

**European Communities and Certain Member States –
Measures Affecting Trade in Large Civil Aircraft
WT/DS316**

**Opening Statement of the United States
Second Meeting of the Panel**

July 25, 2007

1. Good morning, Mr. Chairman, members of the Panel. On behalf of the United States, we would like to begin once again by thanking the Panel and the Secretariat staff for their extraordinary effort in this important dispute. We also wish to express our appreciation to the Panel and the Secretariat for all of their hard work in making the arrangements for the public viewing of this session. The public viewing of the first meeting was a success, giving the public valuable insight into this critical aspect of the WTO's work, and we expect that the upcoming viewing also will be a success. Finally, we wish to acknowledge the Panel's issuance of its preliminary ruling in advance of this hearing. The ruling elucidates several significant issues and should help to focus our discussion at this meeting.

I. INTRODUCTION

2. Mr. Chairman, members of the Panel, in our first submission and at the first meeting, the United States laid out our *prima facie* case in detail. We demonstrated that the \$15 billion in Launch Aid that EC member States have provided to Airbus, as well as each of the other measures at issue, constitute subsidies that are specific under Articles 1 and 2 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). We showed that these subsidies have been essential to the launch of each and every major large civil aircraft ("LCA")

model Airbus has introduced to date. We showed that these subsidies have enabled Airbus to increase its share of the global LCA market from zero percent in 1969, to 39 percent in 2001, to 57 percent in 2005 – and perhaps even higher following the wave of new orders received at last month’s Paris Air Show¹ – to win sales, and to depress prices. We also showed that for certain LCA models, the provision of Launch Aid is tied to a contractual undertaking by Airbus that Airbus cannot fulfill without exporting, thus making these subsidies prohibited under Article 3 of the SCM Agreement.

3. A key point we will emphasize today is that the essential elements of this *prima facie* case remain largely undisputed. Of course, the EC disagrees with the United States on any number of issues. But, these disagreements do not involve the basic facts.

4. For example, the EC does not dispute that Airbus’s launch of each major LCA model since the A300 back in 1969 has been supported by Launch Aid. Nor does it dispute the core characteristics of Launch Aid as success-dependent, back-loaded, unsecured, preferential financing. Nor does it even dispute that Launch Aid confers a benefit on Airbus’s LCA production. Instead of challenging these indisputable elements of the U.S. demonstration that Launch Aid is a subsidy, the EC focuses its response on other issues— peripheral issues – such as the precise amount of the Launch Aid benefit; the relevance of SCM Agreement rules (as opposed to non-covered-agreement rules); and the continuity of benefits following corporate reorganizations. The EC’s arguments on these other issues are wrong – as we have shown in

¹See Reuters, *Airbus pulls ahead of Boeing in 2007 plane orders* (July 9, 2007) (Exhibit US-637).

prior submissions and will further show in this statement. And, significantly, when the Panel rightly puts aside the distractions created by these other issues, it will see that the U.S. *prima facie* case remains unrebutted.

5. Similarly, the EC does not dispute that Airbus would not have launched the A300, the A310, the A320, the A330, or the A340 without Launch Aid. Instead, it argues that when these aircraft take sales and market share from Boeing and depress prices, this does not constitute “serious prejudice” within the meaning of Article 6 of the SCM Agreement.

6. In short, the EC’s approach generally has been not to dispute the essential elements of the U.S. *prima facie* case, but instead to put up defenses designed to confuse the issues or prevent the Panel from reaching the merits of the U.S. claims. You heard some of this in yesterday’s third party session. In our submissions and statements, we have shown that these defenses should not distract the Panel from making the findings that the evidence unmistakably supports. We will continue to emphasize that point today.

7. Our statement today is lengthy, although I understand in comparison to what you will be hearing later today, it is relatively brief. In any event, we have endeavored to keep it as brief as possible. However, there is a lot of ground to cover, and, as this will be our last opportunity to meet with you, we wanted to be sure to address the key points.

8. We will begin our presentation with a discussion of our claims under Part II of the SCM Agreement that certain provisions of Launch Aid are prohibited export subsidies. We then will turn to our claims under Part III, reviewing each of the measures that constitutes a subsidy to Airbus's LCA production and reviewing how these subsidies cause or threaten to cause adverse effects to the interests of the United States. The fact that we address only some of the EC's arguments does not indicate that we agree with the others. Much of our response to the EC is set forth in our answers to the Panel's questions and in our second written submission. To the extent the Panel believes there are issues that remain unaddressed, we would of course be pleased to address them in response to the Panel's further questions.

II. PROHIBITED EXPORT SUBSIDIES

9. Let me turn now to the subject of prohibited subsidies. The United States has made a clear and straightforward claim that Launch Aid for the A380, A340-500/600, and A330-200 was granted contingent upon export performance by Airbus within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement. These measures therefore are prohibited subsidies under Article 3.2. The contingent relationship between the provision of Launch Aid and export performance is established by the Launch Aid contracts themselves.

10. Under each of the contracts at issue, a government promises to provide Launch Aid to Airbus in exchange for a promise by Airbus to develop the covered aircraft and repay the Launch Aid through a levy on each sale of the aircraft. The repayment schedule is structured in such a way that – given demand for these aircraft – Airbus can meet the schedule only if it exports.

Thus, as contemplated in footnote 4 of the SCM Agreement, the granting of the Launch Aid subsidy is “tied to . . . anticipated exportation or export earnings.”

11. This tie is evident not only in the provisions on repayment of Launch Aid, but also in other contractual provisions in which the governments make clear that, in providing Launch Aid, they are relying on representations by Airbus, including representations regarding anticipated exportation.² The tie also is demonstrated unmistakably in statements by the governments and in other evidence – such as Airbus business cases and government project appraisals – which we have discussed in our prior submissions and statements.³

12. In a futile attempt to rebut the U.S. showing of export contingency, the EC uses five tactics: (i) it misconstrues terms of the SCM Agreement; (ii) it invents new terms not in the SCM Agreement; (iii) it misrepresents U.S. arguments; (iv) it misstates relevant panel and Appellate Body reports; and (v) it misconstrues the evidence.

A. EC Conflates “Anticipated Exportation” With “Actual Exportation”

13. With respect to the terms of the SCM Agreement, the EC continues to run up against the problem that the provision of a subsidy is contingent upon export performance if it is tied to anticipated exportation or export earnings – that is, exportation or export earnings that are

²See U.S. Second Written Submission (“SWS”), paras. 163-209.

³See, e.g., U.S. First Written Submission (“FWS”), paras. 343-386, HSBI App., paras. 26-60; U.S. Oral Statement at First Panel Meeting (“FOS”) (non-BCI), paras. 65-75.

“expected” to occur, but may or may not actually occur.⁴ The EC itself has conceded that the Airbus governments expected Airbus to repay Launch Aid.⁵ Because of the levy-based nature of Launch Aid repayments and the repayment schedules agreed to under the Launch Aid contracts, this would be possible for the A380, A340-500/600, and A330-200 only with substantial exports. The provision of the Launch Aid for these models, therefore, is unquestionably tied to exportation that the Airbus governments expect to occur.

14. Faced with these undisputed facts, the EC tries to find a definition of “anticipated” more to its liking – one that avoids the uncertainty about the future inherent in the term “expected.” What it settles on, as I will explain momentarily, is the assertion that exportation is anticipated if it “will occur;” it thus collapses the concepts of “actual” and “anticipated.”⁶

15. An early tip-off to the EC’s recognition that the text does not support its position is its assertion that “{t}he drafting of Article 3.1(a) and especially footnote 4 might not be a model of clarity.”⁷ The problem for the EC is not that the SCM Agreement lacks clarity; it is that the text does not support the EC’s position. Nevertheless, taking this asserted non-clarity as a license to depart from customary rules of interpretation of public international law, the EC surveys various definitions of the word “anticipate” and focuses on one element – “a temporal connotation.”⁸ It

⁴See *Canada - Aircraft* (AB), para. 172.

⁵See, e.g., EC FWS, para. 448; EC Responses to First Panel Questions, para. 48.

⁶See, e.g., EC SWS, para. 245 (suggesting that for subsidy to be export contingent, granting Member must impose “a requirement that the recipient export in order to obtain the subsidy”).

⁷EC SWS, para. 236.

⁸EC SWS, para. 238.

ignores that the ordinary meaning of “anticipated” has more than “a temporal connotation.” It also has a subjective connotation. That is, it implies the existence of a person or entity – in the case of footnote 4, the grantor of a subsidy – that has a point of view regarding the future. This connotation is reinforced by the Spanish and French texts, which render the word “anticipated” as “previstos” and “prévues,” respectively. You heard this point made yesterday in connection with one of the third party statements.⁹ The Spanish and French texts also undermine the EC’s proposed definition of the term “actual” as “existing” rather than “real.”¹⁰

16. Understanding this aspect of the term “anticipated,” the Appellate Body – which, unlike the EC, did not question the clarity of Article 3.1(a) and footnote 4 – considered the term “anticipated” in its *Canada - Aircraft* report and found it to mean “expected.”¹¹ Not only does the EC neglect to mention this, but in listing the various dictionary definitions of the word “anticipate,” it conspicuously omits “expect.”¹²

17. As Australia points out, the EC “would render meaningless the first sentence of footnote 4 with its reference to tying the granting of a subsidy to anticipated exportation or export

⁹See Brazil Third Party Oral Statement, para. 15.

¹⁰The Spanish text uses “reales,” and the French text uses “effective.” See *Oxford Spanish Dictionary*, p. 625 (2d ed. revised, 2001) (defining “real” to mean “verdadero, no ficticio”); *Le Petit Robert, Dictionnaire de la Langue Française*, p. 838 (revised ed., 2004) (defining “effectif, i⁺ve” as “qui se traduit par un effet, par des actes réels. => concret, 1. positif, réel, tangible”).

¹¹*Canada - Aircraft* (AB), para. 172.

¹²Compare EC SWS, para. 238, with *Shorter Oxford English Dictionary*, Vol. 1, p. 91 (5th ed., 2002) (definition of “anticipate”).

earnings.”¹³ Indeed, the *Canada – Aircraft* panel rejected an earlier attempt to distort footnote 4 in precisely the same way.¹⁴

B. EC Reads Text Into The SCM Agreement

18. Perhaps recognizing the flaw in its core thesis regarding the terms that are in the SCM Agreement, the EC resorts to inventing rules that are not in the agreement. For example, the EC contends that a subsidy is contingent upon export performance only if “the terms of the measure vary, in law or in fact, depending on whether sales performance is in the domestic or export markets.”¹⁵ However, the SCM Agreement contains no such requirement. Indeed, such a requirement relating to actual sales performance would conflict with the text we have just been discussing – the reference in footnote 4 to “anticipated exportation or export earnings.” And, once again, the argument in which the EC seeks refuge was already rejected in the *Canada - Aircraft* dispute.¹⁶

19. Similarly, the EC suggests that to support its claim of export contingency, the United States had to show that “Airbus altered its *Global Market Forecasts* or the product designs that were based on those forecasts” in order to get Launch Aid, or that the governments’ anticipation

¹³Australia Third Party Submission, para. 33.

¹⁴See *Canada - Aircraft* (Panel), paras. 6.248 - 6.252 and 9.343.

¹⁵EC SWS, para. 300.

¹⁶See *Canada - Aircraft* (Panel), paras. 6.250 (“Canada argues that the TPC is not contingent on export performance because it is *neutral* as to the *destination*. . . .”) and 9.342-9.343 (rejecting Canada’s attempt to rebut Brazil’s *prima facie* demonstration of export contingency).

of exportation upon providing Launch Aid created demand in the market.¹⁷ But, Article 3.1(a) and footnote 4 require neither such showing. They require a showing that the provision of Launch Aid was tied to actual or anticipated exportation, which is precisely what the United States has shown. The SCM Agreement does not dictate the nature of the tie, as the EC seems to suggest.

C. EC Misrepresents U.S. Arguments

20. Moreover, the EC resorts to a third tactic: obfuscating the export contingency issue by setting up and knocking down arguments the United States does not make. Most glaring in this respect is the EC's supposition that, according to the United States, the mere expectation that a recipient of a subsidy will export renders the provision of that subsidy export contingent.¹⁸ In fact, the United States does not argue – and never has argued – that “royalty based financing . . . in a small or export dependent economy or in a global market will always be a subsidy contingent upon export performance.”¹⁹ Rather, the United States has consistently maintained that what makes the provision of Launch Aid export contingent is the contractual tie between the grant of Launch Aid and anticipated exportation, manifested by a promise by Airbus to repay the Launch Aid on a per sale basis, on terms that Airbus simply cannot fulfill without exporting.

21. This tie is critical. It explains why the grant contract in the *Australia – Leather* dispute was contingent upon export performance while the loan contract was not. And, it explains why

¹⁷EC SWS, para. 303.

¹⁸See, e.g., EC SWS, paras. 217, 230, 233, 245, 297.

¹⁹EC SWS, para. 309.

the United States confines its export contingency claims to particular grants of Launch Aid rather than making similar claims with respect to all subsidies provided to Airbus. Indeed, if the EC's portrayal of the U.S. argument were correct – that is, if the United States were arguing that the mere expectation of exports renders a subsidy export contingent – then the logical thing to do would be to challenge every subsidy – not just Launch Aid, but also infrastructure grants, EIB loans, et cetera – as export contingent. But, the United States has not done this, precisely because its argument is not what the EC asserts it to be.

22. The EC further misrepresents the U.S. argument when it asserts that “the United States limits itself to attempting to demonstrate contingency between export and the loan . . . and does not even attempt to demonstrate contingency with the subsidy itself.”²⁰ The EC assumes that it is possible for a financial contribution to be contingent upon export performance without the benefit conferred by the financial contribution also being contingent upon export performance. This unusual argument ignores that, by definition, the financial contribution aspect of a subsidy and the benefit aspect are intertwined. The benefit does not exist independently of the financial contribution such that it is capable of having a contingent relationship to export performance separate from the financial contribution. Accordingly, as the United States explained in its response to the Panel's Question 5, it is the provision of Launch Aid to Airbus on non-market

²⁰EC SWS, para. 226.

terms that is tied to anticipated exportation and that, accordingly, constitutes a prohibited subsidy under Article 3.2 of the SCM Agreement.²¹

D. EC Misunderstands Prior Panel And Appellate Body Reports

23. But the EC does not limit itself to misreading the SCM Agreement, adding terms to the agreement that are not there, and misrepresenting the U.S. arguments. It goes a step further by seeking to support its argument with misstatements of the findings in prior panel and Appellate Body reports. I have already mentioned that the EC repeats many of the arguments that Canada made and that the panel and Appellate Body rejected in *Canada - Aircraft*. In one especially puzzling passage in its second submission, the EC apparently tries to distinguish this dispute from *Canada - Aircraft* by portraying that dispute as involving subsidies contingent upon actual exportation.²² However, much like the present dispute, that dispute plainly involved subsidies contingent upon anticipated exportation.²³

24. The EC also seeks support from the panel report in *Australia - Leather*. For reasons discussed in our prior submissions, that report does not help the EC either.²⁴ In its most recent submission, the EC contends that the report in *Leather* supports its understanding of “anticipated exportation” as exportation that “will occur” as opposed to exportation that is “expected” to

²¹See U.S. Responses to Questions from the Panel Following the First Meeting With the Parties (“Responses to First Panel Questions”), paras. 49-50.

²²EC SWS, para. 242; *see also id.*, para. 307.

²³See *Canada - Aircraft* (Panel), para. 9.317, 9.326, 9.333-9.339, 9.341-9.343.

²⁴See, e.g., U.S. SWS, paras. 156-158, 221, 245-250; U.S. Responses to First Panel Questions, paras. 77-79,

occur.²⁵ However, the EC overlooks the *Leather* panel’s express finding that its conclusion was unaffected by “the fact that the anticipated exports may not have come to pass in the volumes anticipated.”²⁶ The EC also neglects that of the three grant disbursements at issue in that dispute, the first was made at contract signing, before any of the anticipated exportation had occurred, and the last was made with two-and-a-half years of actual performance by the recipient remaining.²⁷

25. Additionally, the EC errs in trying to compare the Launch Aid contracts to the loan contract at issue in *Leather*. The EC contends that like the loan in *Leather*, Launch Aid is not contingent upon export performance, because Airbus in theory could voluntarily accelerate its repayments of Launch Aid.²⁸ The EC’s theory seems to be that because repayment of Launch Aid ahead of time is an “option,” the alternative of repayment through a levy on each delivery also is an “option.” Thus, in the EC’s view, the prepayment option severs the tie to anticipated exportation.

26. This theory ignores the facts and would lead to absurd results. First, what distinguishes the loan contract in *Leather* from the Launch Aid contracts at issue here is that in *Leather* there was no tie to export performance; the Australian government had an absolute right to repayment. Second, the mere fact that Airbus is allowed to repay Launch Aid at any time does not mean that

²⁵EC SWS, para. 244 and n.226.

²⁶*Australia - Leather*, para. 9.68.

²⁷See *Australia - Leather*, para. 9.62.

²⁸EC SWS, para. 306.

repayment upon delivery is not an obligation. Certainly a government provider of Launch Aid does not have the right to demand repayment before delivery. The government's only claim to repayment arises upon delivery of a plane. Indeed, if the EC's prepayment theory were correct, a subsidy in the form of repayable financing tied to actual or anticipated exportation could never be export contingent, because the option to accelerate repayment would always extinguish the contingency. As this theory has no basis in the SCM Agreement, the Panel should reject it.

27. The EC also misreads the Appellate Body report in *Canada - Autos*. As the Appellate Body explained, in considering the *de jure* claims in that dispute, the panel should have analyzed how the measures at issue "actually work."²⁹ Likewise, in this dispute, in considering the U.S. export contingency claims as *de jure* claims, the Panel should consider how the Launch Aid contracts "actually work." To do so, it is appropriate to consider the contracts in the context of Airbus's Global Market Forecasts and the governments' project appraisals.

E. EC Misconstrues Evidence Showing De Facto Export Contingency

28. And, of course, in considering the U.S. export contingency claims as *de facto* claims, the Panel should consider not only the Launch Aid contracts in the context of the Global Market Forecasts and project appraisals, but also the wealth of other evidence the United States has brought to bear. The EC's attempt to dismiss this evidence turns primarily on its flawed premise that the terms of an export contingent subsidy must vary expressly according to the destination of a particular sale. As already mentioned, this theory conflates anticipated exportation with

²⁹*Canada - Autos* (AB), para. 128; *see also id.*, para. 131.

actual exportation. For further discussion of the EC's misconstruing of the U.S. evidence, we refer the Panel to our second written submission.³⁰

29. In sum, as the EC has failed to rebut the U.S. *prima facie* case, the Panel should find that Launch Aid for the A380, A340-500/600 and A330-200 is contingent upon export performance and therefore prohibited.

III. LAUNCH AID

30. Mr. Chairman, members of the Panel, we will stay with the subject of Launch Aid for a bit longer, but change our focus now from Part II to Part III of the SCM Agreement. We begin this portion of our presentation with the Launch Aid Program.

A. The Launch Aid Program is a Measure

31. In our submissions and statements, we have demonstrated that each individual grant of Launch Aid is not simply an *ad hoc* measure that causes adverse effects to the interests of the United States, but also is part of a larger measure consisting of the Launch Aid Program, through which the EC causes adverse effects to the interests of the United States.

32. At the heart of the Launch Aid Program is the routine provision of Launch Aid for each major new Airbus LCA model. In each case, Launch Aid has the same essential features: It consists of long-term, unsecured financing at zero or below-market rates of interest, with back-

³⁰*See, e.g.*, U.S. SWS, paras. 235-244.

loaded repayment schedules that allow Airbus to repay, if at all, through a levy on each delivery of the financed aircraft. An inter-governmental apparatus and national bureaucracies exist expressly to support this Program. And, significantly, the existence of the Launch Aid Program is confirmed by the understanding of market players – notably credit rating agencies – which attribute financial value to the Program’s existence in their analyses of Airbus,³¹ as well as by statements by officials of the Airbus governments expressing their commitment to the continuity of Launch Aid, and statements by executives of Airbus and EADS evidencing the companies’ reliance on Launch Aid.³²

33. The EC does not dispute the accuracy of the facts the United States adduces to demonstrate the existence of the Launch Aid Program. Rather, the EC disputes that these facts actually demonstrate the existence of the Program as a distinct measure that breaches SCM Agreement obligations. In doing so, however, the EC again conflates two distinct concepts: the concept of “measure” and the concept of an “as such” claim.” Rather than discuss the question of whether the Launch Aid Program is a measure, the EC argues that the United States has not substantiated an “as such” claim.³³

(1) EC Confuses Concept of “Measure” With Concept of “As Such” Claim

34. Because the EC confuses the nature of the U.S. claim, let us state clearly what that claim is: The United States has shown, first, that the Launch Aid Program is a measure – indeed, a

³¹See U.S. FWS, paras. 91-106; U.S. FOS (non-BCI), paras. 19-26.

³²See U.S. FWS, paras. 85-106; U.S. FOS (non-BCI), paras. 19-26.

³³See EC FWS, para. 343; EC FOS (BCI), para. 2; EC SWS, para. 110.

subsidy – and second, that this measure – distinct from particular grants of Launch Aid – causes adverse effects to the interests of the United States within the meaning of Articles 5 and 6 of the SCM Agreement. In this regard, the U.S. claim is not unlike claims in other disputes in which the measure challenged happened to consist of individual components that could themselves be considered measures. Examples include the measures at issue in the *Japan – Apples* and *EC – Biotech* disputes.³⁴

35. Instead of responding to the actual U.S. claim, the EC has responded to a claim that the United States has not made; namely, that Launch Aid is “as such” is WTO-inconsistent. In so arguing, the EC refers to the Appellate Body report in *US - Zeroing (EC)* and factors that the Appellate Body identified in establishing the existence of an unwritten measure setting forth a rule or norm.³⁵ However, while the challenge to the unwritten measure in the *Zeroing* dispute happened to be an “as such” challenge, nothing in the Appellate Body’s report suggests that an unwritten measure may only exist in the context of an “as such” challenge.

36. In the present dispute, we have shown that a measure that is not set forth in a single written instrument – the Launch Aid Program – is in fact a measure and in fact possesses the qualities the Appellate Body identified in *US - Zeroing (EC)*. This measure meets the SCM Agreement’s definition of a subsidy: It is a “financial contribution” – in particular a “government practice” that “involves . . . direct transfers of funds or potential direct transfers of

³⁴*Japan – Apples (21.5)* (Panel), paras. 8.28-8.33; *EC – Biotech* (Panel), para. 7.1292.

³⁵See EC FWS, para. 343.

funds³⁶ – that confers a benefit on Airbus, for example by enhancing its credit standing. Like the other subsidies we have challenged, the Launch Aid Program causes adverse effects by enabling Airbus to launch new aircraft more quickly and simultaneously reduce prices to gain market share.

37. That, in brief, is our claim. It is a claim that focuses on the breach resulting from the Launch Aid Program itself. It is not a claim that focuses on something about a measure that mandates or necessarily results in a breach each time the measure is applied, which is the essence of what is referred to in WTO dispute settlement as an “as such” claim.³⁷ Indeed, it is questionable whether it is even possible to successfully claim that a measure “as such” breaches Article 5 of the SCM Agreement, as that would require showing that the measure will mandate particular effects in the future, such as displacement and impedance, which involve marketplace factors independent of the measure.

38. Having clarified the nature of our claim, let me now discuss why the EC has failed to rebut our showing that the Launch Aid Program is a measure.

(2) *Launch Aid Program Has Precise Content*

39. The EC contends that the United States has not shown the precise content of the Launch Aid Program or that the measure is one of general and prospective application. Even assuming

³⁶SCM Agreement, Art. 1.1(a)(1)(i).

³⁷See generally, *US - Corrosion-Resistant Steel Sunset Review* (AB), para. 82.

that we needed to show these elements to establish that the Launch Aid Program is a measure, the EC is wrong on both counts.

40. The precise content of the Launch Aid Program is the consistent provision of Launch Aid based on the core terms I mentioned a moment ago. That precise content was articulated as far back as 1969, in the French-German agreement on launch of the A-300-B,³⁸ and each of the numerous grants of Launch Aid since then has been characterized by the same essential features. The EC's dismissal of this fact is flawed for several reasons.

41. First, the EC asserts that there are "considerable differences" among Launch Aid contracts.³⁹ However, the only differences it cites – such as different interest rates and different repayment amounts⁴⁰ – simply go to the amount of benefit conferred by each grant of Launch Aid and do not undercut the U.S. description of the elements that make up the precise content of the measure. The EC states that these differences in details show that Launch Aid is not "monolithic."⁴¹ Yet, there is no requirement to show that the operation of a measure is "monolithic."

³⁸See 1969 Launch Aid Agreement, Art. 7 (Exhibit US-11).

³⁹EC SWS, para. 117.

⁴⁰See EC FOS (BCI), paras. 7-8.

⁴¹EC FOS (BCI), para. 10.

42. Second, the EC asserts that the content of the Launch Aid Program is not precise, because “these very same attributes are displayed by market-based instruments.”⁴² However, the only examples the EC gives are Airbus’s contracts with risk-sharing suppliers and a single contract with a private bank syndicate. As we have demonstrated in the context of measuring the benefit conferred by Launch Aid, risk-sharing suppliers have a relationship with Airbus based primarily on the supply of goods and services. Their relationship is far different from that of market-based providers of financing. And, in both of the EC’s examples, the terms of the financing are substantially different from the terms of Launch Aid.⁴³ These isolated, flawed examples, provide no support for the EC’s characterization of the content of the Launch Aid Program as “generic and common.”⁴⁴

43. Third, the EC contends that frequent meetings among Airbus governments do not evidence the existence of an institutional apparatus supporting the operation of a Launch Aid Program.⁴⁵ But the evidence the United States has brought to bear, and which the EC simply ignores, is not merely evidence that “the Airbus governments meet frequently.”⁴⁶ It is evidence of entire institutional structures that have been created and that continue to operate with the sole and express purpose of administering the Launch Aid Program.⁴⁷ Although the EC denies the

⁴²EC SWS, para. 119.

⁴³See U.S. FOS (BCI), paras. 5-15, 20-27; U.S. SWS, paras. 101-108, 113-119, HSBI App., paras. 8-13.

⁴⁴EC SWS, para. 128.

⁴⁵EC SWS, paras. 114-115.

⁴⁶EC SWS, para. 115.

⁴⁷See U.S. FWS, paras. 93-106; U.S. FOS (non-BCI), para. 21.

existence of an “executive of a non-existent measure,”⁴⁸ the agreement establishing the intergovernmental Launch Aid institutions could not be clearer on this point. When the governments of France and Germany entered into their 1969 agreement “to reinforce European cooperation in the field of aeronautics,” they created an Intergovernmental Committee, which they tasked with creating an Executive Committee. The mission of those institutions from their inception has been to work with Airbus to ensure the success of each new LCA model, including through the provision of Launch Aid.⁴⁹ And, that mission has been reinforced through the conclusion of successive agreements building on the 1969 agreement.⁵⁰

44. Moreover, the EC ignores not only the intergovernmental institutions that support the Launch Aid Program, but also the national bureaucracies that have been set up to administer the Program. We described these bureaucracies in our first written submission.⁵¹ These include, for example, the French government’s special unit on “transport aircraft of more than 100 seats” which, as part of its mission, “deals with requests for reimbursable advances,” “manages the protocols, particularly with respect to the provision of advances from the State and their

⁴⁸EC SWS, para. 115.

⁴⁹See 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).

⁵⁰See *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*, Art. 3.1, reprinted in BOE núm. 18 at 1918 (Jan 21, 1994) (“A320 intergovernmental agreement”) (Exhibit US-16); 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”) (Spanish and French version; English translation) (Exhibit US-28).

⁵¹See U.S. FWS, paras. 96-101.

reimbursement,” and “participates in the work of the intergovernmental bodies put in place” to facilitate cooperation in the finance and management of aircraft programs.⁵²

45. Similarly, in the United Kingdom, DTI’s Aerospace and Defence Unit is “responsible for relations with civil aerospace companies, and launch investment.”⁵³

46. Finally, there is the evidence demonstrating that credit rating agencies recognize and attribute value to the fact that the Launch Aid Program is an established part of the financial landscape in which Airbus operates. The EC dismisses this evidence on the ground that these market players cannot be “aware of the exact details” of each Launch Aid contract, as these are confidential.⁵⁴ However, market analysts do not need to know the “exact details” of the individual contracts to understand that the Launch Aid Program exists and confers a benefit on Airbus. The relevant fact is that, based on the information available to them, they are willing to stake their credibility on a finding that the Program exists and to assimilate that fact into their financial analyses.

(3) *Launch Aid Program Has General and Prospective Applicability*

47. In attempting to show that the Launch Aid Program lacks general and prospective applicability, the EC relies primarily on the observation that Airbus has not sought or accepted

⁵²Arreté 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).

⁵³DTI, Aerospace and Defence (emphasis added) (Exhibit US-52).

⁵⁴EC SWS, paras. 111-113.

Launch Aid from each of the four Airbus governments for each and every LCA launch.⁵⁵ In effect, the EC is saying that the power to determine whether the Launch Aid Program has general and prospective applicability – and, thus, whether it constitutes a measure – lies with Airbus rather than the governments. Following the EC’s logic, by refraining from seeking Launch Aid in a given instance, or by declining it when it is offered, Airbus can deprive the almost 40-year program of its general and prospective character.

48. But that logic makes no sense. How can it be that the occasional decision of a program’s sole beneficiary to depart from its usual course of conduct – affecting not the program, but the beneficiary’s use of it – has the effect of altering the characterization of the entire program? It is the conduct of the Airbus governments, not the conduct of Airbus, that defines the precise content of the Launch Aid Program and makes it general and prospective. That conduct includes the work of the established institutions that ensure that, as former French Prime Minister de Villepin put it, “the State will fully play its part”⁵⁶ in the long-term success of EADS and Airbus.

49. Indeed, as previously discussed, the Airbus governments confirmed the general and prospective nature of the Launch Aid Program when they fulfilled market expectations and made “legally binding” commitments to provide Launch Aid for Airbus’s newest LCA model, the

⁵⁵EC SWS, paras. 120-126.

⁵⁶Gil Bousquet and Jean-Pierre Bédéï, *Interview: de Villepin: “I will remain vigilant”*, La Dépêche du Midi (Nov. 14, 2006) (Exhibit US-638).

A350.⁵⁷ In this connection, we note that the EC disputes the legally binding nature of these commitments by alleging that the governments have merely made commitments to negotiate – an allegation for which it provides no evidence – and that the A350 has been replaced by the A350 XWB.⁵⁸ However, the fact that there may still be a need to negotiate what Airbus’s then CEO referred to as “the details” of the “legally binding” commitment of Launch Aid is not inconsistent with the existence of that commitment.⁵⁹ Nor does the EC substantiate its contention that the development of a new design for the A350⁶⁰ extinguished the commitment.

50. The EC dismisses as “speculation” the benefit conferred by the governments’ commitment of Launch Aid for the A350.⁶¹ It is unquestionable, however, that having a commitment of Launch Aid enables Airbus to be more flexible on pricing than it would be if it had to produce the A350 without Launch Aid.⁶² It is equally unquestionable that such a commitment is beneficial to Airbus from the point of view of would-be creditors.⁶³

51. Finally, the EC contends that the Launch Aid Program is not a measure because the facts here are not precisely identical to the facts in the *Zeroing* dispute, in which the Appellate Body

⁵⁷See U.S. FWS, paras. 304-320; U.S. FOS (non-BCI), para. 23.

⁵⁸See EC SWS, paras. 130-133.

⁵⁹See *Airbus says government aid pledges are 'legally binding'*, Associated Press (Oct. 7, 2005) (Exhibit US-48).

⁶⁰See, e.g., Emma Vandore, *Airbus chief denies Boeing’s claim that A350 XWB still needs work*, Associated Press (June 16, 2007) (describing A350 XWB as an upgraded “version of the A350”) (Exhibit US-639).

⁶¹EC SWS, para. 133.

⁶²See U.S. FWS, para. 308 (citing Kevin Done and Peter Spiegel, *EADS firm on launch aid for the A350*, Financial Times (Sept. 14, 2005) (Exhibit US-84)).

⁶³See U.S. Responses to Questions from the Panel Following the First Meeting With the Parties (“Responses to First Panel Questions”), para. 30.

identified factors for examining the existence of an unwritten measure.⁶⁴ This argument is striking, given that earlier in the very same submission the EC points out that the occurrence of Appellate Body statements “in the context of one particular set of facts, does not mean, as a matter of law, that its conclusions cannot also extend to other sets of facts.”⁶⁵

52. In sum, Mr. Chairman and member of the Panel, the EC has failed to rebut the U.S. showing that the Launch Aid Program constitutes a measure distinct from individual grants of Launch Aid. Later in our statement, my colleague, Mr. Yocis, will show that the Launch Aid Program causes adverse effects to the interests of the United States.

B. Launch Aid Confers a Benefit on Airbus

53. I will turn now to the issue of the benchmark for measuring the benefit conferred by particular grants of Launch Aid. So I am now moving from the Launch Aid Program to specific elements of Launch Aid. The essential point to keep in mind is that, after all is said and done, the EC does not dispute that Launch Aid confers a benefit and therefore is a subsidy under Article 1 of the SCM Agreement. Whether one uses the Ellis benchmark, as we propose, or the Whitelaw benchmark, as the EC proposes, this essential result is the same.⁶⁶

⁶⁴EC SWS, paras. 127-128.

⁶⁵EC SWS, para. 93.

⁶⁶See U.S. FOS (non-BCI), paras. 15-17, 53; Exhibit US-448, p. 2; U.S. SWS, paras. 72-78.

(1) *EC Mischaracterizes Launch Aid as Debt Rather Than Financing With Both Debt and Equity Qualities*

54. The EC's main disagreement with the United States on the benchmark issue is over the risk premium the market would demand for Launch Aid-type financing. Much of the EC's critique is shown to be unfounded in the NERA Response to Whitelaw Report, which we provided as Exhibit US-534, and in our second written submission.⁶⁷ In today's statement, we will highlight several key points. As the EC has designated much of the relevant information as BCI or HSBI, we will supplement this discussion in our confidential statement.

55. We first address the EC's insistence that Launch Aid be treated as a form of debt. As we have demonstrated, the government providers of Launch Aid assume equity-like risk, in that their entitlement to repayment depends entirely on the success of the covered project, and they have no recourse in the event of non-repayment.⁶⁸ Because Launch Aid has these equity-like qualities along with other, debt-like qualities, it is properly considered a hybrid type of financing. Indeed, in *Canada - Aircraft*, Canada described financing virtually identical to Launch Aid as "investments rather than loans,"⁶⁹ and the panel agreed with that assessment.⁷⁰

⁶⁷See U.S. SWS, paras. 79-131.

⁶⁸See, e.g., U.S. SWS, paras. 82-88; NERA Response to Whitelaw Report, pp. 3-5 (Exhibit US-534 (HSBI)).

⁶⁹*Canada - Aircraft* (Panel), para. 6.201 (summarizing argument of Canada).

⁷⁰*Canada - Aircraft* (Panel), n.619.

56. To support its contrary view, the EC refers to analyst reports by certain investment banks.⁷¹ However, these reports do not purport to evaluate the risk associated with Launch Aid. Rather, their goal is to value Airbus's equity. To do that, the reports simply assume that the A380 will succeed. That is, they assume away the very risk of failure, and the consequent risk of non-repayment, that give Launch Aid its equity-like features.⁷² The investment bank reports have absolutely nothing to do with the appropriate characterization of Launch Aid for purposes of determining the return the market would demand for financing on similar terms.

(2) *EC Understates The Risk Associated With Launch Aid*

57. The EC also tries to downplay the riskiness of an LCA launch, but its argument is highly misleading. For example, the EC makes the entirely irrelevant observation that Airbus has “never failed to certify a launched aircraft.”⁷³ All that means is that any failure that may have occurred did not occur during the development or manufacturing process. However, the main risk of non-repayment of Launch Aid is not a risk associated with development or manufacturing; it is a risk associated with sales, as Airbus's recent experience with the A380 demonstrates.

⁷¹EC SWS, para. 174.

⁷²See, e.g., Morgan Stanley, “Little Scope for Further Downside Risk,” 20 June 2003, at 13 (Exhibit EC-673); Deutsche Bank, “EADS, Ready for the Cycle Upturn,” 5 July 2004, at 25 (Exhibit EC-674).

⁷³EC SWS, para. 181.

58. The EC’s related observation that Airbus has not “experienced a significant commercial failure”⁷⁴ depends on what the EC means by “failure.” Certainly if “failure” includes substantial delays in the repayment of Launch Aid with the distinct possibility that it will never fully be repaid, that statement is false.

59. Further, the EC distorts the significance of the risk premium proposed by the United States. The NERA Response to Whitelaw Report explains the rationale for using a risk premium based on venture capital investments.⁷⁵ In criticizing that risk premium, the EC’s consultant cites the high average return of almost 700 percent to individual venture capital projects that culminate in public offerings.⁷⁶ The EC’s consultant thus tries to suggest that the returns on venture capital investments are too extreme to serve as the basis for establishing a risk premium for Launch Aid. However, the U.S. benchmark does not rely on returns to individual venture capital projects. Rather, it relies on the much lower returns – on average, about 16.7 percent – to well-diversified portfolios that contain venture capital investments.⁷⁷ These returns notably are in line with the very returns on high-yield debt that, according to the EC’s consultant, are too low to be of interest to venture capitalists.⁷⁸ Accordingly, the U.S.-proposed risk premium is far more conservative than the EC suggests.

⁷⁴EC SWS, para. 181.

⁷⁵See NERA Response to Whitelaw Report, pp. 6-10 (Exhibit US-534 (HSBI)).

⁷⁶See Whitelaw Rebuttal Report, para. 19 (Exhibit EC-656 (HSBI)).

⁷⁷See NERA Response to Whitelaw Report, p. 7 (explaining reliance on “the risk premium for a well-diversified investor in both venture capital projects and other, less risky, equity investments represented by a stock market index”).

⁷⁸Whitelaw Rebuttal Report, para. 12 (HSBI).

(3) *EC Fails to Substantiate Its Assertion That Launch Aid May Entail Costs*

60. In its second submission, the EC introduced a new argument as part of its effort to downplay Airbus's benefit from Launch Aid. In addition to its arguments concerning risk, the EC now adds the argument that "government financing may impose costs on the recipient that market instruments do not."⁷⁹ The EC does not assert that Launch Aid does impose such costs, let alone quantify those alleged costs. Nor does the EC try to substantiate its assertion. Accordingly, this argument has no probative value and leaves unchanged the EC's admission that Launch Aid confers a benefit on Airbus.

C. Rules Relevant to Settlement of This Dispute Are in The SCM Agreement

61. I will turn now to the EC's continued attempt to have the Panel analyze the U.S. claims regarding Launch Aid according to rules other than those set out in the SCM Agreement.

(1) *DSU Article 7.2 Concerns Only Covered Agreements*

62. The EC's most recent argument is that Article 7.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") compels the Panel to address provisions of non-covered agreements cited by the EC, including the 1992 agreement, the 1979 Aircraft Agreement, and the Tokyo Round Subsidies Code.⁸⁰ Article 7.2 states: "Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." The EC seems to read this as a direction to address two different categories of

⁷⁹EC SWS, para. 159 (emphasis added); *see id.*, paras. 162-167.

⁸⁰*See, e.g.*, EC SWS, paras. 32, 70, 82, 146.

agreements: (i) “any covered agreement,” and (ii) “agreements cited by the parties to the dispute” (whether covered or not). Believing that the 1992 agreement, the 1979 Aircraft Agreement, and the Tokyo Round Subsidies Code fall into the latter category, the EC suggests that the Panel must address their relevant provisions – even though it took the very opposite position in the *India - Autos* dispute.⁸¹

63. However, this argument is based on an unsupported reading of Article 7.2. The natural reading of that article, which contains no internal punctuation separating the two phrases on either side of the word “or,” is that the word “covered” modifies both “agreement” and “agreements.” This reading is confirmed by the Spanish and French texts, in which it is unmistakable that the adjective modifies both the singular and the plural. Thus, the Spanish refers to “acuerdo o acuerdos abarcados,” while the French refers to “l’accord visé ou {les} accords visés.”

(2) *1992 Agreement is Not Relevant to This Dispute*

64. The EC’s continuing efforts to make the 1992 agreement relevant to this dispute through other means are no more availing. The EC tries to support its position by reference to academic theories about “systemic integration” between WTO law and other sources of international law.⁸² However, the very fact that the EC must resort to such theories demonstrates the lack of a basis

⁸¹See U.S. SWS, para. 27 (discussing EC position in *India - Autos* as reflected in the panel report in that dispute at footnote 71 and paras. 4.38, 4.40, and 4.42).

⁸²See EC SWS, paras. 54, 57, 69, 80-84.

in customary rules of interpretation for its notion that the SCM Agreement should be understood through the lens of a defunct agreement involving only two out of 151 Members of the WTO.

65. The EC is asking the Panel to do precisely what the Appellate Body in *Mexico - Soft Drinks* said that a panel may not do – decide WTO disputes on the basis of non-covered agreements.⁸³ The EC tries to distinguish that finding on the ground that it was made in the context of an argument that a panel lacked jurisdiction, a point not at issue here.⁸⁴ However, the Appellate Body’s reasoning did not depend on that aspect of the dispute.

66. As the EC’s other arguments in its second written submission regarding the 1992 agreement simply repeat arguments the EC made previously, we will not dwell on the issue, but instead refer the Panel to our rebuttal of these points set forth in previous submissions.⁸⁵

(3) *1979 Aircraft Agreement is Irrelevant to This Dispute*

67. As the 1979 Aircraft Agreement is not a covered agreement, the EC also errs in arguing that it is relevant to this dispute. Moreover, the EC remains evasive on the relevance of the 1979 Agreement,⁸⁶ and utterly misrepresents the U.S. argument on this issue. Far from “embrace{ing}” the EC’s notion that “specificities in the LCA sector . . . need to be taken into account”⁸⁷ in

⁸³See *Mexico - Soft Drinks* (AB), para. 56.

⁸⁴See EC SWS, paras. 71-78.

⁸⁵See, e.g., U.S. Responses to First Panel Questions, paras. 1-13; U.S. SWS, paras. 27-53.

⁸⁶See EC SWS, paras. 30-35.

⁸⁷EC SWS, para. 34.

considering all provisions of the SCM Agreement, the United States has shown that whatever “specificities” there may be in the LCA sector already have been taken into account through the inclusion of certain footnotes attached to particular provisions of the SCM Agreement.

68. On a related point, the EC persists in its mistaken view that one of those footnotes – that is footnote 16 – is relevant to the analysis of whether Launch Aid is a subsidy.⁸⁸ However, no matter how hard the EC tries, it simply cannot make a footnote attached to an expired provision, Article 6.1 of the SCM Agreement, apply to the definition of “subsidy” in Article 1. As for the EC’s “economic rationale” for its preferred rule,⁸⁹ that is an argument to be made in negotiations, not in dispute settlement.

(4) Tokyo Round Subsidies Code is Irrelevant to This Dispute

69. Finally, there is no basis whatsoever for the EC’s attempt to revive the Tokyo Round Subsidies Code by way of reference to that agreement in the 1979 Aircraft Agreement.⁹⁰ The EC’s insistence on the Code’s relevance rests on its view that the Code was the prevailing law at the time when certain provisions of Launch Aid came into existence. The EC mistakenly assumes that what is relevant in a dispute under part III of the SCM Agreement is the coming into existence of a subsidy. However, what is relevant is not the coming into existence of a

⁸⁸See EC SWS, paras. 151-157.

⁸⁹EC SWS, paras. 154-157.

⁹⁰See EC SWS, paras. 142-145.

subsidy but the causing of adverse effects through the use of that subsidy.⁹¹ As the EC's premise is incorrect, there is no basis for its reliance on the Tokyo Round Subsidies Code.

70. In sum, despite the EC's efforts to muddy the waters, there is only one set of rules relevant to the settlement of this dispute, and that is the set of rules in the SCM Agreement.

IV. RESEARCH AND DEVELOPMENT GRANTS

71. Mr. Chairman, members of the Panel, we will now move from the subject of Launch Aid to a different topic – the subject of research and development grants. The massive amounts of Launch Aid provided to Airbus are complemented by very substantial amounts of research and development (“R&D”) grants. The EC does not dispute that R&D grants that support the development and production of Airbus LCA are subsidies. Where the EC differs with the United States is over the amount of such grants that have been provided by the EC and its member States – an amount we have shown to be in excess of Euro 3 billion – and the extent to which certain of those grants are specific within the meaning of Article 2 of the SCM Agreement.

72. The EC acknowledges as “relevant” only those R&D grants given to Airbus SAS and its subsidiaries.⁹² It treats as not relevant grants given to the companies – such as Deutsche Airbus GmbH, Aérospatiale, and BAe Airbus – that were part of Airbus GIE and that later reorganized their relationship to one another to create EADS and then Airbus SAS. Likewise, it treats as not

⁹¹*See, e.g.*, U.S. Answers to Panel Questions Concerning the Temporal Scope of the SCM Agreement, paras. 1-6 (Dec. 18, 2006).

⁹²*See, e.g.*, EC SWS, para. 614.

relevant grants for LCA production to entities such as EADS, EADS Deutschland, and BAE Systems (a 20 percent owner of Airbus during the period at issue). The mistaken premise for the EC's distinction between "relevant" and "not relevant" is that the United States would have had to show "pass-through" to Airbus SAS for grants to the "not relevant" entities to become "relevant."

73. The EC misunderstands the concept of "pass-through." That concept applies, for example, where a subsidy is granted to an upstream producer of an input that is unrelated to a downstream producer of the product at issue. Under such a scenario, a pass-through analysis may be necessary to show that the subsidy confers a benefit with respect to the product at issue. But that is not the situation here. The entities that the EC deems to be not relevant are makers of Airbus LCA, regardless of whether they are named "Airbus SAS," or something else. What the EC is calling "pass-through" is really an accounting exercise, whereby the United States supposedly would have to show that subsidies benefitting Airbus LCA models continued to benefit those models following corporate restructurings leading to the creation of Airbus SAS. However, the SCM Agreement requires no such accounting.⁹³

74. The EC's separate contention that grants under the EC's Framework Programs, the UK Technology Program, and the Spanish PROFIT program are not specific is based on an artificial and unsubstantiated theory of how specificity should be analyzed for purposes of Article 2 of the SCM Agreement. The EC asserts that "specificity must be determined at the programme

⁹³See U.S. Responses to First Panel Questions, paras. 108-118.

level.”⁹⁴ Yet it points to no language in Article 2 stating that this is how “specificity must be determined.” And, indeed, there is none.

75. Moreover, by assessment “at the programme level” what the EC really seems to mean is assessment at the broadest level of aggregation of the activities of the granting authority. In the case of the Framework Programs (“FPs”), for example, it means assessment at the level of “the entire EC Framework Programs, or entire EC FPs,”⁹⁵ as opposed to the level of sub-budgets within each FP.

76. However, Article 2.1(a) of the SCM Agreement provides that a subsidy “shall be specific” “{w}here the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises.” The article does not require that the explicit limitation of access occur at one particular level of the granting authority’s activity rather than another. Nor does Article 2.1(c) prescribe the level at which a *de facto* specificity analysis must occur. The very goal of an analysis under Article 2.1(c) is to determine what is occurring “in fact.” That goal would be frustrated if one were constrained to do the analysis always at the broadest level of the grantor’s activity.

77. Instead, to determine what is occurring “in fact,” one must adopt a frame of reference that is appropriate to the context. A logical frame of reference for evaluating R&D grants is a level

⁹⁴EC SWS, para. 626; *see also id.*, para. 629.

⁹⁵EC SWS, para. 623; *see also* EC FWS, para. 1245; EC Responses to First Panel Questions, para. 308.

of activity for which there is a separate allocation of money and at which distinct conditions and criteria for eligibility are set. This is precisely how we have looked at the EC FP grants, the UK Technology Program grants, and the Spanish PROFIT grants and shown them to be specific within the meaning of Article 2 of the SCM Agreement.⁹⁶ Accordingly, we respectfully request that the Panel reject the EC's assertion that these grants are not specific.

V. INFRASTRUCTURE AND INFRASTRUCTURE-RELATED GRANTS

78. Mr. Chairman, members of the Panel, we will now address the issue of the substantial infrastructure and infrastructure-related grants that member States and regional governments have provided to Airbus.

A. EC's Understanding of "General Infrastructure" Has no Basis in Text

79. As with Launch Aid, there is no disagreement regarding the basic facts. Instead, the EC relies on what it calls a "general infrastructure defence"⁹⁷ with respect to the Hamburg and Toulouse measures, as well as the Bremen runway extension. As we showed previously, that defense relies on the erroneous view that any infrastructure is "general," as long as it is created for reasons of "public policy" or to "foster economic development" or to perform a "public task."⁹⁸

⁹⁶*See, e.g.*, U.S. SWS, paras. 499-506, 518, 519.

⁹⁷EC SWS, para. 342.

⁹⁸U.S. FOS (non-BCI), para. 79; U.S. Responses to First Panel Questions, paras. 136-139; U.S. SWS, paras. 303-310.

80. In its second written submission, the EC compounds its error by suggesting that all infrastructure starts out as “general infrastructure” and must be “remov{ed}” from that status in order to constitute a financial contribution within the meaning of Article 1 of the SCM Agreement.⁹⁹ Under this theory, it seems that removal from general infrastructure status occurs only when limitations on the use of infrastructure are “clearly specified” and “restricted by regulation.”¹⁰⁰ The EC provides no textual substantiation for this theory, and indeed none exists. The distortions of trade that can occur from the provision of infrastructure to certain enterprises on non-market terms obviously can occur regardless of whether use restrictions are spelled out in regulations. Rather, the question is whether the financial contribution is general infrastructure or not, and requires a case-by-case examination of the relevant evidence. In this case, that examination clearly shows that it is not. That is, it is not general infrastructure.

81. Even under the terms of the EC’s own flawed theory, however, the infrastructure provided to Airbus in Hamburg, Toulouse, and Bremen would not be “general infrastructure.” In each case, use of the infrastructure is “restricted by regulation” in a way that is “clearly specified.”¹⁰¹

⁹⁹EC SWS, para. 373.

¹⁰⁰EC SWS, paras. 333, 336-339.

¹⁰¹See U.S. SWS, paras. 342-345 (Hamburg); U.S. FWS, para. 459 (Toulouse); U.S. Responses to First Panel Questions, paras. 146-147 (Toulouse); U.S. FWS, para. 451 (Bremen); U.S. Responses to First Panel Questions, para. 153 (Bremen).

82. Moreover, the EC’s “two-step approach” to analyzing the provision of infrastructure to Airbus¹⁰² lacks any basis in the text of the SCM Agreement or in common sense. When infrastructure is created expressly for a particular user, such as Airbus, creation of the infrastructure and its subsequent provision to the user cannot be separated from one another and treated as two distinct, unrelated transactions. Further, the government’s investment in creating the infrastructure reflects the savings to the recipient – that is, the benefit – from receiving the infrastructure at a price that ignores that investment. Focusing on this fact does not represent, as the EC asserts,¹⁰³ a cost-to-government approach to analyzing a subsidy.¹⁰⁴

B. Creation and Provision to Airbus of Industrial Site at Mühlenberger Loch is a Subsidy

83. Let me now turn to the question of infrastructure regarding the Mühlenberger Loch in Hamburg. We have already provided the Panel with detailed evidence regarding the creation and provision to Airbus of the A380 assembly site in Hamburg.¹⁰⁵ We will not dwell on this issue except to make a handful of key observations.

84. First, the Panel should note the dramatic shift in the EC’s explanation of what makes the Airbus site in Hamburg general infrastructure, in its view. Originally, the EC argued that the “law on the development of the port” required Hamburg to reclaim the land from the

¹⁰²See EC SWS, paras. 340-341.

¹⁰³See EC SWS, paras. 358-363, 388.

¹⁰⁴See U.S. SWS, paras. 359-361.

¹⁰⁵See U.S. FWS, paras. 423-445; U.S. SWS, paras. 311-371.

Mühlenberger Loch and that “{a}gainst that background, the reclamation of land qualifies as general infrastructure.”¹⁰⁶ That was the EC’s original view. When we confronted the EC with the fact that the Mühlenberger Loch is not covered by the Port Act,¹⁰⁷ it abandoned this argument, asserting that coverage by the Port Act is not, in fact, as relevant as it first contended.¹⁰⁸ Notwithstanding this belated acknowledgment, the EC has yet to address the fact that the Port Act actually had to be amended to accommodate creation of the industrial site for Airbus, confirming that the site is not general infrastructure.¹⁰⁹

85. The EC offers the alternative theory that creation of the site is general infrastructure because it responds to a problem of scarce industrial land in Hamburg.¹¹⁰ We have shown this premise to be irrelevant as well as false.¹¹¹ The EC now tries to bolster its theory with a letter written, conveniently, in the midst of this dispute by the head of an entity controlled by the City of Hamburg.¹¹² However, given the timing and Hamburg’s obvious interest in this matter, that letter is of no evidentiary value.

¹⁰⁶EC FWS, paras. 777-778.

¹⁰⁷See U.S. FOS (non-BCI), para. 80.

¹⁰⁸See EC SWS, para. 347.

¹⁰⁹See U.S. SWS, paras. 326-327.

¹¹⁰See EC Responses to First Panel Questions, para. 227; EC SWS, para. 348.

¹¹¹See U.S. SWS, paras. 318-320.

¹¹²See Exhibit EC-610.

86. In any event, the EC now admits that the filling of the Mühlenberger Loch wetland was done precisely “to accommodate the A380 {assembly line}.”¹¹³ The evidence indeed shows this to be the case without a doubt: Under EC and German law, the reclamation of the protected wetlands would not have been permitted but for Airbus’s specific need; Airbus has a 30-year exclusive right to use of the land; the “land construction plan” adopted by the City of Hamburg designates the land exclusively for an aircraft factory and air traffic; and inadequate access would make it impractical to use the land other than as an extension of Airbus’s existing site.¹¹⁴

87. Finally, the EC makes the remarkable assertion that the Hamburg site does not confer a benefit on Airbus because, absent the government’s investment, Airbus would not have invested its own Euro 693 million (according to the EC) to create the land, but instead would have put the A380 assembly line elsewhere, where it would have offered “market-based rent.”¹¹⁵ This speculation is factually doubtful, due in part to Airbus’s need to locate the line next to its existing facility.¹¹⁶ But more fundamentally, there is no basis for the suggestion that Airbus did not receive a benefit simply because it might have made a different location choice if the government had not provided the Hamburg site to it.

¹¹³EC SWS, para. 1083.

¹¹⁴See U.S. SWS, paras. 333-349.

¹¹⁵EC SWS, para. 357.

¹¹⁶See Realisierungsgesellschaft Finkenwerder mbH (ReGe), A380-Werkserweiterung im Mühlenberger Loch - eine Bilanz, p. 10 (“A requirement for finding suitable sites . . . was immediate proximity to the existing aircraft production facility in Hamburg-Finkenwerder. This is the only place where the synergies with the existing final assembly plant . . . could be utilized.”) (Exhibit US-182).

**C. Creation and Provision to Airbus of Industrial Site And Related
Infrastructure in Toulouse is a Subsidy**

88. Let me turn now to the infrastructure that French authorities created and provided to Airbus in Toulouse. Like its argument on Hamburg, the EC’s argument on Toulouse suffers from the EC’s overly-broad understanding of what constitutes “general infrastructure.”¹¹⁷

(1) AéroConstellation Site is Not General Infrastructure

89. As the Panel will recall, the issue in Toulouse concerns the conversion of agricultural land into an industrial site, known as the AéroConstellation site. The government of Grand Toulouse provided the site to Airbus at a price that took no account of the roughly Euro 200 million invested to develop the site and make road improvements necessitated by the site. Its provision of this infrastructure to Airbus thus conferred a benefit on Airbus in the form of a substantial saving of costs Airbus otherwise would have had to incur itself. The site is considered a “zone d’aménagement concertée” or “ZAC” under French law. Rather than discuss the AéroConstellation site in particular, the EC tries to build an argument based on the functions of ZACs in general.¹¹⁸ However, the U.S. claim is not about ZACs in general; it is about the AéroConstellation site in particular.

¹¹⁷See, e.g., EC SWS, paras. 377, 389.

¹¹⁸EC SWS, paras. 376-380.

90. The EC makes the related argument that the AéroConstellation site is general infrastructure because “{it} is part of a large network of ZACs located across France.”¹¹⁹ That argument amounts to characterizing the AéroConstellation site based on nothing more than its association with other sites that are subject to the same legal arrangement. Following this logic, an industrial site that is not general infrastructure on its own magically becomes general infrastructure simply because it was created under legal authority used to create other sites elsewhere in the Member’s territory. This theory finds no support in the SCM Agreement.

91. The EC’s desire to avoid focusing on the AéroConstellation site in particular is understandable. Doing so makes clear that it is not general infrastructure but infrastructure for Airbus and Airbus suppliers. The site was created specifically as a location for Airbus’s A380 facilities. As the City of Blagnac explains on its website: “This site was proposed by the local communities to accommodate the A380 assembly plant when Airbus was looking for the best site for setting up the plant.”¹²⁰ Moreover, the site’s use is expressly limited to the aeronautics industry, and, in fact, it is used almost exclusively by Airbus and its suppliers.¹²¹

92. As with the Hamburg infrastructure, the EC argues that the benchmark for determining whether the provision of the AéroConstellation site to Airbus is a subsidy should be the market price for improved land. That is, according to the EC, the benchmark should exclude the

¹¹⁹EC SWS, para. 389; *see also id.*, para. 394.

¹²⁰“AéroConstellation, nid de l’A380,” available at www.mairie-blagnac.fr (Exhibit US-640).

¹²¹*See* U.S. FWS, paras. 457-462; U.S. Responses to First Panel Questions, paras. 141-147.

government's investment into making the land into an industrial site.¹²² But that argument assumes that the site was general infrastructure in the first place. For the reasons we have discussed, it was not. The French authorities created the site expressly for Airbus. A private owner of land that prepared the land for a particular buyer would not exclude the value it had invested in development from its selling price. Yet, that is exactly what the government of Grand Toulouse did in providing the AéroConstellation site to Airbus. As the government provided the land for less than adequate remuneration based on a market benchmark, it conferred a subsidy on Airbus.

(2) *Road Improvements Necessitated by Creation of AéroConstellation Site Are Not General Infrastructure*

93. Finally, regarding what the French authorities call “the road work related to the AéroConstellation industrial site,”¹²³ the EC accuses the United States of “shift[ing] its theory” by focusing on only two overpasses and two traffic circles.¹²⁴ But we have done no such thing. From the beginning and throughout this dispute, the United States has challenged improvements to existing roads that became necessary as a result of preparing the AéroConstellation site for Airbus.¹²⁵

¹²²See EC SWS, paras. 387-392.

¹²³Conseil Général de la Haute-Garonne, Les autres voies de circulation, available at <http://www.cg31.fr/actioncg31.asp?id=31> (“Les aménagements routiers d’accompagnement de la zone d’activité d’Aéroconstellation”) (Exhibit US-203).

¹²⁴EC SWS, para. 370.

¹²⁵See U.S. FWS, paras. 481-484; U.S. Responses to First Panel Questions, paras. 149-151.

94. With respect to the RD 901 overpasses, the EC accuses the United States of trying to “have it both ways,” by challenging the improvements both as part of the French road system and as part of the AéroConstellation site.¹²⁶ But this is not so. It does not matter whether the Euro 17 million worth of construction work undertaken to relocate the RD 901 through and beneath the AéroConstellation site (including the underpasses and overpasses) are analyzed as integral parts of the AéroConstellation site or as separate, non-general infrastructure triggered by the construction of that site. Either way, this work was not undertaken to create general infrastructure, but was specifically related to the AéroConstellation site.

95. Regarding improvements to the RD 902 and RD 963, the EC misrepresents the U.S. argument. The key factor is not that the roads are used more often by Airbus than by others.¹²⁷ Rather, the improvements are not general infrastructure because they were undertaken expressly to provide access to the AéroConstellation site for Airbus and its suppliers.¹²⁸

96. We are now going to leave the subject of infrastructure, but before doing so, I should mention that we have not discussed the Bremen runway extension or the Welsh grant for Airbus’s Broughton facility, because these are addressed fully in our recent submissions,¹²⁹ and the EC’s second submission has added nothing new on the subject.¹³⁰ The same is true for the

¹²⁶EC SWS, para. 372.

¹²⁷See EC SWS, para. 373.

¹²⁸See U.S. FWS, paras. 481-485; U.S. Responses to First Panel Questions, para. 150.

¹²⁹See U.S. Responses to First Panel Questions, paras. 152-161 (Bremen); U.S. SWS, paras. 415-419 (Bremen), 425-430 (Broughton).

¹³⁰See EC SWS, paras. 365-367, 408-410.

German and Spanish infrastructure-related grants. The EC continues to rest its defense entirely on an assertion of no specificity.¹³¹ That argument relies on a construction of the regional specificity provision in Article 2.2 of the SCM Agreement that would render it redundant with Articles 2.1(a) and 8.2(b) and that is not even followed in EC countervailing duty law. We have addressed this issue fully in our second submission,¹³² and the EC has offered no new argument.

VI. EQUITY INFUSIONS

97. Mr. Chairman, members of the Panel, I will now turn now to the issue of French and German equity infusions.

A. French Equity Infusions Provided Subsidy to Airbus

98. As the Panel may recall, the French government made two sets of equity infusions to Aérospatiale that are at issue in this dispute. The first consisted of a series of investments from 1987 to 1993, and the second consisted of the government's transfer to Aérospatiale of its interest in the Dassault aviation company in 1998. In both cases, the transactions were inconsistent with the "usual investment practice . . . of private investors," which both parties agree is the relevant standard here.¹³³ Given a financial state of affairs that led even the company's chairman to describe Aérospatiale as "repellent" from an investor's point of view,¹³⁴ a private investor would not have made the investments the government made in the 1987 to

¹³¹See EC SWS, paras. 399-407.

¹³²See U.S. SWS, paras. 372-396; U.S. FOS (non-BCI), paras. 90-94.

¹³³SCM Agreement, Article 14(a).

¹³⁴*EC to review France's Aérospatiale capital injection*, Aerospace Daily, at 217-218 (Feb. 9, 1994) (Exhibit US-275) (discussed in U.S. FWS, para. 558).

1993 period. The situation by the time of the Dassault share transfer was no better.¹³⁵ As the government provided Aérospatiale with equity that a private investor would not have provided, the company received a benefit and thus a subsidy. The EC’s response does not rebut the U.S. *prima facie* case.

(1) *1987 - 1993 Equity Infusions Were Not Consistent With Usual Investment Practice of Private Investors*

99. Now, the EC accuses the United States of “ignor{ing}” “contemporaneous, objective evidence” of what it asserts to be Aérospatiale’s “positive future prospects” at the time of the 1987 to 1993 equity infusions. Then, over the space of eight pages, it lists the evidence that the United States supposedly “ignore{d}.”¹³⁶ Then, over the space of eight pages in its latest submission, the EC lists the evidence that the U.S. supposedly ignored. In fact, this evidence was neither ignored, nor is it “objective,” nor does it demonstrate Aérospatiale’s “positive future prospects.”

100. The evidence to which the EC refers was not “ignore{d},” because it was not even provided until the EC filed its second submission. When the Panel reviews the documents cited at paragraphs 534 and 535 of the EC’s second submission, it will see that the overwhelming majority were newly provided as part of that very submission. In this connection, we recall that under the Panel’s Working Procedures, the parties were required to “submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence

¹³⁵See U.S. FWS, paras. 610-612.

¹³⁶EC SWS, paras. 534-535.

necessary for purposes of rebuttals or answers to questions.”¹³⁷ The evidence at issue plainly was not submitted “for purposes of rebuttals,” or answers to questions, for that matter. The EC itself characterizes the evidence as elements of its case in chief that the United States allegedly ignored. As this evidence was untimely submitted, the Panel should pay it no regard.

101. In any event, the evidence the EC cites hardly can be characterized as “objective.” It consists almost entirely of internal documents from Aérospatiale and Airbus GIE, as well as the French state-owned bank Crédit Lyonnais, all of which had an obvious interest in expressing optimistic views about the company’s prospects.

102. The EC also cites documents from Boeing containing optimistic projections about the future of the airline industry. But this only highlights another problem in the EC’s argument, which is its focus on demand for aircraft in general, rather than the prospects for Airbus in particular. The fact that the future of the aircraft market may have looked good to a private investor does not mean that investing in Airbus in particular – as opposed to one of Airbus’s peers with stronger financial ratios or a company supplying customers in the aircraft industry – was consistent with the usual investment practice of private investors.

103. Further, the EC continues to assert the illogical view that if Aérospatiale’s management believed new investment to be “imperative,”¹³⁸ then giving the company an infusion of new

¹³⁷Working Procedures for the Panel, para. 15.

¹³⁸EC SWS, para. 531.

capital was consistent with the usual investment practice of private investors. But, private investors with virtually unlimited ways to dispose of their capital do not make investments in particular companies simply because management believes the need for new capital to be “imperative.”¹³⁹

104. Finally, we previously called attention to the absence of any evidence of contemporaneous studies or analyses by the French government on the investment prospects of Aérospatiale.¹⁴⁰ The EC responds that in analyzing a government equity infusion, there is no need to show that a government relied on “objective, contemporaneous evidence” as long as it is shown that such evidence existed.¹⁴¹ Apart from the fact that the evidence to which it refers is not “objective,” the EC acknowledges that the relevant standard is ““the usual practice of private investors.””¹⁴² Analyzing “practice” entails more than simply noting that certain evidence happened to exist when an investment was made.

(2) *1998 Dassault Share Transfer Was Not Consistent With Usual Investment Practice of Private Investors*

105. Turning to the French government’s 1998 transfer to Aérospatiale of its shares in Dassault, the EC’s principal argument is that this transaction was not economically significant, because the government was simply consolidating two assets, and “{its} interest in both assets

¹³⁹See U.S. Responses to First Panel Questions, paras. 183-184; U.S. SWS, paras. 472-474.

¹⁴⁰See, e.g., U.S. Responses to First Panel Questions, para. 174.

¹⁴¹See EC SWS, para. 544.

¹⁴²EC SWS, para. 520 (quoting SCM Agreement, Art. 14(a)) (emphasis added).

remained the same.”¹⁴³ The fallacy in this argument is that it assumes that the relevant perspective is that of the French government. It is not. The relevant perspective is that of Aérospatiale, which unquestionably received a valuable asset for which it paid nothing.¹⁴⁴

106. As for the EC’s argument that France ultimately was compensated for its contribution of the Dassault shares to Aérospatiale,¹⁴⁵ we refer the Panel to the report by corporate finance and investment expert Lauren D. Fox, submitted with our second submission, which demonstrates that this was not the case.¹⁴⁶

B. German Equity Infusions Provided Subsidy to Airbus

107. Let me change focus now to the German equity infusions. The Panel may recall that in 1989, as part of a broader restructuring package, the German state bank KfW purchased a 20 percent stake in Deutsche Airbus for DM 505 million. It was agreed that MBB, which was purchased by Daimler-Benz, would buy this stake back from KfW by 1999. However, this return of shares was accelerated to 1992, following issuance of the Subsidies Code panel report finding a different element of the 1989 restructuring package – that is, an exchange rate insurance scheme – to be a prohibited export subsidy.

¹⁴³EC SWS, para. 552.

¹⁴⁴See U.S. SWS, paras. 481-482.

¹⁴⁵See EC SWS, paras. 557-563.

¹⁴⁶See Lauren D. Fox, 1998 Dassault Share Transfer Valuation Report (Exhibit US-595 (HSBI)); U.S. SWS, paras. 484-486.

108. We have shown both the original investment by KfW and the 1992 return of shares to be inconsistent with the usual investment practice of private investors.¹⁴⁷ With regard to the return of shares, we note that the EC has yet to provide any explanation of why both Daimler and Peter Carl, then-Director General for Trade at the European Commission, described the transaction as compensation for the withdrawal of the German exchange rate insurance scheme.¹⁴⁸

Additionally, while the EC tries to defend the return of shares on the basis of a valuation by two accounting firms, it still has not provided that valuation. It has provided only a letter stating that a valuation occurred.¹⁴⁹

109. As for KfW's original purchase of Deutsche Airbus shares, the EC's only basis for calling this a commercial transaction is a comparison to a transaction that the EC itself describes as an investment by Daimler in Deutsche Airbus.¹⁵⁰ In fact, Daimler did not make a direct investment in Airbus; it made an investment in MBB, a company that had a large defense portfolio in addition to its stake in Airbus. MBB, in turn, provided an equity infusion to Deutsche Airbus, which was its wholly-owned subsidiary.¹⁵¹

110. More fundamentally, contrary to the EC's portrayal, Daimler's investment was not independent of the German government's equity infusion such that it might corroborate the

¹⁴⁷See U.S. FWS, paras. 543-556; U.S. Responses to First Panel Questions, paras. 206-212; U.S. SWS, paras. 447-462.

¹⁴⁸See U.S. Responses to First Panel Questions, paras. 210-211.

¹⁴⁹See EC SWS, para. 601.

¹⁵⁰See EC SWS, para. 605.

¹⁵¹See U.S. SWS, para. 453.

commercial nature of the infusion. The evidence shows the very opposite to be true. As Deutsche Airbus was “on the verge of insolvency,”¹⁵² Daimler insisted that, as a precondition for its investment, the government provide Airbus a long-term aid package, of which the equity infusion was a part. The government did not make its infusion “following the financial restructuring of Deutsche Airbus,” as the EC now alleges,¹⁵³ it did so as an integral part of that restructuring.¹⁵⁴

111. Accordingly, the EC has failed to rebut our demonstration that the German equity infusions were not consistent with the usual investment practice of private investors and therefore, like the French infusions, constitute subsidies.

VII. GERMAN GOVERNMENT FORGIVENESS OF DEUTSCHE AIRBUS DEBT

112. Mr. Chairman, members of the Panel, we will continue our discussion of the German government’s subsidization of Deutsche Airbus by addressing the 1998 transaction in which the government released the company from a DM 9.4 billion debt following payment of a lump sum of DM 1.7 billion, thus leaving Airbus with a DM 7.7 billion benefit.

113. Now as you know, the EC disputes the characterization of Airbus’s obligation to the German government in 1998 as “debt,” based on the fact that the obligation to pay had not yet

¹⁵²EC SWS, para. 564.

¹⁵³EC SWS, para. 608.

¹⁵⁴See EC FWS, para. 1180.

come due at that time.¹⁵⁵ But, the mere fact that the debt had not yet reached maturity does not make it something other than debt. Accordingly, the government's agreement to extinguish Airbus's obligation upon payment of a fraction of that obligation is debt forgiveness.

114. The EC says that the 1998 transaction was not debt forgiveness but, rather, the conversion to present value of Airbus's future obligation to the government, which, according to the EC, did not confer a new benefit on Airbus.¹⁵⁶ The EC is wrong. As the EC itself recognizes, the transaction was the result of a negotiation, not simply the transformation of an existing measure through rote application of a mathematical formula.¹⁵⁷ The consequence of that negotiation was that, rather than enjoying a smaller and unknown benefit stream over an extended period of time, Airbus received a large, one-time benefit of DM 7.7 billion.

115. The benefit to Airbus of this lump sum financial contribution is substantially different from the smaller and uncertain recurring benefit it might have received if the underlying debt had remained in place. This is obvious when considered from the point of view of Airbus's balance sheet. The immediate elimination of a DM 7.7 billion debt from its books is equivalent to receiving a cash grant in that amount, which can be used for current investment in a way that smaller increments of benefit that might be received in the future cannot.

¹⁵⁵EC SWS, paras. 567-570.

¹⁵⁶See EC FWS, para. 1176.

¹⁵⁷See EC SWS, para. 565.

116. The EC tries to belittle this particular benefit to Airbus, asserting that it was “neutralise{d}” through the discount rates and other assumptions made in valuing Airbus’s debt.¹⁵⁸ However, for an ongoing enterprise, the 1998 settlement removed considerable doubt, turning an uncertain future benefit into a substantial, definitive present benefit.¹⁵⁹

117. Additionally, the EC argues that the real focus of the U.S. challenge is not the 1998 debt settlement but the underlying 1989 arrangement, and that a challenge to that arrangement is outside the Panel’s terms of reference.¹⁶⁰ The EC’s characterization of the U.S. claim is incorrect. But, even if it were correct, a challenge to the 1989 arrangement is within the Panel’s terms of reference. As we explained in our second submission, the U.S. panel request unmistakably refers not only to the German government’s “forgiveness” of debt owed by Deutsche Airbus but also to its earlier “assumption . . . of . . . debt accumulated by Deutsche Airbus,” which is the substance of the 1989 arrangement.¹⁶¹

118. In sum, in 1998, the German government forgave DM 7.7 billion in debt owed to it by Airbus, and thus conferred a subsidy. Even if that transaction is characterized other than as debt forgiveness – as the EC mistakenly suggests – it still conferred a benefit on Airbus and still is a subsidy.

¹⁵⁸EC SWS, para. 576.

¹⁵⁹See U.S. SWS, paras. 433-434.

¹⁶⁰See EC SWS, paras. 585-591.

¹⁶¹U.S. SWS, paras. 436-438.

VIII. EUROPEAN INVESTMENT BANK LOANS

119. We will now address the last category of subsidies at issue – that is, loans to Airbus from the European Investment Bank (“EIB”). In our previous submissions and statements, we showed that these loans were provided at below-market rates, and therefore confer a benefit on Airbus, making them subsidies. We also showed that they are specific within the meaning of Article 2 of the SCM Agreement. The EC contests our showing of both the benefit conferred and specificity.

A. EIB Loans Confer a Benefit on Airbus

120. We will speak first to the issue of benefit. The EIB itself admits that “{b}eing a not-for-profit institution, the Bank passes on the benefits {of its ability to raise funds at advantageous rates} to its clients in the form of loans at fine rates.”¹⁶² In an attempt to counter this admission, the EC makes an argument about international lending institutions in general, grouping the EIB together with “these institutions.”¹⁶³ But the U.S. claim is not about international lending institutions in general. It is about the EIB in particular. It is not the United States that is making “sweeping generalizing conclusions,” as the EC asserts.¹⁶⁴ It is the EC that is doing so in trying to hold the EIB to a different standard than that set forth in Article 1 of the SCM Agreement by virtue of the EIB’s status as a particular type of lending institution.

¹⁶²EIB, FAQs, Projects & Loans at 1-2, <http://www.eib.org/faq/faq.asp?faq=65> (emphasis added) (Exhibit US-160). *See also* U.S. FWS, paras. 398-402.

¹⁶³EC SWS, para. 411.

¹⁶⁴EC SWS, para. 414.

121. Apparently recognizing that the EIB’s status as an international lending institution does not exclude its loans from SCM Agreement rules, the EC goes on to argue that “just because the EIB does not seek to maximize profits” does not mean that its loans are subsidies.¹⁶⁵ However, it is the very fact that “the EIB does not seek to maximize profits” that distinguishes its loans from the relevant benchmark – the returns that a market-based lender would demand. In this connection, the EC’s discussion of *Korea – Commercial Vessels* is illogical. Our point in that dispute was that it is possible for a lender to earn a profit and yet still offer rates that are below-market. This does not mean, as the EC suggests, that the lender’s profitability or lack thereof is generally and always “irrelevant” to a benefit analysis.¹⁶⁶

122. The EC also tries to erase the benefit conferred by EIB loans by vaguely alluding to hypothetical “other lending conditions” that “can . . . outweigh {}” “{a}n advantageous interest rate.”¹⁶⁷ It refers to various unquantifiable administrative burdens, but specifies no evidence to substantiate its allegation. Nor does the EC demonstrate that the transactional costs associated with EIB borrowing are any higher than the transactional costs associated with a bond offering or other commercial borrowing.¹⁶⁸

¹⁶⁵EC SWS, para. 487.

¹⁶⁶EC SWS, para. 489.

¹⁶⁷EC SWS, para. 492 (emphasis added)

¹⁶⁸See EC SWS, paras. 498-499.

123. Finally, the EC’s belief that loans for which the face amount has been repaid cease to confer benefits and cause adverse effects¹⁶⁹ ignores that those loans were below market, and so the subsidy element has not been repaid. Those subsidies support the development and production of planes that Airbus continues to produce and sell today.¹⁷⁰ Moreover, the EC’s argument restates its mistaken understanding of “pass-through,” which I discussed earlier in connection with the U.S. claims concerning research and development grants, and reflects a fundamental misunderstanding of our adverse effects argument, as my colleague, Mr. Yocis, will discuss shortly.

B. EIB Loans Are Specific

124. Let me turn now to the question of specificity. We previously have shown that the 2002 loan provided to EADS for the A380 under the EIB’s Innovation 2000 Initiative (“i2i”) and the various loans provided to Airbus from 1988 to 1993 are specific within the meaning of Article 2 of the SCM Agreement. In each case, the loans are discretionary, “individual” loans that are disproportionately large.¹⁷¹ The EC disputes this, contending that the loans are neither *de jure* nor *de facto* specific, and even going so far as to argue that they are *de jure* non-specific.

125. With respect to *de jure* specificity, the EC asserts that the EIB loans to Airbus are sufficiently similar to other loans granted by the EIB that they cannot be considered subsidies

¹⁶⁹See EC SWS, paras. 481-484.

¹⁷⁰See U.S. Responses to First Panel Questions, paras. 127-129.

¹⁷¹See U.S. FWS, paras. 405-406, 417-420; U.S. Responses to First Panel Questions, paras. 84, 92-102, 103-107; U.S. SWS, paras. 280-297.

that are specific within the meaning of Article 2.1(a) of the SCM Agreement.¹⁷² However, the EC has provided no evidence to demonstrate this. Belatedly, the EC has provided contracts for the EIB loans to Airbus that it had withheld since the Annex V Facilitator first requested them.¹⁷³ However, it has provided no evidence that could meaningfully serve as a basis against which to compare those loans. It has provided only general information about how the EIB operates.¹⁷⁴ Accordingly, the EC has not rebutted the U.S. demonstration that the EIB’s discretionary, individual loans to Airbus are *de jure* specific.

126. Nor has the EC shown that the loans are *de jure* non-specific within the meaning of Article 2.1(b) of the SCM Agreement. The EC’s own description of the multiple layers of review that must be completed in order for the EIB to make a loan shows that eligibility for these subsidies is anything but “automatic” within the meaning of Article 2.1(b).¹⁷⁵

127. This then brings us to the question of *de facto* specificity. The EC maintains that for a *de facto* specificity analysis under Article 2.1(c), the EIB loans to Airbus must be analyzed in comparison to all the lending activity of the EIB over its entire 50-year history.¹⁷⁶ It reasons that Article 2.1(c) requires an analysis of particular subsidies relative to the program under which

¹⁷²See EC SWS, paras. 417-424.

¹⁷³See *Replies to Questions by the Facilitator under Annex V of the SCM Agreement by the European Communities* (Nov. 18, 2005), Q82(b) (Exhibit US-5 (BCI)).

¹⁷⁴See EC SWS, para.

¹⁷⁵See U.S. SWS, paras. 283-293.

¹⁷⁶See, e.g., EC SWS, para. 478.

they are granted, and that the program in the case of the EIB loans is all EIB lending that ever took place, going all the way back to 1957.¹⁷⁷

128. However, while Article 2.1(c) does refer to a “subsidy programme,” it does not require that a subsidy be provided under the auspices of a program in order to be specific. Moreover, the EC never explains its understanding of the term “program” or why all the lending activity of the EIB over its entire history should be considered a program for the analysis at hand. Nor does the EC ever grapple with the problem that under its view, the longer a subsidy-granting institution is in existence the less likely it is that any subsidies it provides will be specific, even though particular subsidies may well be disproportionately large relative to other subsidies granted during the same distinct periods.¹⁷⁸

129. Ironically, although the EC asserts without any explanation that five decades of EIB activity constitutes a single program, and that this is an appropriate frame of reference for analyzing whether particular loans are specific, the EC faults the United States for proposing as a frame of reference something that the EIB itself actually called a program – that is, the i2i program.¹⁷⁹ The i2i program is an appropriate frame of reference not only because the EIB

¹⁷⁷See EC SWS, paras. 434-436.

¹⁷⁸See U.S. Responses to First Panel Questions, paras. 85-87.

¹⁷⁹See EC SWS, para. 445.

called it a program, but also because it involved a “dedicated” amount of money loaned over a period of time with starting and ending points prescribed by the EIB.¹⁸⁰

130. The EC’s criticism of the i2i program as a frame of reference is seriously flawed, as a few key examples will illustrate. First, the EC attempts to show that if the i2i program had not existed, the 2002 loan to EADS would not have been specific under the U.S. approach. However, this hypothesis is entirely speculative.¹⁸¹ Second, the EC’s attempt to show that i2i did not involve a “dedicated” amount of money also fails, as the document it quotes for this proposition states simply that the i2i did not entail an increase in the EIB’s “volume of finance.”¹⁸² Third, the EC misleadingly tries to magnify the total amount of lending under the i2i program, and thus dilute the significance of the loan to EADS, by referring to all lending by the EIB Group – not the EIB itself, but the EIB Group, which, in addition to the EIB itself, includes a venture capital fund.¹⁸³ These and other errors in the EC’s argument further undermine its attempt to counter use of the i2i program for assessing the specificity of the EIB’s 2002 loan to EADS.

131. The EC makes similar errors in its criticism of the U.S. approach to assessing the specificity of the 1988 to 1993 EIB loans to Airbus. For a specificity analysis of these loans, it is

¹⁸⁰*The Innovation 2000 Initiative, Actively promoting a European economy based on knowledge and innovation*, European Investment Bank, at 3 (Exhibit US-154); *see also* U.S. Responses to First Panel Questions, paras. 84, 92-102.

¹⁸¹*See* EC SWS, paras. 439-443.

¹⁸²*The Innovation 2000 Initiative, Actively promoting a European economy based on knowledge and innovation*, European Investment Bank, at 3 (Exhibit US-154) (discussed in EC SWS, paras. 445-447).

¹⁸³*See* EC SWS, para. 450.

appropriate to consider how the EIB itself classified its lending activity during the period at issue – notably, according to economic sector and lending objective.¹⁸⁴ As with the 2002 loan, the EC disparages this approach, but still offers no rationale for its approach of examining all lending by the EIB over the course of 50 years.¹⁸⁵

132. In sum, the aim of a specificity analysis under Article 2.1(c) of the SCM Agreement is to determine whether subsidies “may in fact be specific.” Determining what is occurring “in fact” requires use of a frame of reference that is appropriate under the circumstances. The United States has proposed such a frame of reference for each of the EIB loans under consideration – based on how the EIB itself describes its lending activity – and has shown that each of the loans is “in fact” specific. The EC, on the other hand, has proposed one frame of reference, which it believes to be applicable in all circumstances, which entails comparing each loan to the broadest conceivable level of activity of the EIB, and which would have the anomalous result of allowing the EIB to avoid findings of specificity simply by virtue of the length of time it has been in existence. As this approach lacks any support in the SCM Agreement, the Panel should reject it.

IX. SUBSIDIES TO AIRBUS HAVE NOT BEEN EXTINGUISHED OR EXTRACTED

133. Mr. Chairman, members of the Panel, I am now going to move to the topic of extinction, or what the EC calls extinguishment or extraction. The Panel may recall that in its first submission, the EC explained that it would “describe{} the successive steps taken by

¹⁸⁴See U.S. Responses to First Panel Questions, paras. 103-107.

¹⁸⁵See EC SWS, para. 478.

stakeholders to create Airbus SAS” in order to demonstrate that “these transactions” extinguished subsidies.¹⁸⁶ Now, the EC seems to have abandoned that undertaking, asserting that it “has not taken” the position that subsidy extinction was the result of “transactions related to the establishment of Airbus SAS,” but that it was the result only of particular transactions identified only in response to a question by the Panel after the first meeting.¹⁸⁷

134. This is not the only way in which the EC’s “extinction” and “extraction” defense has evolved. Whereas previously the EC relied heavily on findings in panel and Appellate Body reports,¹⁸⁸ it now simply asserts that the principles articulated in those reports are “extendable.”¹⁸⁹ And, in its second written submission, the EC does not even attempt to defend its so-called “extraction” theory any longer.¹⁹⁰

135. The EC continues to ignore that when transactions have been found to extinguish subsidies in past disputes, those transactions were not only at arm’s length and for fair market value, but also involved the transfer of all or substantially all of the assets of the subsidized entity and relinquishment of control by the seller. Relatedly, the EC fails to address the logical implications of its argument for subsidies to publicly traded companies. Because, in the EC’s view, any arm’s-length, fair market value transaction – no matter how small – extinguishes

¹⁸⁶EC FWS, para. 196.

¹⁸⁷EC SWS, para. 96.

¹⁸⁸EC FWS, paras. 198-219.

¹⁸⁹EC SWS, para. 96.

¹⁹⁰*Compare* EC FWS, paras. 220-225 (setting out “extraction” theory) *with* EC SWS, paras. 89-106 (omitting any discussion of “extraction”).

previously granted subsidies, it would seem that where shares in a company are constantly traded on public exchanges, subsidies to that company would constantly be extinguished. Of course, this would constitute a major loophole in the SCM Agreement as it applies to public companies.

136. We refer the Panel to our prior submissions for further discussion of the flaws in the EC's extinction and extraction arguments, none of which have been remedied in the EC's second written submission.¹⁹¹ At this point, Mr. Chairman and members of the Panel, I will turn to my colleague, Mr. Yocis, to continue our statement with respect to adverse effects.

X. ADVERSE EFFECTS

137. Mr. Chairman, members of the Panel, as with other issues in this dispute, the EC largely does not contest the fundamental facts and arguments that the United States has made in support of our adverse effects claims. Instead, the EC develops a long series of side issues, misstatements, and rebuttals of arguments that the United States has not made. Once these diversions are set aside, it is remarkable how little of the U.S. demonstration of the existence of adverse effects and the causal link between them and the subsidies has been even responded to by the EC, much less contradicted.

¹⁹¹See, e.g., U.S. Responses to First Panel Questions, paras. 109-122, 321-348, 376-385; U.S. SWS, paras. 520-555.

A. The Serious Prejudice Is Present and Actionable

138. What we have demonstrated is this: the EC and the Airbus governments have, through the use of Launch Aid, both alone and together with other subsidies, caused adverse effects to the interests of the United States. These adverse effects have been caused over a period of many years, continuing through the time of the establishment of this Panel in 2005 and beyond.

139. As with other elements of the U.S. claims, the key facts are not seriously disputable. First, Airbus increased its share of the world LCA market from 39 percent in 2001 to 57 percent in 2005, and has maintained most of these gains in 2006 and so far in 2007.¹⁹² This increase is reflected in the U.S. market, the EC market, and third-country markets, both individually and collectively. Second, Boeing lost significant sales to Airbus during this period, with a number of key customers choosing Airbus LCA over Boeing LCA in head-to-head competitions worth billions of dollars, often as a result of demonstrable price undercutting by Airbus.¹⁹³ Third, the prices that Boeing has been able to receive for the LCA that it did sell during this period have fallen, or failed to increase in keeping with inflation, and largely have not recovered to this day.¹⁹⁴ None of these facts, as such, are disputed by the EC.

140. In addition, the EC concedes that the launches of the A300, A310, A320, A330, and A340 – that is, the base model for every LCA that Airbus has ever delivered to a customer –

¹⁹² U.S. FWS, para. 705 & Table 1; U.S. Answers to First Panel Questions, para. 286.

¹⁹³ U.S. FWS, paras. 777-796.

¹⁹⁴ U.S. FWS, paras. 804-808 & Figures 4-7.

would not have occurred, at least not when and how it did, if the Airbus governments had not provided Launch Aid or other subsidies.¹⁹⁵ Nor has the EC contested the accuracy of the calculation by Deutsche Bank, discussed at the first panel meeting, showing that net Launch Aid disbursements from the Airbus governments significantly improved the cash flow of EADS, the parent company of Airbus, during the relevant period.¹⁹⁶

141. Nor does the EC even attempt to rebut that these facts demonstrate the existence of adverse effects over the 2001-2005 period. Instead, the EC argues only that the U.S. claim relates only to the *past* effects of the subsidy, rather than their *present* effects.¹⁹⁷ Likewise, the EC's response to the U.S. showing of material injury focuses almost exclusively on whether the improvement in Boeing's financial performance *after* the establishment of the panel precludes a finding of "present" material injury.¹⁹⁸

142. The EC's exclusive focus on events subsequent to the establishment of the Panel is both wrong on the facts and an incorrect legal characterization of the matter that has been entrusted to the Panel. It is in no way a rebuttal of the U.S. *prima facie* case.

¹⁹⁵ U.S. FOS, para. 129; *cf.* EC SWS, paras. 763 (disputing only that launches of some derivatives and the A380 would have occurred but for Launch Aid).

¹⁹⁶ U.S. FOS, para. 160 (citing Deutsche Bank, *EADS: Risks Mispriced – Downgrade to Sell*, Jan. 9, 2007, at 7 (Exhibit US-459)).

¹⁹⁷ *E.g.*, EC SWS, paras. 679-697.

¹⁹⁸ *E.g.*, EC SWS, paras. 1175-1192.

143. As a factual matter, the EC is incorrect to allege that the 2001-2005 period does not reflect “current” conditions of competition or current realities in the market.¹⁹⁹ Airbus gained significant market share from 2001 to 2005, and maintained most of those gains in 2006 and the first part of 2007.²⁰⁰ The sales lost to Airbus in the 2001-2005 period are still resulting today, in 2007, in deliveries by Airbus rather than Boeing, and they have led directly to new sales by Airbus to many of those same customers.²⁰¹ And, despite two consecutive years of extraordinarily high demand, LCA prices did not recover in 2006.²⁰²

144. If the period 2001-2003 was, as the EC claims, an aberration – as opposed to a normal down cycle in a naturally cyclical industry – then one would have expected that the market share shifts in favor of Airbus that occurred during those years would have reverted back by now. They have not. To the extent that some of the indicators of serious prejudice were mitigated somewhat in 2006, the evidence indicates that this was due, in large part, to temporary technical problems with A380 production and A350 design during 2006 rather than a reduction in the effects of the subsidies.

145. In any event, during the first half of 2007, Airbus once again surpassed Boeing in the number of firm orders it has received, accounting for 57% of LCA orders in the first six months

¹⁹⁹ See, e.g., EC SWS, para. 656; EC Answers para. 330.

²⁰⁰ U.S. SWS, para. 662.

²⁰¹ E.g., U.S. Answers to First Panel Questions, para. 272.

²⁰² U.S. SWS, paras. 724-729.

of this year.²⁰³ This strong performance is yet another fatal blow to any argument by the EC that the adverse effects shown to have existed in the 2001-2005 period are a thing of the past.

According to the EC, only very current evidence concerning share of orders, and not data even from the most recent past regarding share of deliveries, truly reflects the “present” state of competition in the market.²⁰⁴ Well, the data are now in, and using the EC’s favored metric – the most recent data on orders – the market share for Airbus is back near its peak level during the 2001-2005 period.

146. In any event, as we have already discussed at length, the legal question before the Panel is whether the EC is causing adverse effects at the time of panel establishment.²⁰⁵ In the *EC – Biotech* dispute, the EC asked that panel to decline to rule on whether an alleged WTO breach had occurred on the grounds that any such breach had ceased to exist after the panel had been established.²⁰⁶ That panel refused the EC request, for reasons that are equally applicable in the present dispute, as the United States has explained.²⁰⁷ Thus, even if the EC had demonstrated that the adverse effects that were manifest in the 2001-2005 period have now ceased to exist – and they have most certainly have not ceased to exist – such a demonstration would not affect the authority or the responsibility of the Panel to rule on the U.S. claim that the DSB has placed before it.

²⁰³ Airclaims database, data query as of July 20, 2007.

²⁰⁴ *E.g.*, EC SWS, para. 1140 (stating that “deliveries alone do not allow for a full assessment of *present* serious prejudice”); EC Answers to First Panel Questions, para. 330 (stating that “the Panel should also rely, where appropriate, on partial year 2007 data, where reasonably available and reliable”).

²⁰⁵ *E.g.*, U.S. SWS, paras. 670-684; U.S. Answers to First Panel Questions, para. 280.

²⁰⁶ *EC – Biotech*, para. 7.1297.

²⁰⁷ U.S. SWS, paras. 673-682.

147. The EC has made no convincing arguments for the Panel to depart from established practice in this regard. The EC asserts that the United States believes that it is enough to show adverse effects in “some historical period,” rather than in the present.²⁰⁸ But the U.S. claim is not about serious prejudice in the distant past, but rather serious prejudice that was “present” when the claim was made – and that, in fact, is still present today. Of course, adverse effects do not occur in an instant, but manifest themselves over time. The Appellate Body has recognized as much.²⁰⁹ This is particularly true in an industry with especially long time horizons, such as the LCA industry. Airbus itself explains that “{n}o single year’s order intake and market share in an industry with such long-term horizons can be taken as an indication of market position.”²¹⁰ Along just those lines, we have demonstrated how the *present* adverse effects of these subsidies have manifested themselves over time, and particularly over the most recent period, taking account of the nature of the subsidies and the industry at issue.

148. The EC tries to find support for its position in the third-party submission of Japan, which argued that panels evaluating claims of adverse effects from subsidies existing before panel establishment may consider evidence that adverse effects have *continued* during the panel

²⁰⁸ EC SWS, para. 681.

²⁰⁹ *US – Cotton Subsidies (AB)*, para. 477 (stating that the SCM Agreement text contemplates that “some time may have passed between the granting of a subsidy and the demonstration of the absence of its effects”).

²¹⁰ Airbus North America Holdings Inc., *Key Determinants of Competitiveness in the Global Large Civil Aircraft Market: An Airbus Assessment* (Mar. 2005), at 11 (Exhibit US-379).

proceeding.²¹¹ It is true that evidence of “continuing adverse effects”²¹² from pre-panel-establishment subsidies could confirm that adverse effects already existed, or were at least threatening to exist, when the panel was established. This is consistent with the view that, while a panel may examine evidence from any period, the fundamental question for a panel in an adverse effects dispute is whether the subsidy was in fact causing or threatening to cause adverse effects at the time the complaining party made its claims. That panels could or would consider such evidence does not support the EC’s radical assertion that panels in disputes under the SCM Agreement, unlike panels in other disputes, are to evaluate the measures or claims as they exist in the “present” rather than as they existed when the panel was established. Neither the EC nor any third party has cited any relevant authorities that support such a proposition; the Panel may also take note of Japan’s comments on this issue in the third-party session.²¹³ The U.S. submissions to the compliance panel in *Cotton*, which the EC continues to misrepresent, also do not support the EC’s position, as we have already explained.²¹⁴

149. Accordingly, the United States has set forth a prima facie case, not rebutted by the EC, that the subsidies have caused, and do cause, adverse effects that are present and actionable under Part III of the SCM Agreement.

²¹¹ EC SWS, para. 694 (citing Japan Third Party Submission, paras. 1, 12-14).

²¹² Japan Third Party Submission, para. 13.

²¹³ Japan Third Party Oral Statement, paras. 8-14.

²¹⁴ EC SWS, paras. 695-696; U.S. SWS, para. 677 n.854.

B. The Subsidized Product is Airbus LCA

150. The parties have also devoted considerable attention to the identity of the subsidized product or products in this dispute. As before, the facts are largely not in dispute. On the one hand, the LCA market is differentiated; a Boeing 737 is not the same size as a Boeing 747, and an Airbus A320 is not the same size as an Airbus A380. At the same time, the different LCA models have the same basic physical structure; the different sizes and ranges are designed to optimize the economics of the various missions for which customers use LCA. Moreover, there are certain commonalities among different LCA models of one manufacturer that result in a degree of synergies for producers and customers. Therefore Airbus and Boeing sell fleets of aircraft, not just individual models. The large majority of sales are to customers that also operate fleets of aircraft. The disagreement between the parties is focused on the legal significance of these facts for the Panel's analysis.

151. The United States has provided the Panel with a summary of at least six ways in which Launch Aid, in particular, provides a benefit to the Airbus LCA family as a whole, and not just to individual models.²¹⁵ We will not repeat that summary here. However, we would draw the attention of the Panel to a very recent order from U.S. Airways that was announced after the last written submissions of the parties, at the Paris Air Show in mid-June. This customer selected 92 aircraft from Airbus, including A320s, A330s, and A350s, over a competing offer from Boeing for 737s and 787s. Press reports quoted Doug Parker, the CEO of U.S. Airways, as explaining that:

²¹⁵ U.S. SWS, paras. 632-640.

the airline had to pick one company for its massive order. “Both suppliers linked narrowbody and widebody orders, so we couldn’t de-link the orders,” said Parker.²¹⁶

Indeed, shortly before the air show, it was reported that:

US Airways wanted to keep the competition for the single- and twin-aisle airplanes separate, but Airbus and Boeing are promoting package deals.²¹⁷

Thus, in this very recent sale, *both* Airbus and Boeing insisted – over the apparent misgivings of the customer – on selling what the EC would call separate LCA products in a “package deal.”

152. Such “package deals” are not isolated or accidental events, but flow directly from the connections among the different LCA models.²¹⁸ Moreover these “package deals,” regardless of their frequency, tend to be of considerable significance for both Airbus and Boeing. For example, the 92 LCA ordered by U.S. Airways alone represent nearly 13 percent of the 718 orders collected by Airbus in the first half of 2007.²¹⁹ Thus, it is undeniable that significant volumes of LCA of different sizes are sold together.

153. It is also undeniable that LCA of different sizes often share the same production facilities, which are sometimes even built with the same subsidies. For example, the A330 and the A340, which the EC considers to be separate subsidized products, were developed at the same time, share common design features and a single production line, and were supported by

²¹⁶ *U.S. Air Deal Highlights Big Day for Airbus Orders*, Aviation Daily, June 19, 2007, at 1 (Exhibit US-641).

²¹⁷ Scott Hamilton, *Paris Air Show preview: Airbus vs. Boeing*, www.lee.ham.net, June 12, 2007, at 1 (Exhibit US-642).

²¹⁸ U.S. Answers to First Panel Questions, paras. 422-428.

²¹⁹ Airclaims database, data query as of July 20, 2007.

the same provision of Launch Aid.²²⁰ This same point is raised by the EC's most recent submission in discussing the Hamburg infrastructure subsidies.²²¹ One of the main reasons given in the public information about the decision to locate A380 production in Hamburg is the efficiencies of combining production facilities for single-aisle A320 family aircraft with that for the A380: "This is the only place where the synergies with the existing A319 and A321 standard fuselage airplanes could be utilized."²²² We will say more on this topic in the confidential session.

154. From the side of the customer as well, we have provided numerous Airbus public documents and statements by Airbus customers attesting to the economic value of commonality among various Airbus models.²²³ In its second submission, the EC attempts to dismiss this evidence as mere marketing hype.²²⁴ But the EC also submits new evidence that confirm the importance of commonality. For example, it submits a document describing a business rationale for launching new derivatives, which in their non-confidential portions state:

Many A310 and A300-600 operators are expressing the need for more range capability and, where they also operate A320s, A330s, or A340s, more commonality with the newer members of the Airbus family. . . .

Failure to launch these derivatives would mean that Boeing would pick up the airline demand and increase its market share. This would happen not only in the narrow

²²⁰ U.S. FWS, paras. 211-233.

²²¹ EC SWS, paras. 1077-1089.

²²² AREA, *A380-Werkserweiterung im Mühlenberger Loch – eine Bilanz*, at 1 (Exhibit US-182).

²²³ U.S. Answers to First Panel Questions, paras. 228-234, 424.

²²⁴ *E.g.*, EC SWS, para. 709.

segment discussed here, but, via commonality and CCQ {common cockpit qualification} issues, would also extend to other market segments.²²⁵

And, of course, these are only some of the factors that we have identified that compel the conclusion that the subsidies have been provided for the Airbus LCA family as a whole.

155. Notwithstanding these facts, the EC insists that, as a legal matter, when each individual item that benefits from a subsidy is not a “like product” to every other such item, then there must be several separate “subsidized products” and, of course, several separate “like products” that correspond to them.²²⁶ This view is wrong, on several levels.

156. First, the EC confuses the definition of the *subsidized product* with the definition of the *like product*. The latter term is defined in the SCM Agreement,²²⁷ but the former is not. Nothing in the text of the SCM Agreement requires that the definition of *like product* must be applied when determining whether two or more items that benefit from a subsidy can be considered as a single *subsidized product*. The EC recites many panel reports applying the concept of the *like product* in the context of the SCM Agreement and other WTO agreements,²²⁸ but never explains why these reports are relevant for the determination of the *subsidized product*. Indeed, as we have explained, the panel in *US – Softwood Lumber Dumping* found that the identical definition

²²⁵ Exhibit EC-776, paras. 4.1, 4.6 (HSBI). Note that the quoted paragraphs of this document have not been designated as HSBI or BCI by the EC.

²²⁶ EC SWS, para. 738; EC Answers to First Panel Questions, paras. 405-406.

²²⁷ SCM Agreement, footnote 46.

²²⁸ E.g., EC SWS, paras. 737-753; EC Answers to First Panel Questions, paras. 403-442.

of “like product” that appears in the Antidumping Agreement has no relevance for determining what may or may not be included in a single “product under consideration.”²²⁹

157. Second, it is well established that a range of related, if not necessarily like, products can be grouped as a single “subsidized product” or “product under consideration” under the SCM Agreement, and likewise under the Antidumping Agreement. Factors such as whether the different items are produced by the same producers or in the same facilities, or whether they are sold in similar channels of distribution, often will support a finding that there is a single subsidized product or product under consideration.

158. Examples of such product definitions in the antidumping and countervailing duty (CVD) contexts include the U.S. investigation of *Softwood Lumber* already mentioned (which applied equally to antidumping and countervailing duty (CVD) determinations). In addition, we have already demonstrated examples from the EC, such as the antidumping investigation of *Bicycles*²³⁰ and the CVD investigation of *Fasteners*.²³¹ The recently circulated panel decision in *Japan – DRAMS CVD* provides another example. All DRAMS are fundamentally the same, even though they come in different sizes that affect performance and that are recognized by the market. A slower, lower capacity 4 megabyte DRAM is not the same as a faster, higher capacity 64 megabyte DRAM, just as an A320 is not an A380. As the Panel is aware, the CVDs recently

²²⁹ U.S. Answers to First Panel Questions, paras. 413-414 (citing *US – Softwood Lumber Dumping (Panel)*, para. 7.157).

²³⁰ U.S. FOS, para. 167.

²³¹ U.S. SWS, para. 646.

applied to DRAMS from Korea by the United States, the EC, and Japan have each been the subject of WTO dispute settlement proceedings. In the underlying proceedings, the United States, the EC, and Japan each found that all the subject DRAMS, regardless of size and other attributes, formed a single subsidized product, and that the DRAMS produced by their respective domestic industries were a single domestic like product.²³² The identification of the subsidized product in these cases was accepted as a matter of course, and was not controversial in any of these disputes or the underlying domestic proceedings in any of the three Members. Nor did the use of a single subsidized product and a single like product prevent the investigating authorities from taking product differentiation into account when evaluating market share, price underselling, or other factors affecting competition.

159. Third, and perhaps most centrally, the EC separates the identification of the subsidized product from an analysis of how the subsidies are provided or of their nature and operation. For example, consider the range of possible subsidies that could be provided to the passenger automobile industry. In one case, a subsidy might confer benefits to a wide range of products

²³² *Japan – DRAMS CVD*, para. 2.1 (subsidized product is “DRAMS from Korea manufactured by Hynix”); *EC – DRAMS CVD*, para. 2.1 (subsidized product is “DRAMS from Korea”); *US – DRAMS CVD (Panel)*, para. 2.1 (subsidized product is “DRAMS and memory modules containing DRAMS from Korea”). The single subsidized product was defined in the underlying EC investigation as DRAMS:

of all types, densities and variations, whether assembled, in processed wafer or chips (dies), manufactured using variations of metal oxide-semiconductors (MOS) process technology, including complementary MOS types (CMOS), of all densities (including future densities), irrespective of access speed, configuration, package or frame etc. This also includes DRAMS presented in (non-customized) memory modules or (non-customized) memory boards, or in some other kind of aggregate form, provided the main purpose of which is to provide memory.

Commission Regulation No. 708/2003, para. 8, 2003 O.J. L 102/7, 8 (Exhibit US-646); *confirmed by* Council Regulation No. 1480/2003, para. 7, 2003 O.J. L 212/1, 1. For the underlying U.S. investigation, *see* 68 Fed. Reg. 16,766, 16,767 (Apr. 7, 2003).

produced by one or more manufacturers, while in another case a subsidy might confer a benefit only on a single automobile model, as was the case in the *Indonesia – Autos* dispute.²³³ In the latter case, the subsidized product is clearly the one model with respect to which a benefit is conferred; but in the former case, the effect of the subsidy might best be measured with respect to groupings of some or even all models together. It all depends on the actual subsidies at issue and how they confer benefits in respect of particular products.

160. Indeed, in different disputes involving different subsidies in the same basic industry, it could well be that the subsidized product might be identified differently from one dispute to another, depending on the particular subsidies at issue in each. Nothing in the SCM Agreement precludes such an outcome. In fact, by not defining the terms “subsidized product” and “product under consideration,” the Agreement affords panels and parties the flexibility to shape the definition of the subsidized product with reference to the subsidy, as well as the product, at issue in a given dispute. Yet the EC argues that the Panel *must* define the subsidized products based on whether the various items meet the “like product” test or compete with one another directly, and *specifically not* with reference to the way in which the United States has shown these particular subsidies to have provided benefits to Airbus’s production and sales.²³⁴ By insisting that the definition of the subsidized product or products comes first, and the analysis of the subsidies only after the number and scope of the subsidized products has been defined, the EC

²³³ *Indonesia – Autos*, para. 16.164 (“In this case, the European Communities and the United States have alleged that the subsidies in question are conferred on the Timor. Accordingly, our analysis of the effects of these subsidies must be performed in relation to their effects on products which are ‘like products’ to *that passenger car*.” (emphasis added)).

²³⁴ EC SWS, para. 738-739.

effectively reads out of the SCM Agreement the flexibility that Members are provided in that Agreement.

161. The EC once recognized this flexibility in the *Korea – Commercial Vessels* dispute, when it argued to that panel that it should accept a complaining party’s product definition as long as that definition is “reasonable and coherent” and would not “make a market analysis impossible.”²³⁵ The EC does not expressly disavow this statement, but rather contends that treating all LCA as a single subsidized product would, in fact, not be reasonable or coherent.²³⁶ Yet the EC cannot deny that many market actors, including Airbus, frequently analyze the LCA market as a whole.²³⁷ Indeed, the EC itself repeatedly refers in its submissions to the “LCA market,” in the singular.²³⁸ That for some purposes it may be convenient to treat particular LCA segments separately is beside the point; the question is how to analyze LCA products reasonably and coherently for *this* purpose, the purpose for which the Panel asks the question: namely, whether the EC and the Airbus governments, through the use of the subsidies challenged in this dispute, are causing adverse effects to the interests of the United States.²³⁹

162. In this context, it cannot be overlooked that the subsidies at issue in this dispute have been provided to facilitate the development of the Airbus LCA family as a whole. To assess the

²³⁵ U.S. SWS, para. 647 (quoting *Korea – Commercial Vessels*, Annex F-1, para. 33).

²³⁶ EC SWS, para. 700.

²³⁷ U.S. FOS, para. 162 (citing Exhibit US-390).

²³⁸ *E.g.*, EC SWS, para. 1114 (asserting that subsidies to Boeing “cause harm to its competitor *in the LCA market*, the European Communities’ Airbus SAS” (emphasis added)).

²³⁹ SCM Agreement art. 5.

effect of the subsidy by breaking up the object of subsidization – the Airbus LCA family – into several distinct products would require an enormously complex analysis to determine how to allocate the subsidy across each of the subsidized products and to trace how one subsidy has affected several interrelated markets – and several interrelated parts of Boeing’s LCA family – at the same time. It is this analysis that the EC proposes, not the U.S. product definition, that fails to be “reasonable and coherent.”²⁴⁰

C. The United States Has Demonstrated Causation

163. Let me next turn to discuss causation. We have shown, and at the first panel meeting discussed in some detail, the ways in which Launch Aid in particular significantly distorts LCA markets. We identified two principal mechanisms of this distortion – the effect of Launch Aid on Airbus’s launch decisions, and therefore on the products that Airbus is able to offer as part of its LCA family, and the effect of Launch Aid on Airbus’s ability to price aggressively while at the same time maintaining a rapid program of new product launches.²⁴¹ These two market distortions are the effect of the subsidy and together, these two market distortions in turn are manifested in each of the types of adverse effects that are readily observed in the LCA market during the 2001-2005 period and beyond. In addition, each of the subsidies other than Launch Aid supplement and deepen one or both of the market-distorting effects of Launch Aid.²⁴² Thus, the United States has shown that, both for Launch Aid taken alone and as a succession of

²⁴⁰ *Cf. Korea – Commercial Vessels*, Annex F-1, para. 33.

²⁴¹ U.S. SWS, paras. 560-627; U.S. FOS, paras. 134-160; U.S. FWS, paras. 810-838.

²⁴² U.S. SWS, paras. 620-627.

individual provisions when it is cumulated with the other subsidies, the effect of the subsidy is each of the types of adverse effects that we have alleged.

(1) Launch Aid Fundamentally Distorts Competition in the LCA Market

164. With regard to the impact of Launch Aid on Airbus's launch decisions, the EC does not question that the decisions to launch the A300, A310, A320, A330, and A340 aircraft programs would have come out differently if the Airbus governments had not provided Launch Aid. Further, it is clear that Boeing has lost sales to these aircraft, seen its exports displaced or impeded by these aircraft, and experienced price suppression or price depression from subsidized competition with these aircraft. That these events are, in significant measure, the effect of the subsidy, is the fairly straightforward conclusion from these facts. The EC response is not to show that the base model of any Airbus LCA ever delivered would have been launched without subsidies, nor is it to deny that Boeing has lost sales, market share, or pricing power. Instead, the EC argues that the U.S. causation argument is effectively inadmissible under the SCM Agreement.

165. The EC asserts this most directly when it argues that the existence of these subsidized aircraft are part of the "conditions of competition" in the LCA market, so that the only "appropriate counterfactual assessment is one examining what Boeing's present prices, sales, and market share would be *but for* the effects of subsidies, if any, *on pricing and marketing*

decisions of Airbus,” not on its product development decisions.²⁴³ According to the EC, the direct effects of subsidies on pricing and marketing decisions of existing aircraft are the only effects of the subsidies that the Panel may examine. For the EC, the effects of subsidies on the *supply* of Airbus LCA – that is, the types and configurations of the Airbus LCA models – available during the reference period is a *fait accompli* that the United States, and the Panel, have to accept as given.

166. Some subsidies give their recipients a competitive advantage within the market as it exist, while other subsidies fundamentally change the dynamics of the market. The problem with the EC argument is that *both* types of subsidy have an impact on the pricing and marketing decisions of the subsidized entity, just in different ways. And so both types of effect must be actionable under Part III of the SCM Agreement. The EC cannot concede, as it has, that “but for” the subsidy certain aircraft would not have been developed without also conceding that, in a market in which Airbus is now the larger of the two producers, the way in which Airbus has developed and sold its existing aircraft shapes current sales and current prices.

167. The EC makes a number of other similar arguments. For example, the EC asserts that the United States cannot demonstrate in precise detail how the LCA market would have developed differently, but for 37 years of new Airbus model launches that could not have occurred without subsidies. From this, the EC concludes that the U.S. argument that these subsidies have shaped the market to the detriment of U.S. producers is necessarily speculative and must therefore

²⁴³ EC SWS, para. 853 (second emphasis added).

fail.²⁴⁴ But it is not speculation to observe that, without Launch Aid, Airbus could not have brought to market the LCA that it did at the speed that it did; nor is it speculation to observe that the improvement in Airbus's competitive position in the LCA market that thereby resulted has come entirely at the expense of U.S. producers, not producers in any other country.

168. In fact, as the United States pointed out at the first meeting, an economic study commissioned by one of the Airbus governments in 1995 concluded that, as of that date, the subsidized entry of Airbus into the LCA market reduced Boeing's profits by more than \$100 billion and reduced McDonnell Douglas's profits by two-thirds.²⁴⁵ The EC responds only to complain that there are aspects of this 67-page study that we did not mention.²⁴⁶ Yet the three aspects of the Neven and Seabright study that the EC faults us for not pointing out in fact support our position.

169. The EC also puts great stock in "business cases" for two derivative aircraft (the A330-200 and the A340-500/600) as well as for the A380. According to the EC, the net present value of these derivative launches (but not the base models they were derived from) and the A380 launch would have been large enough even without Launch Aid if the programs had achieved their volume, price, and cost targets.²⁴⁷ The EC misses the point. If these targets are more or less met and a program is profitable, Launch Aid simply provides extra profits that may allow

²⁴⁴ EC SWS, paras. 846-847.

²⁴⁵ U.S. FOS, para. 149 (citing Damian Nevin & Paul Seabright, *European Industrial Policy: The Airbus Case* (1995) (Exhibit US-382)).

²⁴⁶ EC SWS, paras. 1052-1055.

²⁴⁷ EC SWS, paras. 763-795.

more flexibility in pricing (on that or other models) or in preparing for the next launch. But if the targets are not met, Launch Aid may be the difference makes the program profitable, or at least mitigates the losses – particularly if the volume targets are not met and some or all of the Launch Aid is forgiven.

170. When an LCA manufacturer evaluates a potential launch, it must recognize that, as the EC’s expert Dr. Wachtel says, this is “an industry where the range of variation around expected outcomes is always wide and is known in advance to be so.”²⁴⁸ Therefore it is not enough just to know whether the program is profitable if the “expected outcomes” are realized. One must also be confident that the program is viable if the gap between reality and the “expected outcomes” turns out, as it usually does, to be “wide.” Thus, Launch Aid does not only affect how profitable a program is – many types of subsidy could have that effect. What is uniquely distorting about Launch Aid is that it also directly affects the *probability* that a program will be profitable, and therefore makes launches more likely.²⁴⁹

171. None of the EC’s discussion so much as addresses this point. For example, the EC’s discussion of Dr. Dorman’s model of a launch decision focuses almost exclusively on the EC contention that the projected number of deliveries in his “base case” – 850 widebody aircraft – is

²⁴⁸ Paul Wachtel, *Clarification of Critique of “The Effect of Launch Aid on the Economics of Commercial Aircraft Programs” by Dr. Gary J. Dorman*, May 20, 2007, para. 8 (Exhibit EC-659)

²⁴⁹ See generally Gary J. Dorman, *The Effect of Launch Aid on the Economics of Commercial Airplane Programs*, Nov. 6, 2006 (Exhibit US-70).

unreasonably pessimistic.²⁵⁰ This assertion is surprising. Airbus has *never* had a widebody program that has produced more than 600 aircraft in its history. According to the Airbus website, from the beginning of Airbus until June 30 of this year, Airbus delivered 560 A300s, 255 A310s, 481 A330s, and 346 A340s.²⁵¹ Indeed, no LCA manufacturer – including Boeing – has ever achieved 850 deliveries in the first 15 years of a widebody program.²⁵² Yet the EC’s main criticism of Dr. Dorman is that he should have projected *more* than 850 deliveries in the first 15 years of his model program.

172. But even if the EC critique were valid, this would take nothing away from Dr. Dorman’s conclusion that Launch Aid significantly affects the *probability* that a launch will be profitable and therefore significantly influences the recipient’s decision on *whether* to launch at all. Thus, the EC fails to rebut the U.S. showing that Launch Aid has fundamentally altered the conditions of competition in the LCA market by allowing Airbus to develop a full family of LCA in a way that it could not have done without subsidies, to the detriment of the U.S. LCA industry.

(2) *The EC Mischaracterizes the U.S. Demonstration of the Impact of Launch Aid on Airbus Pricing*

173. The EC arguments with respect to the second part of the U.S. causation argument – which the EC calls the “U.S. cash flow argument” – are equally beside the point, as they are attempting to respond to an argument that the United States does not make. We do not

²⁵⁰ EC SWS, paras. 810-821.

²⁵¹ Airbus, *Orders, Deliveries, Operators – Worldwide* (Exhibit US-645).

²⁵² Data on total deliveries of all widebody aircraft programs of all manufacturers are provided in Exhibit US-647.

understand how the EC can continue to misunderstand what the United States is saying here, as the U.S. argument on this point has been clear from the beginning of this dispute. Let me recall one formulation:

{T}here are “financial” effects of Launch Aid that enable Airbus to deploy its resources more broadly in order to grow its LCA family and overall LCA market share more rapidly. By assuming a large share of the financial risk of Airbus’s aggressive product development strategy, the Airbus governments improve Airbus’s overall credit rating and lower its overall cost of capital, which facilitates Airbus’s ability to reduce prices (and win sales) for all of its LCA family. Further, by assuming a large share of the commercial risk of LCA launch, the Airbus governments enable Airbus to simultaneously invest in multiple LCA launches more quickly than it otherwise could *and* use its limited funds to reduce prices for already launched LCA models. Without subsidies, Airbus would bear all of the commercial and financial risk of its launch decisions – and, of necessity, would have to launch fewer models, engage in less aggressive pricing practices in order to conserve limited resources to fund launches, or both.²⁵³

That net Launch Aid disbursement accounts for a significant share of EADS’s cash flow²⁵⁴ demonstrates that EADS, and therefore Airbus, is subject to real financial constraints that are significantly loosened by Launch Aid. This loosening is manifest in *both* Airbus’s launch decisions *and* in its pricing policies.

174. Thus, these “financial effects” of Launch Aid, like the effect of Launch Aid on the launch decisions themselves, fundamentally operate by changing the conditions of competition in the LCA market. Launch Aid lets Airbus do more than it could otherwise do given its financial constraints, *first* in terms of bringing new aircraft models into production, and *second* in terms of having the pricing flexibility to gain market share with those aircraft models. What the EC calls the “U.S. cash flow argument” is something else entirely – a supposed claim that the effect of the

²⁵³ U.S. Answers to First Panel Questions, para. 264 (emphasis original, footnotes deleted).

²⁵⁴ E.g., Deutsche Bank, *EADS: Risks Mispriced – Downgrade to Sell*, Jan. 9, 2007, at 7 (Exhibit US-459).

subsidy is to reduce per-plane repayments of Launch Aid, giving Airbus cash that it somehow “uses” in order to “price down” its aircraft.²⁵⁵

175. But the U.S. argument does not, and never has, suggested that the primary effect of Launch Aid or the other subsidies is that they give Airbus a certain amount of cash per aircraft that can be “used” in particular sales campaigns to “price down” that particular aircraft. In fact, it is not clear that the subsidy operates in this way at all. Perhaps a pure production subsidy could lower per-plane costs in a way that translated directly into lower prices on a per-plane basis; but that is not Launch Aid and that is not the primary way that the United States has shown Launch Aid to distort the market. Rather, the United States has focused its argument on the *structural* way that Launch Aid fundamentally distorts the conditions under which Airbus – and therefore Boeing – must compete in the global LCA market. But the EC, by treating the so-called “U.S. cash flow argument” as if it focused solely on how Airbus uses subsidies within the competitive conditions distorted by subsidies, the EC once again fails to respond to the arguments the United States has actually made.

176. The difference between the structural causation argument that the United States has made and the EC’s caricature of it is particularly apparent in the ways that the parties discuss the magnitude of the subsidy. Now, nothing in the SCM Agreement requires a precise quantification of the subsidy benefit in the context of a claim of serious prejudice; what matters is whether the

²⁵⁵ EC SWS, paras. 915-1076.

subsidy is of sufficient magnitude to have caused the claimed effects.²⁵⁶ We have shown that the magnitude of the subsidy was large enough to have materially affected all of Airbus's launch decisions because it did affect Airbus's launch decisions – that is a point that the EC mostly does not dispute. In addition, we have shown that net Launch Aid disbursements contributed significantly to EADS's free cash flow in the 2001-2005 period, especially early in that period when Airbus was driving down prices to gain market share. Thus, the new Launch Aid disbursements that Airbus was receiving in this period were of sufficient magnitude to affect its ability to discount prices for *any* LCA model, while still maintaining its rapid pace of product development.²⁵⁷ Since the subsidy is of sufficient magnitude to have had the effects that the United States has claimed, an inquiry into the precise amount of the benefit in this dispute is largely an academic exercise. Accordingly, the United States cannot agree with the EC that a quantification of the magnitude of the subsidy that goes beyond this demonstration is necessary in this dispute.²⁵⁸

177. Nonetheless, the EC has attempted to calculate the precise benefit, and the United States has given some indications of how such a calculation – if one were at all relevant to this inquiry – might be made. The parties have developed their estimates using the same three basic inputs – (1) the delivery schedule forecast at the time Launch Aid was granted; (2) the per-plane repayments called for in the Launch Aid contracts and the effective interest rate (if any) implied therein; and (3) the commercial benchmark interest rates provided in the Ellis Report. Indeed,

²⁵⁶ See *US – Cotton Subsidies (AB)*, para. 461; *US – Cotton Subsidies (Panel)*, para. 7.1173.

²⁵⁷ U.S. SWS, para. 602.

²⁵⁸ EC SWS, para. 917.

the EC remarks on the many similarities between the U.S. and EC approaches to the benefit calculation.²⁵⁹ Yet, the EC asserts that the subsidy benefit is *de minimis*, while the United States shows that the cumulative benefit of Launch Aid is, in 2006 dollars, well over \$100 billion. How is this possible, if both parties are using similar methodologies and the same basic data?

178. The EC says the U.S. calculation is unbelievably large; if it were accurate, according to the EC, Airbus would be bankrupt several times over.²⁶⁰ But the figure is not unreasonable as a measure of how 40 years of Launch Aid have affected Airbus's current financial position. After all, the EC concedes that Airbus launched many aircraft programs that it could not have launched without subsidies. As the programs were not viable without subsidies, it is only to be expected that if Airbus had launched the programs without subsidies, the financial impact would have been strongly negative. Recall also that Neven and Seabright calculated the financial impact on Boeing of the subsidized launches of Airbus through 1995 as also being more than \$100 billion.²⁶¹ Moreover, it is the EC calculation that is truly unbelievable. How is it possible that government support played the instrumental role that it has throughout the growth of Airbus, as everyone including the EC recognizes, if the magnitude of the support is *de minimis*?

179. In examining the EC calculations we believe we have identified four main problems with the EC approach that lead to its implausible result. First, the EC calculates the benefit net of the marginal rate of corporate taxes, while the United States estimates the pre-tax benefit. It is not

²⁵⁹ EC SWS, para. 920.

²⁶⁰ *E.g.*, EC SWS, para. 960.

²⁶¹ Damian Nevin & Paul Seabright, *European Industrial Policy: The Airbus Case* (1995) (Exhibit US-382)

established that Airbus or its constituent entities actually paid taxes at the alleged marginal rates. Indeed, in response to the Panel's direct question in this regard, the EC coyly states only that Airbus paid all the taxes that it owed, it refuses to say whether any taxes were in fact owed and paid or whether they were paid in the amount used in the calculation.²⁶² Second, the EC calculation deducts subsidies allegedly extinguished or extracted by various corporate reorganizations. We have already shown why this is wrong. On these points, the EC methodology is clearly incorrect.

180. Third, the EC expenses interest in the year it accrues, and objects to the U.S. calculation using a compound interest rate – although, as explained at the last panel meeting, the U.S. uses this rate only for the first 17 years of each loan, not forever as the EC assumes.²⁶³ An example will illustrate the difference between our approaches. If the government provides a long-term loan of \$100 that would have a commercial interest rate of 10% per year, but only charges 4% per year, after one year the outstanding balance on the loan would be \$104 at the subsidized rate but \$110 at the commercial rate. If no payment of principal or interest is made in year one, the EC would calculate the interest due in year two only on the original \$100 principal amount, while the U.S. methodology calculates interest in year two based on the unpaid balance of principal and interest in both cases. In the EC approach, the unpaid interest in year one becomes, in effect, a new interest-free loan. A commercial lender would not allow this, unless perhaps the borrower paid a higher simple interest rate to pay for this privilege. In short, it will depend on

²⁶² EC Answers to First Panel Questions, para. 112.

²⁶³ Compare U.S. FOS, para. 158, with EC SWS, paras. 956-958.

whether the interest rates incorporate the usual assumption – that unpaid interest accrues additional interest, compounded, until it is paid – or whether those interest rates incorporate a different assumption about the treatment of unpaid interest.

181. In this case, all of the interest rates used are intended to be applied as compound interest rates. The EC implicitly acknowledges this when it calculates the effective interest rates in the Launch Aid contracts using the standard “net present value” or “internal rate of return” financial function.²⁶⁴ These standard formulas use compound rates, not simple rates. The U.S. calculation is therefore consistent with the interest rates actually being used in the calculation, while the EC methodology is not.

182. The final error in the EC calculation is the question of perspective. At issue in this dispute are very long-term loans, which are disbursed early in an aircraft program and are repaid, if at all, through heavily back-loaded repayments many years down the line. Because of the time value of money, the “present value” of the benefit stream from the perspective of the moment of launch is different from the “present value” of the benefit stream in current dollars. The same benefit thus appears differently if one measures it, as the EC does, at the moment of launch – that is, years before the first disbursement and many years, if not decades, before the final repayment – or if one measures it, as the United States does, in present terms.

²⁶⁴ EC First Answers to Questions, paras. 99-101 (explaining methodology used to generate Exhibit EC-597).

183. For the EC, the several provisions of Launch Aid are “non-recurring subsidies” mostly given long in the past.²⁶⁵ Viewed from the perspective of many years’ distance, the EC portrays the subsidies as vanishingly small. But, as the United States has shown, the subsidies have been used to develop Airbus LCA that exist and are sold, produced, and delivered *today*; the A300 was launched in 1969, but the last A300 was just delivered less than two weeks ago.²⁶⁶ The impact of these subsidies on the LCA market exists *today*, not just when the first provision of Launch Aid was made. More recent provisions of Launch Aid have effects on Airbus’s pricing policies *today*. Thus, the United States focuses on the cumulative magnitude of all of these subsidies in the LCA market that exists *today*.

184. However, it appears that the EC no longer insists that the magnitude of the subsidy can only be viewed from the perspective of the original launch. In its second submission, the EC makes a new calculation and explains that, given any benchmark interest rate for a particular provision of Launch Aid, it is possible to calculate the ratio by which each of the scheduled repayments would have to increase for the Launch Aid to be repaid at the benchmark interest rate. According to the EC, “{t}he difference between the repayment amount includ{ed} in the {Launch Aid} contract and the correct zero benefit repayment {that is, the repayment needed to provide zero benefit at the benchmark interest rate} *is the benefit per aircraft.*”²⁶⁷ The assertion is that when subsidized Launch Aid *reduces* the amount of the per-aircraft repayment below what it would be if Launch Aid were provided on commercial terms, then the amount by which

²⁶⁵ EC SWS, paras. 947-952.

²⁶⁶ Airbus Press Release, *Airbus delivers last A300 to Fedex*, July 12, 2007 (Exhibit US-643).

²⁶⁷ EC SWS, para. 1027 (emphasis added).

the per-aircraft repayment is *reduced* due to the subsidy would be a benefit that is realized at the moment repayment is due – that is, upon delivery of the aircraft, not upon its launch.

185. The United States has significant reservations with this approach to estimating the overall benefit. It does not really address how Launch Aid distorts the present market structure by enabling aircraft launches that otherwise could have not occurred. Nor does it address the situation in which a program is unsuccessful and the outstanding unpaid balance is forgiven. Nor does it measure the way that Launch Aid's long-term impact on Airbus cash flow and its ability to undertake multiple expensive, risky strategies simultaneously has distorted the market and produced adverse effects. Nor does it measure how Launch Aid improves Airbus's credit rating and therefore the cost of the capital it raises in the private market. In short, this methodology simply does not measure whether the magnitude of the subsidy is sufficient to have caused the effects that the United States has demonstrated. Instead, it measures something else – how much Airbus saves on any scheduled repayment because Launch Aid is provided at an interest rate below a commercial rate.

186. The EC purports to set forth this calculation in Exhibit EC-661. There are, however, two technical errors in the calculation. When these errors are corrected, the results show that to date, the Launch Aid repayment needed to achieve a commercial rate of return would be *more than double* the actual per-plane repayment the Airbus governments have required.²⁶⁸ In some cases it is much more than double. But, once again, this is not the effect of the subsidy that the United

²⁶⁸ The precise figures are set forth in Exhibit US-644 (BCI).

States has described. Whether the magnitude of the subsidy, measured by lower per-plane Launch Aid repayments, is sufficient to cause a different type of price effect, is ultimately not a relevant question in evaluating the U.S. claims.

(3) *Additional Comments on the EC Causation Responses*

187. Very briefly, I would like to make a couple of more comments on the EC causation arguments. On the particular point that Launch Aid has improved Airbus's overall credit rating and access to private capital, the EC again misrepresents the U.S. position. According to the EC, the United States claims that credit ratings services such as Moody's give a higher credit rating to EADS "by virtue of the company's status as a 'Government Related Issuer.'"²⁶⁹ But the United States has never argued that Moody's gives EADS a higher credit rating because EADS is partially government-owned. Rather, the United States has shown that "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"²⁷⁰ and that Moody's perceives that the Airbus governments have "an entrenched inclination for state protection and a low appetite for exposing private bond holders to losses"²⁷¹ – private bond holders, not governmental shareholders. Yet again, the EC attacks a straw man of its own creation, while ignoring the prima facie case that the United States has established.

²⁶⁹ EC SWS, para. 1040.

²⁷⁰ Moody's Investor Service, *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).

²⁷¹ Moody's Investor Service, *Moody's confirmation of EADS highlights government's role as odd rescuers* (Mar. 12, 2007) (Exhibit US-450)

188. With regard to alleged other causes of the adverse effects, the United States has already addressed the EC allegations in the first panel meeting and its written submissions and has shown them to be baseless. Alleged Boeing “arrogance” is primarily a reference to Boeing’s mostly unsuccessful attempts to maintain the value of its products in the face of low Airbus pricing;²⁷² geopolitical concerns and demand fluctuations have affected both Boeing and Airbus equally; and developments in the leasing sector and engine markets have had little impact on the LCA market.

D. The United States Has Demonstrated Adverse Effects

189. With regard to the particular type of adverse effects, the EC response consists largely of the points that we have just been discussing.²⁷³ The data showing sharp adverse trends in both market share and pricing during the 2001-2005 period – and continuing thereafter – largely speak for themselves.

190. We would, however, like to address briefly, and I promise this is the last point we will address, the EC’s new and novel argument that the United States is precluded from asserting a claim of displacement or impedance under Article 6.3(b) or price undercutting under Article 6.3(c) because Boeing is allegedly also a recipient of subsidies.²⁷⁴ As the Panel is aware, whether Boeing LCA are subsidized and whether such subsidies have caused adverse effects to

²⁷² U.S. SWS, para. 709.

²⁷³ *E.g.*, EC SWS, para. 1138.

²⁷⁴ EC SWS, paras. 1100-1137.

the EC are the subject of a different dispute, and the panel in that dispute will fully address any EC claims in this regard. In any event, the EC's attempt to read the term "non-subsidized like product" in Article 6.4 and Article 6.5 as referring to an "entirely unsubsidized product" is manifestly erroneous.

191. Article 6.4 envisions an assessment of the "effect of the subsidy" through a comparison of the relevant third-country market shares of the "subsidized product" and the "non-subsidized like product" of the complaining Member, while Article 6.5 provides for an assessment of the "effect of the subsidy" through a comparison of prices of the "subsidized product" and the "non-subsidized like product" of the complaining Member. Simply put, the text of the Agreement contemplates that the effect of a subsidy is measured by comparing the market performance of the "subsidized product," which benefits from that subsidy to that of the "non-subsidized" like product that does not benefit from that subsidy. This is how the "effect of the subsidy" is measured – how does the subsidized product fare in the market in competition with like products that do not receive *that subsidy*. This interpretation gives meaning both to the term "non-subsidized like product" and to the term "effect of the subsidy."

192. Thus, in the context of Part III of the SCM Agreement, the obligation in Article 5 not to cause, through the use of any subsidy, adverse effects to the interests of other Members does not depend on whether the affected Members themselves use subsidies. In fact, nothing in the term "non-subsidized," if read as the EC does would imply that the disqualifying subsidy must be more than *de minimis* in magnitude, or that the disqualifying subsidy must be specific, or that the

disqualifying subsidy must be provided directly with respect to the like product concerned. It can safely be presumed that a significant proportion of the products produced in the territory of Members potentially benefit from indirect, non-specific, *de minimis* subsidies, such as public education or public health measures. On the EC's interpretation, no such Member could assert its rights under Article 6.3(b) or Article 6.3(c), no matter how direct, targeted, and massive a subsidy causing adverse effects might be, because it receives an indirect, non-specific, *de minimis* subsidy, and therefore does not have a non-subsidized like product. This would eviscerate the entirety of Part III of the SCM Agreement, and cannot be the correct interpretation of the text.

XI. CONCLUSION

193. Mr. Chairman, members of the Panel, on behalf of the United States, thank you for your attention. We would be pleased to answer any questions you may have.
