a significant concession. Ordinarily, when LCA are ordered from Airbus or Boeing, aircraft are delivered over many years after the order is placed, and the final delivery price is adjusted or "escalated" to delivery-year dollars to account for inflation in aircraft manufacturing costs. The U.S. Bureau of Labor Statistics publishes an Aircraft Manufacturer Producer Price Index, which may be taken as a reasonable proxy for the normal escalation rate that would apply in the absence of a specific price escalation cap. From 2001 to 2005, the average annual increase in this index was 3.83 percent.[986] At that rate, after ten years the price of a $40 million aircraft would inflate to $58.3 million, while under a 1.8 percent price escalation cap, the price in year ten would be only $47.8 million – an additional $10 million, or 18 percent price concession.

788. **Iberia Airlines.** In 2003, Spain's Iberia Airlines held a campaign to replace some of its older B747s with new Boeing B777s or Airbus A340s, and the airline's president, Xavier de Irala, announced that the airline was going to make a "fundamentally financial" decision between the two.[987] In the end, Iberia announced that it was "taking advantage of exceptional terms" offered

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[981] James Wallace, *Boeing Loses Huge Air Berlin Jet Order to Airbus*, Seattle Post-Intelligencer (Nov. 5, 2004) (Exhibit US-411).

[982] *Id.*

[983] *Airbus to Beat Boeing Again*, Wall St. Journal (Nov. 8, 2004) (Exhibit US-412).

[984] *Id.*

[985] Kang Siew Li, *AirAsia Awaits Indon{esian} Gov{ernmen}t Nod for Joint Venture*, Business Times (Malaysia) (Oct. 12, 2004) (Exhibit US-413).

[986] *See* Exhibit US-402.

[987] Agencie EFE – Servicio Económico, *Iberia opta por el Airbus A340-600 para sustituir sus Boeing 747* (Jan. 30, 2003) (stating that "ya el pasado mes de noviembre el presidente de Iberia, Xabier de Irala, anunció que la

(continued...)

by Airbus.[988]

789. The *Wall Street Journal* published a lengthy and unusually detailed description of the sales campaign, and reported that after prolonged negotiations,

> Airbus nosed ahead thanks to its planes' lower prices and common design with the rest of Iberia's fleet. By offering guarantees on the planes' future value and maintenance costs, plus attractive financing terms, Airbus edged out Boeing's aggressive package. The deal's final financial terms remain secret.
>
> At Airbus, Mr. Leahy {head of sales} was relieved, but he faced one last slap. Iberia's news release crowed about Airbus's {residual} price guarantees on the planes – a detail that Mr. Leahy considered confidential. Iberia's Mr. Dupuy said he wasn't rubbing it in. But he had, he boasted, won "extraordinary conditions."[989]

The *Wall Street Journal* further explained the importance of residual price guarantees in this (and other) campaigns as a tool to undercut Boeing's price offer:

> Mr. Leahy helped seal the deal by guaranteeing {Iberia} a minimum resale price, which kicks in after 2005. If Iberia wants to sell {the new A340s}, Airbus must cover any difference between the market price of the used planes and the guaranteed floor price.
>
> The guarantee is one of the tools that Mr. Leahy has used to boost Airbus's share of world sales to about 50% today from 20% in 1995. Boeing rarely guarantees resale values.[990]

790. Residual value guarantees, even if they do not actually result in future cash disbursements by Airbus, are nonetheless valuable rights and, as Iberia officials explained, greatly enhance the value of the Airbus package of concessions in this and many other campaigns. Although the EC did not report the value of such guarantees in its responses to the Facilitator's Annex V questions,[991] they effectively lower the overall price of Airbus LCA and shift part of the risk of the purchase from the customer to Airbus.

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[987] (...continued)
aerolínea estaba estudiando la renovación de su flota y aclaró que se trataba de una decisión 'fundamentalmente financiera'") (Exhibit US-414).

[988] Iberia Press Release, *Iberia opta por Airbus para la renovación de su flota B-747* (Jan. 30, 2003) (Exhibit US-415) ("aprovechar unas condiciones excepcionales").

[989] Daniel Michaels, *Dogfight*, Wall St. Journal (Mar. 10, 2003) (Exhibit US-416); *see also Iberia opta por el Airbus A340-600 para sustituir sus Boeing 747,* Iberia Press Release, *Iberia opta por Airbus para la renovación de su flota B-747* (Jan. 30, 2003) (Exhibit US-415).

[990] Daniel Michaels, *Dogfight*, Wall St. Journal (Mar. 10, 2003) (Exhibit US-416).

[991] The EC confirmed that the pricing data it provided during the Annex V process do not reflect a number of concessions, including residual value guarantees. *See* EC follow-up responses, Dec. 22, 2005, at 45-47 (item xxxiv, residual value guarantees, not included in pricing data) (Exhibit US-7; see BCI Annex).

791. **South African Airways.** In 2002, South African Airways decided – despite having recently ordered 21 B737s in order to operate an all-Boeing fleet[992] – to switch much of its fleet to Airbus. Airbus reportedly was eager to offer a "heavy discount" on its A340s,[993] and South African ultimately ordered 12 A340s, as well as 11 A319s and 15 A320s. South African described the LCA it bought from Airbus as "aggressively priced."[994]

792. **Thai Airways International.** Press reports indicated that Airbus won a contract with Thai Airways in 2003 for eight A340s, containing special price concessions, including a "special introductory concession" of $7 million each, "extra credits" of $9.75 million for each A340-500 and $10.25 million for each A340-600, and an "aircraft phase-out subsidy" of unspecified magnitude for Thai Airways' existing MD-11 and B747 jets.[995]

793. **Singapore Airlines, Emirates Airlines, and Qantas.** Each of these airlines purchased the new Airbus A380 over Boeing's 747X, a proposed redesign of the existing 747 that was not launched because it could not find sufficient initial customers in competition with the A380. Industry observers were virtually unanimous in noting that Airbus was particularly aggressive in pricing the A380:

> Airbus's pursuit of the A380 market has been extremely aggressive. First, pricing is said to be exceedingly soft, with most estimates in the area of $150 million, over 40% off the typical 2003 list price of $270 million. While steep discounts are common in today's depressed jetliner market, the initial round of A380 customers includes the very carriers that are most likely actually to need a plane in this class. Convincing carriers with fewer dense routes and a greater focus on profitability, such as British Airways or American Airlines, to buy the A380 will be very difficult without these discounts.[996]

> Then there is the issue of the A380 launch deals. Healthy discounting for launch customers is nothing new, but by some reports Airbus has gone further than most. A recent BusinessWeek article claims that the company is selling the A380 cargo version for $133 million and the passenger version for just over $140 million. The latter figure is approximately 60% of the A380's $230 million list price and less than the average cost Boeing charges for its 747. Moreover, the article alleges that, in its hunger to announce new orders, Airbus is accepting down-payments of as little as $500,000 per aircraft and offering customers the opportunity to cancel their orders 12 months before delivery

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[992] South African Airways, Group Audited Results, Year Ending March 31, 2002, at 2, available at http://ww4.flysaa.com/results/march2001/results_02.html (describing SAA's fleet as consisting of 62 in-service Boeing LCA, with five on order, after the airline "completed the disposal of its Airbus fleet as a result of the upgrade to new Boeing 737-800's.") (Exhibit US-417).

[993] *Boeing, Airbus Projections for 2003 May Be Too Rosy*, Airline Financial News (Sept. 9, 2002) (Exhibit US-418).

[994] South African Airways, Group Audited Results, Year Ending March 31, 2002, at 2 (Exhibit US-417).

[995] *Airbus Offers THAI $200 Million Reduction to Encourage 8-Plane Purchase*, Krungthep Turakij (June 16, 2003) (Exhibit US-419).

[996] Richard Aboulafia, *A380 at the Halfway Point*, Aerospace America (Sept. 2003) (Exhibit US-420).

> without penalty . . . . Noting the aggressive pricing strategy, Phillip Baggaley, of rating agency Standard & Poors, observes that the programme seems to have found commercial success, but remains a "financial question mark."[997]

794. The prices of these A380 aircraft were so low, in fact, that the impact of the delivery delays has turned them into loss-making contracts.[998] After the first significant A380 delay was announced, the minutes of an EADS audit committee meeting on May 12, 2006 – leaked to and released by *Le Monde* – cited Gustav Humbert, then president and CEO of Airbus, as reporting "that the first two Singapore Airlines {A380} aircraft are at a loss and that it is too early to say if the next 3, to be delivered early next year, are also at a loss."[999] After the most recent delay, EADS announced publicly that "A380 loss making contracts" would result in a Euro 600,000,000 reduction in its 2006 pre-tax earnings.[1000] Further, Airbus has reportedly had to make additional concessions on other LCA sales to mitigate the effects of the A380 delays on customers.[1001]

795. **Czech Airlines (CSA).** When CSA decided in 2004 to purchase six Airbus A319s and six Airbus A320s, instead of "next generation" Boeing B737s, to replace CSA's existing "B737 Classic" fleet, CSA strategic director Jan Vana explained: "Both offers met all of our technical specifications without exception. But Airbus offered the better price.[1002] The president of CSA, Jaroslav Tvrdik, gave more details about CSA's decision in a subsequent press conference reported in the Czech media.[1003] According to Mr. Tvrdik, Boeing's offer was, in his view, "truly super and lucrative {and} hard to refuse," but the Airbus bid, evaluated for the net present value of the various cash flows involved, was more than 100 million Czech crowns ($4 million) less than Boeing's offer.[1004]

796. That "better" Airbus price included a number of additional bonuses by which, Mr. Tvrdik

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[997] Kevin O'Toole, *After the Launch*, Airline Business (Apr. 2001) at 54 (Exhibit US-421).

[998] EADS CFO Andreas Sperl announced a negative impact of EUR 1.1 billion on Airbus's 2006 EBIT as a result of loss-making A380 contracts based on unit cost deterioration and liquidated damages allocated to the contracts. See A380 financial update, Presentation to Global Investor Forum (Oct. 19-20, 2006) slide 7 (Exhibit US-422).

[999] EADS Audit Committee Minutes at 5 (May 12, 2006) (Exhibit US-423).

[1000] EADS, Ad-hoc Release: *EADS and Airbus finalise A380 review* (Oct. 3, 2006) (Exhibit US-66). Current guidance from EADS anticipates that the revised A380 delivery schedule will result in a cumulative cash flow reduction of Euro 6,300,000,000 from 2006 to 2010.

[1001] For example, Qantas recently ordered an additional 8 A380s, for which, according to its CEO, it "negotiated an attractive package . . . {which} also includes an additional four A330-200 aircraft, which will help Qantas mitigate capacity concerns associated with the delay of the airline's first A380s." International Herald Tribune, *Qantas asks Airbus for 8 More A380s* (Oct. 29, 2006) (Exhibit US-405).

[1002] Jan Vana, quoted in *Ceske Aeroline: Order for Airbus Jets Worth CZK 10-CZK 12 Billion*, Dow Jones Newswire (Oct. 15, 2004) (Exhibit US-424).

[1003] Jan Cizner, *Tvrdik: Airbus Gave Us a More Attractive Offer*, Mlada Fronta Dnes (Oct. 21, 2004) (translated) (Exhibit US-425).

[1004] *Id.*

explained, "Airbus is going to cover our transition costs." These included a free training simulator worth 250-300 million Czech crowns ($10-12 million) to be used to train CSA pilots and pilots of other airlines on Airbus equipment, extensive customer service, spare parts at favourable prices and additional services, such as air crew training.[1005]

797. When the evidence shows – as it does here – that Airbus has not only taken numerous large sales from Boeing, several of them worth billions of dollars, but also that it has done so primarily by offering a lower price than Boeing, that evidence demonstrates not only "significant ... lost sales," but also the existence of "significant price undercutting" within the meaning of Article 6.3(c).

798. As Article 6.5 explains:

> For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability.

799. In the context of the LCA industry, the customer is the only party in any given transaction that has access to all of the data necessary to compare the prices offered by Boeing and LCA, net of all direct and contingent price concessions and taking "due account" of all factors affecting price comparability, as required by Article 6.5. Airbus and Boeing are bound by contractual confidentiality obligations with respect to the terms of the sales they win, and do not have any detailed knowledge of the terms of the offers made by its competitor in any given campaign. In the course of a sales campaign, however, each customer engages in a detailed and painstaking review of every contractual term, including determining the value to it of proposed concessions contingent on future events (such as maintenance cost guarantees, residual price guarantees, and so forth). As Airbus recognizes:

> Airlines are sophisticated buyers who compete in a highly cost competitive environment. Their aircraft fleet planning decision can significantly affect the viability of the airline over the entire life of the aircraft selected. As a result, airlines tend to be analytical and exhaustive in their review of the available competing products. Their evaluation is always conducted by analyzing the performance and economics of the competing aircraft and how those factors impact costs and revenue generating over an aircraft's economic life of approximately 30 years.[1006]

[1005] *Id.*

[1006] Airbus, *Key Determinants*, at 17-18 (Exhibit US-379; see BCI Annex). For example, in the CSA campaign discussed above, the airline explained publicly that its decision was based on a comprehensive analysis of the value of the competing bids to CSA, including "assessment model calculations," analysis by the consulting group McKinsey & Co., and legal advice from the firm of Weil, Gotshal & Manges. *Czech Airlines to Buy Airbus 319 and 320*, www.boarding.no (Oct. 15, 2004) (Exhibit US-426).

800. Thus, when Airbus and Boeing engage in a competitive LCA campaign, the customer quite carefully makes, in the words of Article 6.5, "a comparison of prices of the subsidized product with prices of a non-subsidized like product." Moreover, this comparison is (1) of products "supplied to the same market," (2) "made at the same level of trade," (3) "made . . . at comparable times," and (4) takes "due account . . . of any other factor affecting price comparability," as Article 6.5 requires. When the evidence establishes that, in a particular LCA transaction, a customer concludes that Airbus, all other things being equal, offered a lower price than Boeing, the evidence constitutes *prima facie* evidence of price undercutting within the meaning of Article 6.5 and, therefore, of Article 6.3(c).[1007]

801. In examining the issue of significance of price undercutting, the Appellate Body has noted, the term "significant" in this context means "important, notable, or consequential."[1008] Likewise, the *Indonesia – Autos* panel defined the requirement in Article 6.3(c) that price undercutting be "significant" as excluding "margins of undercutting so small that they could not meaningfully affect suppliers of the imported product whose price was being undercut."[1009] When, as in this case, customers have stated publicly that price was a major consideration behind the decision to choose Airbus over Boeing, the degree of price undercutting is "significant" within the meaning of Article 6.3(c).

802. Accordingly, Boeing has experienced significant lost sales to Airbus and the prices of Boeing LCA have been significantly undercut by the prices of Airbus LCA within the meaning of Article 6.3(c). That the lost sales and price undercutting are "effects of the subsidies" will be demonstrated below.

d. Boeing Has Experienced Price Suppression and Price Depression for Its LCA Sales in the World Market

803. Serious prejudice also may arise within the meaning of Article 5(c) and Article 6.3(c) of the SCM Agreement if the effect of subsidies is "significant price suppression {or} price depression in the same market." As the Appellate Body has explained, price suppression refers to situations in which prices are "either prevented or inhibited from rising (*i.e.*, they do not increase when they otherwise would have) or they do actually increase, but the increase is less than it

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[1007] In the Annex V process, the EC refused to answer many questions with respect to aircraft pricing, both with respect to revenues for individual models on an annual basis and with respect to the delivery schedule for individual transactions, on the grounds that such information "is most extraordinarily confidential and even a relatively remote possibility that this information could be released is commercially unacceptable to Airbus." *See* EC responses, Nov. 15, 2005, at 219-20, 227-29, 231 (Exhibit US-5; see BCI Annex). Further, the pricing data the EC did provide did not include all concessions. EC follow-up responses, Dec. 22, 2005, at 45-47 (item xxxiv, residual value guarantees, not included in pricing data) (Exhibit US-7; see BCI Annex). In these circumstances, it is neither feasible nor necessary for the Panel to replicate the detailed and comprehensive undercutting analysis already performed by the customers in the transactions described in this submission.

[1008] *US – Cotton Subsidies (AB)*, para. 423.

[1009] *Indonesia – Autos*, para. 14.254.

would have otherwise been."[1010] Price depression, by contrast, refers to situations in which prices "are pressed down, or reduced."[1011] The data demonstrate that the prices of Boeing LCA have been either suppressed or depressed – *i.e.*, reduced, or prevented from rising as a result of the pricing of subsidized Airbus LCA. In the context of this case, the world market is the appropriate market for measuring the price effects of the Airbus subsidies.[1012]

804. Figures 4 through 7[1013] present the indexed annual prices of all actual, worldwide Boeing LCA orders for the period 2001-2005 for the B737, B767, B747, and B777, respectively. The figures are presented in the same way as Figures 1 to 3 discussed above. The blue line represents the actual average dollar value of orders received in each calendar year, at the time of order; the green line in Figure 4 represents the actual average dollar value of orders received in each calendar year, adjusted to reflect post-order/pre-delivery downward price adjustments resulting from degradation of the global pricing environment after the order; and the red line represents the U.S. Aircraft Manufacturers Producer Price Index over the same period.

– U.S. BCI FIGURE 4 DELETED –

805. As shown in Figure 4, Boeing's prices for B737s in the world market **[ ]** between 2001 and 2005. In addition, **[ ]**.

806. These post-order price adjustments demonstrate the price depressing effects of Airbus's pricing practices in recent years. For example, Ryanair used the Airbus pricing at large accounts such as Air Berlin and AirAsia in 2004 and 2005 as leverage to open new "intensive negotiations" with Boeing and Airbus, in which Boeing was forced to make additional price concessions on the 103 undelivered B737s that Ryanair ordered in 2002 and 2003 in order to keep Ryanair as a customer.[1014] As an operator of an all-Boeing fleet, Ryanair could have been expected to make follow-on orders from Boeing as a matter of course in a stable pricing environment. However, as Ryanair explained to its shareholders, in the new "favourable market conditions for significant buyers of new aircraft":

> Boeing has granted the Company certain price concessions as part of the new contract to purchase the Boeing 737-800s under the new and previous contracts. . . . As a result the "effective price" (the purchase price of the

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[1010] *See US – Cotton Subsidies (AB)*, para. 423 (citing *US – Cotton Subsidies (Panel)*, para. 7.1227); *see also Korea – Commercial Vessels*, para. 7.533.

[1011] *US – Cotton Subsidies (AB)*, para. 423.

[1012] *EC Merger Analysis*, para. 20 (Exhibit US-375); *US – Cotton Subsidies (AB)*, para. 410.

[1013] Included in text below and reproduced in Exhibit US-444; see BCI Annex.

[1014] Ryanair Holdings plc, Notice of Extraordinary General Meeting: *Proposed Purchase of up to 140 Boeing "Next Generation" 737-800 Aircraft* at 7-8 (Apr. 22, 2005) (Exhibit US-427).

> aircraft net of discounts received from Boeing) of each aircraft will be significantly below the basic price mentioned above and the net price agreed under the 2002 Boeing Contract. The effective price applies to all aircraft due for delivery from January 2005 including all 89 outstanding aircraft deliveries under the 2002 and 2003 Boeing Contracts. A total of 38 aircraft have previously been delivered pursuant to these contract for which no further concessions will be granted. A further 14 aircraft have been delivered to date in 2005, all of which have benefitted from the effective price.[1015]

These "significant" price decreases over a period of three years are manifest evidence of price depression.

807. Figure 5 shows that the price received for B767 orders follow a similar pricing pattern. Order prices **[ ]**. And Figure 6 shows a similar pattern for the B747, with prices **[ ]**.

– U.S. BCI FIGURES 5 AND 6 DELETED –

808. Figure 7, which shows pricing trends for the B777, presents a somewhat different pattern of price depression. Prices for the B777 **[ ]**. However, **[ ]**. The relevant context for this distinctive pattern of price decline is provided by the relative number of orders for the B777 and the Airbus LCA to which the B777 lost the most sales during this period, the A340. When Airbus lowered its A340 prices in 2002 and 2003, Boeing tried to maintain pricing levels in line with costs for the B777 and, as a result, the A340 captured more than twice as many orders as the B777 by 2003.[1016] Boeing only reversed this trend in 2004 and 2005 by, as Figure 7 shows, reducing its prices to compete with Airbus. That Boeing had to reduce its price for the B777 to stop losing sales to the A340 – even though most impartial observers believe that the B777 is the superior aircraft[1017] – is clear evidence of price depression.[1018]

[1015] *Id.*

[1016] Airclaims CASE database, data query as of August 14, 2006. Of the four campaigns accounting for the A340 orders in 2003, two of them – Iberia and Thai Airways – were discussed in the lost sales/price undercutting discussion above. Emirates Airlines, which made the single largest A340 order in 2003, cancelled its order in October 2006, citing Airbus's failure to "deliver what it set out to deliver in the blueprint." *Emirates Cancels Order for 10 Airbus A340 Planes*, AFX (Oct. 27, 2006) (Exhibit US-428). Thus, it appears that Airbus made an overly optimistic performance guarantee in order to win this sale – a concession it was unable ultimately to deliver upon.

[1017] *E.g.*, Stanley Holmes & Carol Matlack, *Boeing Roars Ahead*, BusinessWeek (Nov. 7, 2005) (quoting Tim Clark, president of Emirates Airlines – a major customer of both Boeing and Airbus – as saying: "Operationally, the 777 is a brilliant machine. She flies fast. She flies high. She has extremely good economics.") (Exhibit US-429). The 2005 *Airfinance Journal* poll asked investors and operators to rate 25 Boeing and Airbus models on a

(continued...)

– U.S. BCI FIGURE 7 DELETED –

809. In sum, the evidence shows that Boeing LCA prices have been falling, or not keeping pace with increasing costs, during the 2001-2005 period. Airbus LCA was the only competition, and, as demonstrated above, Airbus was engaged in widespread and aggressive price undercutting during the period. Thus, the evidence demonstrates significant price depression and price suppression in the world LCA market during the past five years.

e. Subsidies Are the Cause of the Market Effects Described Above

810. The final element of each of the U.S. claims under Article 5(c) is the demonstration of the "causal link" between the subsidies that the EC and the Airbus governments have provided to Airbus and the displacement or impedance of Boeing imports into the EC, the displacement or impedance of Boeing exports to third-country markets, as well as the lost sales, price undercutting, price suppression, and price depression set forth above. In this case, the challenged subsidies, taken together, provide Airbus with a substantial structural advantage in aircraft development that is the direct cause of the adverse effects to the interests of the United States.

811. As the Appellate Body has recognized, the nature of a subsidy plays an important role in analyzing its effects.[1019] In this section, the United States shows that (1) Launch Aid distorts the fundamentals of competition among LCA producers by shifting the enormous costs and risks of aircraft development from the producer to the Airbus governments, and (2) other subsidies have been used in tandem with Launch Aid to supplement its effects. The economic operation of these subsidies, which enhance Airbus's ability to develop, produce and sell its LCA family, leads directly to the adverse trade effects – *i.e.*, the injury and multiple types of serious prejudice – demonstrated above.

[1017] (...continued)
scale of 0 to 10. The B777-300ER tied for second place with a rating of 8.0 and the B777-200ER finished fourth with a 7.9 rating, while the A340-300 (17th place, 5.6), A340-500 (22nd place, 3.5), and A340-200 (24th place, 2.3) finished far behind. *The Real Battleground*, Airfinance Journal (Sept. 2005) at 28, 28 (Exhibit US-430).

[1018] After the lower-priced 777 has regained its market position in 2005, Airbus indicated that it may further reduce A340 prices in response. Daniel Michaels, *Airbus Soars, But Big Model Is Drag; European Jet Maker Weighs Price Cut, Overhaul of A340 as Boeing Plane Takes Off*, Wall St. Journal (Jan. 16, 2006) ("As a result, Airbus officials say they may slash A340 prices or send the planes back to the design shop for the second time in less than a decade. If so, it would make the second time in two years that Europe's giant plane maker was compelled by a resurgent Boeing to update a key model that recently appeared to enjoy a strong market share.") (Exhibit US-431); *Airbus to Offer Cash Back on A340 as 777 Stretches Lead*, Flight International (Jan. 24, 2006) ("While Airbus chief operating officer John Leahy concedes that the A340-600's four-engined configuration means it has a 'single-digit fuel burn penalty' over the 777-300ER, he says this can be 'traded off' through financial compensation to operators.. . . 'I can agree a figure {*sic*} with a customer that reflects the fuel burn delta and run that out over 12 years and pay it to them.'") (Exhibit US-432).

[1019] *US – Cotton Subsidies (AB)*, para. 450.

812. In *United States – Cotton Subsidies,* the panel recognized that the SCM Agreement "permit{s} an integrated examination of effects of any subsidies with a sufficient nexus with the subsidized product and the particular effects-related variable under examination."[1020] As shown below, the effects of Launch Aid – as explained and modeled in the Dorman Report – and the effects of the other subsidies operate cumulatively to produce each of the adverse effects described above. Where, as here, the volume and price effects of the various subsidies Airbus has received to develop and market its LCA family "manifest themselves collectively," it is permissible to "treat them as a 'subsidy' and group them and their effects together."[1021]

i. Launch Aid significantly distorts Airbus's launch decisions to the competitive advantage of Airbus

813. As demonstrated at length above,[1022] the Airbus governments provide significant benefits to Airbus through Launch Aid. They have worked together in a systematic and coordinated way to enable Airbus to develop its LCA family in a way that would have been impossible without Launch Aid.

814. When the Airbus governments provide Launch Aid to Airbus, they do not simply provide Airbus with the direct cash benefit of a long-term loan at non-market interest rates – although, as shown above, given the face value of the Launch Aid that has been provided, the degree to which the interest rates (if any) have been below market rates, and the many years that pass before the loan even begins to be repaid (if at all), this benefit is substantial. They also assume much of the risk that Airbus would otherwise incur in developing its LCA family. It is the success-dependant nature of Launch Aid that is most important for the adverse effects analysis.

815. As a French Senate report puts the matter:

> Advances made to firms need only be reimbursed if the program is successful. In the event of failure, the public money is lost . . . , a sort of insurance policy for the company against industrial risk.[1023]

816. The Dorman Report presents an economic model of the business case for a typical aircraft program and shows how the success-dependant, back-loaded, and below-market aspects of Launch Aid fundamentally change the economics of an LCA launch decision. The model examines a typical wide-body aircraft program with a development cost of $10 billion and a

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[1020] *US – Cotton Subsidies (Panel)*, para. 7.1192. The Appellate Body cited with approval this portion of the panel report. *US – Cotton Subsidies (AB)*, para. 483; *see also Korea – Commercial Vessels*, para. 7.616.

[1021] *US – Cotton Subsidies (Panel)*, para. 7.1192.

[1022] Section IV.A above.

[1023] 1997 French Senate Report at 72 (Exhibit US-18).

projected 850 deliveries.[1024] The model predicts the net present value of the program – and thus whether the program is economically viable – depending on various assumptions as to the number of aircraft that will ultimately be sold as well as on the average sales price and average production cost of those aircraft. The model further shows how Launch Aid affects the net present value (NPV) of the program, using several scenarios with different levels of Launch Aid and the disbursement and repayment structures of six actual grants of Launch Aid to Airbus.

817. The model program described in the Dorman Report is economically viable, even without Launch Aid, if all three key variables – the number of deliveries, production costs, and sales price – meet expectations. But it quickly becomes a loss-maker if any of the three turn out differently than expected over the 20-year life of the program. On the other hand, the model also shows that, with Launch Aid, the net NPV of the program remains positive even if the unit sales, cost of production, or average price targets on which the business case is based are not met over the life of the program. Indeed, because Launch Aid repayment is tied to deliveries, the financial benefit of Launch Aid increases as the number of deliveries decreases – *i.e.*, the less successful the program, the more assistance is provided by Launch Aid.[1025] By substantially "de-risking" the program for the LCA producer, Launch Aid greatly increases the likelihood that the LCA manufacturer would accept the risks involved and develop the aircraft. Thus, as a British economist has explained, "Launch Aid commits European governments to absorbing much of any possible losses, so even if Airbus is risk averse, it has little incentive not to adopt a risky, aggressive strategy."[1026]

818. As the Dorman Report points out, Launch Aid has additional effects beyond those contained in his economic model. For example, by shifting much of the total project risk of a launch to the subsidizing governments, the Launch Aid program enables the LCA producer to obtain more favorable terms from the capital markets and from suppliers than it would otherwise be able to obtain. As noted above, the markets recognize that government support increases the overall creditworthiness of Airbus. When Airbus was at the height of development expenditures for the A380, the investment rating service Moody's explained that its rating of the long-term debt of EADS, Airbus's parent company, reflected the assurance of government support:

> Moody's is comforted by continuing government support in the form of refundable advances of up to 1/3 of the required development expenses for Airbus' commercial aircraft; the significant risk-sharing partners in the development of the A380 superjumbo aircraft; and the spread of the development process over several years.[1027]

[1024] Dorman Report at 3 (Exhibit US-70; see BCI Annex).

[1025] *Id*. at 15, Table 3.

[1026] Kim Kaivanto, *Premise and Practice of UK Launch Aid*, Journal of World Trade 40(3) at 495, 498 (2006) (Exhibit US-2).

[1027] Moody's Investor Service Press Release: *Moody's Assigns A3 Rating to New Euro Mtn Program of European Aeronautic Defence and Space Company EADS N.V* (Feb. 6, 2003) (Exhibit US-56).

By lowering Airbus's overall risk exposure, the system of Launch Aid therefore lowers the cost of capital for Airbus and its parent company, EADS, compounding the direct effect of Launch Aid payments on the cost and risk of an aircraft program.

819. The Airbus governments thus use Launch Aid to shift risk from Airbus, thus enabling Airbus to launch aircraft at an otherwise unsustainable scale and pace, if it could have launched them at all. Further, by assuming development costs through Launch Aid, the Airbus governments improve Airbus's credit rating, reduce its cost of capital, and reduce its need to generate cash to fund future investments. These effects, in turn, have a direct and negative impact on the U.S. LCA industry, by expanding the range of the Airbus product family against which U.S. producers must compete and lowering the price at which Airbus is able to offer those products.

ii. The other challenged subsidies have economic effects similar to those of Launch Aid

820. While Launch Aid has been the primary tool that the EC and the Airbus governments have used to subsidize the Airbus LCA family, the other challenged subsidies also shift the costs of LCA development from Airbus to these governments as part of the same broad strategy to give Airbus an edge in its competition with U.S. producers.

821. ***EIB Financing for Aircraft Launch.*** EIB financing for the design or development of particular LCA models is provided in coordination, and operates in parallel, with Launch Aid provided by the Airbus governments.[1028] The economic effects are cumulative, further reducing the cost and risk of launching new aircraft.

822. ***Funding for Specific Infrastructure.*** As described above, the Airbus governments have provided subsidized infrastructure for the use of Airbus, relieving Airbus of the need to fund the infrastructure necessary for the development and production of LCA.[1029] For example, the Hamburg authorities provided Euro 751,000,000 to build the A380 Hamburg-Finkenwerder A380 production facility, thus lowering Airbus's own expenditures during the A380 development period.[1030] In shifting the costs of aircraft development from Airbus to the Airbus governments, infrastructure subsidies have economic effects similar to those of Launch Aid.

823. ***Funding for Research and Development.*** The EC and the Airbus governments also provide subsidies to Airbus for research and development related to the development of particular

[1028] *See* Section IV.C above.

[1029] *See* Section IV.D above.

[1030] *See* Section IV.D.1.a above.

LCA models or aspects thereof.[1031] These subsidies also relieve Airbus of the additional costs it would have had to incur in launching those LCA models, thereby contributing to the economic effects of Launch Aid already described.

824. Section X of the HSBI Appendix to this submission contains additional evidence that links research subsidies to Launch Aid and launch decisions.

825. ***Debt Forgiveness and Equity Infusions.*** By increasing the capital available to Airbus (both by forgiving debt and providing equity capital directly,[1032] and by improving Airbus's creditworthiness and thus its ability to attract additional private investment), debt forgiveness and equity infusions have also enabled Airbus to maintain a level and pace of product development that could not have been sustained without subsidies. Through these subsidies, the Airbus governments complement Launch Aid by offsetting the build-up of debt on Airbus's balance sheet associated with the pace of its product development.

826. As Airbus has stated:

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827. The EC and the Airbus governments have used each of these subsidy measures, in tandem with Launch Aid, to support Airbus's long-term plan to develop and maintain a competitive LCA family. These subsidies have *economic effects* similar to the economic effects of Launch Aid – *i.e.*, reducing the cost and shifting the risk of LCA development (thus making launch more likely) and alleviating the financial strain of product launches (thus affording pricing flexibility with respect to all models). These economic effects, in turn, directly produce the *trade effects* described in Article 6.3(a)-(c) of the SCM Agreement and demonstrated above, whether related to volume (the displacement of Boeing exports to third markets, the displacement of Boeing imports

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[1031] *See* Section IV.H above. As noted in that section, in many cases the EC refused to provide information as to the specific projects funded under the research and development programs at issue. However, it is clear that at least some of the research funding was used to support projects related to the launch of specific Airbus LCA and, thus, are in essence Launch Aid in another form. *E.g.*, Competitive and Sustainable Growth Programme, 1998-2002 Project Synopsis: New Perspectives in Aeronautics, 2003, at 261 (EC provided Euro 3,007,452 in funding for project to assess A380 wake vortex) (Exhibit US-322).

[1032] *See* Sections IV.E-.G above.

[1033] Aerospatiale report to Credit Lyonnais (1994), DS316-EC-BCI-0000756, at 1 (**[**

]) (Exhibit US-296; see BCI Annex).

into the EC market, the increased volume of subsidized LCA imports into the U.S. market, and lost sales) or to price (price undercutting, price suppression, and price depression in the U.S. market and the world market).

iii. The subsidies provided to Airbus have produced the anticipated effects

828. For the reasons explained in the Dorman Report, subsidies have played an indispensable role in each major Airbus product launch. Moreover, the subsidies have been given to allow Airbus to launch particular aircraft at opportune times, for the express purpose of attacking specific U.S. LCA and building its market share, demonstrating that the subsidies are provided for the purpose of causing the adverse effects that have occurred. Finally, relieved of the obligation to fund future product development out of cash flow or commercial borrowing, Airbus has, in fact, used the financial cushion afforded by the subsidies to further a policy of pricing its LCA in order to obtain market share.

(a) Airbus Could Not Have Developed Its LCA Family Without the Subsidies

829. The Dorman Report demonstrates a key feature of Launch Aid – that, by directly impacting the NPV of an aircraft program, Launch Aid changes the LCA producer's risk involved in a launch and therefore directly impacts its launch decision. To the extent that Launch Aid results in the launch of aircraft projects that would not have been undertaken at all, or at the same pace, without subsidies, the economic effects of such a launch on competing LCA producers is evident. These producers will sell fewer of their own aircraft, with both direct revenue losses and increased costs due to the loss of efficiency and learning curve gains. Further, the competitors of the subsidized LCA will likely be forced to reduce their prices in order to obtain the sales they do make because of additional competition from the subsidized product.[1034]

830. Subsidies have facilitated and accelerated the introduction of every major Airbus model, precisely as the EC and the Airbus governments designed them to do.[1035] The initial launch of the A300, as Airbus has recognized, would have been impossible in the absence of subsidies: "No financial institution would have taken such a risk, or if it had, the interest rate would have been prohibitive."[1036]

831. When Airbus launched the A320, Airbus's then-CEO stated that the launch would not

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[1034] *Id.* at 9-10.

[1035] John Olienyk & Robert Carbaugh, *Competition in the World Jetliner Industry*, Challenge (July 1, 1999) at 5 ("There seems to be little doubt that Airbus would not be in a position of such prominence today without the huge direct subsidies that the consortium has received.") (Exhibit US-434).

[1036] Jean Pierson (Airbus Managing Director), speech at Cranfield University (UK) (1991), quoted in Matthew Lynn, *Birds of Prey* 150 (1998) (Exhibit US-42).

have occurred but for the "prerequisite" of government backing.[1037] McDonnell Douglas chairman S.N. McDonnell observed that, for his company, "finding the money to develop such planes {to compete with the A320} and get them into service is not going to be easy," and industry analysts recognized that if Boeing also decided to launch a similar aircraft, "lending institutions might be reluctant to advance funds to either Boeing or McDonnell Douglas for fear that both might run into heavy losses for years."[1038] Launch Aid therefore gave Airbus a decisive advantage in competition with the two U.S. producers:

> Ernesto Previdi, aerospace analyst for the European Community's (EC) executive commission, Brussels, believes that a large field of competitors will guarantee that none will make a profit. "We see room for only two {different} planes in this market," he emphasizes, "and one of them will certainly be Airbus." One reason Europeans are confident that Airbus will be one of the survivors is the strong backing its project has received from the new French Socialist government.[1039]

Except for Launch Aid, there was no reason for the EC to be so confident that Airbus would be the "survivor"; at the time, Airbus had sold about as many LCA as (and had a worse cost structure than) Lockheed, which had just been forced to exit the LCA industry after suffering massive losses on its L-1011 aircraft program.[1040]

832. For the A330/A340, British Aerospace CEO Sir Austin Pearce explained that "financing . . . through commercial banks {was} not feasible because of the risk associated with the program," and so Airbus received more Launch Aid.[1041] Similarly, for the A330-200 and the A340-500/600, designed to improve on the prior programs and better compete with Boeing's aircraft, the Airbus governments provided additional Launch Aid to ensure that Airbus "would not seriously weaken the financial structure of the company" by having to finance development

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[1037] *Airbus-Industrie: A320 Is a Reality*, Business Wire (Mar. 2, 1984) (quoting Airbus CEO Bernard Lathiere as explaining: "With the agreement by the governments of France, Great Britain, Spain and West Germany to take the necessary measures to enable their industries to make the investments required for this program, the third and final prerequisite, the financial one, is now fulfilled.") (Exhibit US-15).

[1038] *Battle of the Aircraft Giants*, Industry Week (Dec. 14, 1981) (Exhibit US-435).

[1039] *Id.* (alteration in original).

[1040] *Airbus; The Subsidies Roll On*, The Economist (Feb. 14, 1987) at 66 ("Without government aid, Airbus would have gone bust. Lockheed was pushed out of the civil-aircraft business two years ago because the negative cash flow on its TriStar (L-1011) jet – which managed only 223 sales during its first ten years – had accumulated to $6.7 billion (in 1984 dollars) and was showing no sign of turning positive. During its own first ten years, Airbus sold roughly the same number of 300 and A310 derivatives. Somehow Airbus stayed in business – even though its A300/A310 took a year longer to launch, was costlier to develop, won fewer initial sales, and has had 15% higher labour costs throughout its manufacturing life.") (Exhibit US-21).

[1041] *British Aerospace rejects A330/A340 aid proposal*, Aviation Week & Space Technology (Mar. 30, 1987) (Exhibit US-24).

costs out of its own capital or from commercial bank loans.[1042]

833. When it came to Airbus's most expensive development project, the A380, the British Government concluded that launch "would not have been possible if it had not been for the commitment of the British Government."[1043] The French government similarly recognized:

> In the case of the {A380}, since the development cost of the future jumbo jet is estimated to be 50 billion francs, the expenses Aérospatiale must bear would be about 18.8 billion francs. . . . It seems doubtful that the enterprise would be in a position to find outside financing to meet its needs. . . . Above all, however, such external financing would apparently add excessively to the financial expenses incurred by the firms, and would throw their balance sheets out of equilibrium because of the low level of their equity capital.[1044]

834. Launch Aid has also afforded Airbus additional flexibility as to the timing of each of these launches, because the company has not had to depend on its own cash flow to fund development projects. For example, the chairman of one of the Airbus partner companies publicly stated that, in the absence of Launch Aid, the launch of the A320 would have been "pushed further into the future than previously anticipated," because revenues from the A300 and A310 were coming in more slowly than anticipated.[1045] Similarly, the financial pressures on Airbus resulting from its recent A380 delays and poor sales for the relatively new A340-500/600 series would, in the absence of Launch Aid, have a significant impact on Airbus's ability to proceed with development of another aircraft Yet all indications are that Airbus is doing just that – once again, with the financial backing of the EC and the Airbus governments.[1046] The governments that have provided Launch Aid recognize that it "help{s} companies to produce products, get products to market, which either they would not have got so quickly or in such volume."[1047]

835. Finally, because Airbus (through the receipt of Launch Aid and the other challenged subsidies) has been significantly relieved of the need to build capital to fund future aircraft

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[1042] Letter from Karel Van Miert to Hubert Vedrine, *Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program*, Aid No. N369/98, at 5 (7-8 in English translation) (Jan. 26, 1999) (Exhibit US-3).

[1043] Answer of Patricia Hewitt, Secretary of State for Trade and Industry, Hansards Debates, col. 1088 (Mar. 3, 2005) (Exhibit US-436).

[1044] 1997 French Senate Report at 72 (Exhibit US-18).

[1045] *Costs Push British Toward Joint Efforts*, Aviation Week & Space Technology (May 30, 1983) (citing Sir Austin Pearce, chairman of British Aerospace) (Exhibit US-439).

[1046] Gallois Interview, Radio Europe 1 ("Nous allons livrer l'A380, c'est l'avion le plus noderne du monde. La gamme d'Airbus qui vole actuellement est plus moderne que celle de Boeing. Ceci dit, Boeing avec le 787 sera un avion qui sera un défi pour nous. Ce défi il faut le relever. Nous devons le relever avec le nouveau programme de l'A350 dont la décision de lancement doit être prise par le conseil d'administration dans les prochaines semaines et j'espère que la décision sera positive.") (transcript at Exhibit US-406).

[1047] Testimony of John Alty, Director, Business Relations, Department of Trade and Industry, in House of Commons Trade and Industry Committee, The UK Aerospace Industry, Fifteenth Report of Session 2004-2005, Volume II, Oral and Written Evidence (Mar. 22, 2005) at EV 38 (Exhibit US-87).

development, it has increased flexibility to price to win sales and gain market share. The evidence demonstrates this impact of subsidies on Airbus's pricing practices, manifested as a policy of sacrificing profitability for market share.[1048] As shown above, Airbus has taken advantage of pricing flexibility by systematically undercutting the prices of U.S. LCA, thereby taking sales from Boeing and depressing or suppressing LCA prices.

(b) The EC and the Airbus Governments Have Directed the Subsidies to Airbus LCA Designed to Target U.S. Products and Producers

836. The EC and the Airbus governments have provided Launch Aid and other subsidies to enable Airbus to develop LCA models designed specifically to capture market share from the U.S. industry. For example, when Airbus launched its A330 and A340, it explained that it was with the "objective of capturing at least 30 percent of the world market in the next decade."[1049] Similarly, EADS shareholder Daimler Chrysler Aerospace explained that the subsidies used to develop the A380 would allow Airbus to "use the {A380} as a vehicle for direct access to a particularly attractive top segment of the market and establish the Airbus market share at 50% over the long term."[1050]

837. To this end, each new aircraft model that Airbus has added to its LCA family has targeted U.S. LCA models:

> Only days before the start of the air show, Airbus' supervisory board approved production of two versions of the {A340} plane that takes dead aim at McDonnell's MD-11 jet. . . .
> With government funding for the A340-300 program in place, Airbus' hawks are in control. Their strategy, according to one insider, is "to go for the kill" with McDonnell Douglas. Says this source: "The A340 won't be a commercially successful airplane, but it can really hurt McDonnell."[1051]
>
> From a global standpoint, the A340-500/600 program will have only one competitor – Boeing. The A340-500 will be able to compete with the Boeing 747-400 and the 777-300. The A340-600 will be able to compete with the Boeing 777-200 GW.[1052]
>
> We have attacked {the Boeing 747} from below with the A340. Now the idea is to come from

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[1048] Airbus Annual Review 2005 (Jan. 2006) at 18 (Exhibit US-441).

[1049] Rick Gladstone, *Airbus Chief Chides U.S. Competitors, Says It Will Claim 30 Percent of Market*, Associated Press (Apr. 23, 1986) (quoting Airbus CEO Jan Pierson) (Exhibit US-22).

[1050] Daimler Chrysler Aerospace Annual Report 1999 at 11 (Exhibit US-437).

[1051] Frank Comes, *Widebody Wars: Airbus decides "to go for the kill*," Business Week (July 6, 1987) (Exhibit US-29). As this Airbus "insider" predicted, the A340 has not been a commercial success, but McDonnell Douglas has fared even worse.

[1052] Letter from Karel Van Miert to Hubert Vedrine, *Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program*, Aid No. N369/98, at 5 (7-8 in English translation) (Jan. 26, 1999) (Exhibit US-3).

over the shoulder with {the A380}.[1053]

We are positioning our {A350} program to be a 777-200 ER killer.[1054]

We're taking the time to come up with an {A350} plane that will be a step ahead of the 787.[1055]

That the EC and the Airbus governments provide subsidies to help Airbus take actions *intended* to cause adverse effects to the U.S. LCA industry is strong corroborating evidence that those adverse effects, which have in fact occurred, are caused by the subsidies.

838. Of course, that a company designs products that will compete against other companies' products is hardly unusual – such is the nature of competition in the marketplace. But when the Airbus governments provide subsidies specifically for the development of Airbus aircraft designed to "attack" or "kill" competitive U.S. products or "really hurt" a U.S. competitor, the subsidizing governments cannot plausibly deny the causal link between the subsidies and the adverse effects to the interests of the United States.

5. Conclusion

839. The evidence of adverse effects within the meaning of Articles 5 and 6 is indisputable:

- the evidence proves that Airbus has captured significant market share from the U.S. industry in the U.S., the EC, and third country markets;
- the evidence proves that Airbus has systematically undercut U.S. producer prices, thereby suppressing and depressing the prices that Boeing has been able to realize in the market;
- the evidence proves that Boeing has lost numerous multi-billion dollar sales to Airbus in head-to-head competition at key accounts around the world; and
- the evidence proves that Boeing's LCA business declined significantly as Airbus gained market share.

840. The evidence of causation is equally compelling:

[1053] Interview with Bernhard Ziegler (Airbus Technical Director), 1993, quoted in Matthew Lynn, Birds of Prey at 208 (Exhibit US-42).

[1054] *Counterattack; Airbus fights back. The manufacturer redefines A350, eyes 100-plus orders at the Paris air show,* Aviation Week & Space Technology (May 23, 2005) (quoting A350 program manager Olivier Andries) (Exhibit US-140).

[1055] Aude Lagorce, *X factor: Airbus revals A350 XWB*, MarketWatch (July 17, 2006) (quoting Airbus CEO Christian Streiff) (Exhibit US-438).

- The EC and the Airbus governments, by their own admission, have subsidized the development of an LCA family to compete against the U.S. industry;

- The EC and the Airbus governments, by their own admission, have given Airbus subsidies to improve its balance sheet;

- The EC and the Airbus governments, by their own admission, have subsidized Airbus in order to give it an advantage in its competition with the U.S. industry;

- Airbus, by its own admission, has depended on subsidies to bring its aircraft to market;

- Airbus, by its own admission, has developed aircraft for the express purpose of competing with and capturing market share from the U.S. industry;

- Airbus, by its own admission, has priced its LCA to gain market share, and key LCA customers have confirmed that they have purchased Airbus LCA over Boeing on the basis of price.

841. In sum, Airbus and the Airbus governments have confirmed each of the major elements of the U.S. adverse effects case.

J. Article XVI:1 of the GATT 1994

842. For the reasons described above, the subsidies described above are causing or threatening to cause serious prejudice to the interests of the United States. Therefore, they are inconsistent with Article XVI:1 of the GATT 1994.

V. CONCLUSION

843. For the foregoing reasons, the United States respectfully requests that the Panel find that:

(1) The Launch Aid provided to Airbus for the A380, the A340-500/600, and the A330-200 aircraft are export subsidies inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

(2) The Launch Aid and other measures at issue in this dispute are specific subsidies that cause or threaten to cause adverse effects to the United States and, thus, are inconsistent with Articles 5(a), 5(c), 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement.

(3) The Launch Aid and other measures at issue in this dispute are subsidies that are inconsistent with Article XVI:1 of the GATT 1994.

(4) The breaches of the SCM Agreement and the GATT 1994 set forth above nullify or impair benefits accruing to the United States.

844. The United States further requests that the Panel recommend, pursuant to Article 4.7 of the SCM Agreement, that the European Communities, France, Germany, Spain, and the United Kingdom withdraw their export subsidies without delay. The United States respectfully requests that the Panel specify, pursuant to Article 4.7, that the time period for withdrawal be 90 days after the DSB adopts its recommendations and rulings in this dispute.

845. Finally, the United States further requests that the Panel recommend, pursuant to Article 7.8 of the SCM Agreement, that the European Communities, France, Germany, Spain, and the United Kingdom take appropriate steps to remove the serious prejudice and the threat of serious prejudice or withdraw their subsidies.

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LIST OF U.S. EXHIBITS

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

U.S. Exhibit	Description
1.	*Jospin pledges to aid Airbus in fight against Boeing*, Reuters (March 8, 2000)
2.	Kim Kaivanto, *Premise and Practice of UK Launch Aid*, Journal of World Trade 40(3) (2006)
3.	Letter from Karel Van Miert to Hubert Vedrine, *Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program*, Aid No. N369/98 (Jan. 26, 1999)
4.	Questions from the Facilitator to the EC (Oct. 7, 2005) **(See BCI Annex)**
5.	EC Responses to Questions from the Facilitator (Nov. 18, 2005) **(See BCI Annex)**
6.	Follow-up Questions from the Facilitator to the EC (Dec. 9, 2005) **(See BCI Annex)**
7.	EC Non-BCI Responses to Follow-up Questions from the Facilitator (Dec. 22, 2005) **(See BCI Annex)**
8.	EC BCI Responses to Follow-up Questions from the Facilitator (Dec. 22, 2005) **(See BCI Annex)**
9.	*European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (WT/DS316), Procedure under Annex V of the Agreement on Subsidies and Countervailing Measures, Report to the Panel from the Facilitator (Feb. 24, 2006)
10.	Roger Béteille, "Le développement de l'avion, stimulation et coopération européenne," in: Airbus, Un Succés Industriel Européen, Institut d'Histoire de l'Industrie, Paris, 1995
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17H. German Federal Budget, 1974, selected budget items
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17O. German Federal Budget, 1981, selected budget items
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17Q. German Federal Budget, 1983, selected budget items
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17T. German Federal Budget, 1986, selected budget items
17U. German Federal Budget, 1987, selected budget items
17V. German Federal Budget, 1988, selected budget items
17W. German Federal Budget, 1989, selected budget items
17X. German Federal Budget, 1990, selected budget items
17Y. German Federal Budget, 1991, selected budget items
17Z. German Federal Budget, 1992, selected budget items
17AA. German Federal Budget, 1993, selected budget items
17BB. German Federal Budget, 1994, selected budget items
17CC. German Federal Budget, 1995, selected budget items
17DD. German Federal Budget, 1996, selected budget items
17EE. German Federal Budget, 1997, selected budget items
17FF. German Federal Budget, 1998, selected budget items
17GG. German Federal Budget, 1999, selected budget items
17HH. German Federal Budget, 2000, selected budget items
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