

*European Communities and Certain Member States –
Measures Affecting Trade in Large Civil Aircraft:
Recourse to Article 22.6 of the DSU
by the European Union and Certain Member States*

(DS316)

COMMENTS OF THE UNITED STATES
ON THE RESPONSES OF THE EUROPEAN UNION
TO THE THIRD SET OF QUESTIONS FROM THE ARBITRATOR

April 8, 2019

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<i>US – Countervailing Duty Measures Concerning Certain EC Products (21.5) (Panel)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, circulated to the WTO Members 17 August 2005
<i>US – FSC (22.6)</i>	Decision by the Arbitration Panel, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS108/ARB, 30 August 2002, DSR 2002
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<i>US – Zeroing (EC) (21.5) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW, 14 May 2009

1 QUESTIONS SENT TO PARTIES ON 7 FEBRUARY 2019

1.1 For the United States

Question 93 (US)

With reference to paragraph 182 of the United States' written submission and paragraph 4 of Exhibit USA-24 (BCI), could the United States please provide the delivery schedule and price information (gross price, price concessions, escalation formula, escalation factors, and pre-delivery payments) contained in the [BCI]?

Question 94 (US)

With reference to, *inter alia*, the European Union's response to question Nos. 25 (fn 420), 28 (fn 455), 30, and 43, assume for purposes of this question that the Transaero "lost sale" should be valued taking into account, and under the assumption, that the order would have been cancelled in the counterfactual. In this scenario, could the Arbitrator nonetheless value the order as the sum of the deposits due upon order and pre-delivery payments (PDPs) that Boeing would have received in connection with this order? If so, please explain why this would be proper in the light of the apparent facts that: (i) any such deposits and PDPs would appear to have been intended to cover anticipated and actual ongoing production costs of the LCA ordered; and (ii) no direct trade effect would appear to arise in connection with this cancelled order, i.e. no LCA would be delivered pursuant to the order regardless of whether the deposit payments and PDPs are made. In this context, please also confirm whether Boeing customarily retains such deposits and PDPs in the event of subsequent cancellation by the order by the customer.

1.2 For the European Union

Question 95 (EU)

With reference to section IX.B.4 of the European Union's written submission, and in particular paragraph 354 thereof, could the European Union please elaborate on how the Arbitrator should take into account the "revenue impact" arising from Boeing's relevant counterfactual LCA sales on Members other than the United States? For example, should the Arbitrator: (i) take into account whether Boeing directs certain revenues realized from LCA sales to foreign companies other than LCA component suppliers; or (ii) trace such revenues through the supply chain back to the suppliers of raw materials to ensure that one of Boeing's foreign suppliers was itself not using US-sourced components or raw materials, the value of which should be included in the level of countermeasures? In sum, where should the Arbitrator assume such "revenue impact" analytically begins and ends?

1. The EU begins its response not with a direct answer to the question, but by repeating its (incorrect) argument that there is a "legal obligation" to exclude the value of non-U.S. inputs contained in U.S. LCA from the valuation of countermeasures. This is an approach that no other arbitrator has ever taken.

2. Article 7.9 of the SCM Agreement authorizes countermeasures "commensurate with the degree and nature of the adverse effects determined to exist." In this proceeding, the relevant adverse effects are lost sales of U.S. *large civil aircraft* and impedance of imports and exports of U.S. *large civil aircraft* – not the "U.S. content" of LCA or the "revenue" from orders or deliveries of LCA. Thus, deducting "non-U.S." content would undervalue the adverse effects, and result in countermeasures lower than the SCM Agreement provides.

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3. The United States will first address the error in requesting such an adjustment before turning to separate EU arguments regarding the proper metric for determining the value of non-U.S. inputs and where to “draw the line” in assessing the value of such inputs.

4. The EU seeks to justify its proposed deduction of non-U.S. content by arguing that it is necessary to avoid “double remedies” that could occur if another WTO Member challenged the massive EU subsidies to large civil aircraft.¹ It seeks to find support for its approach in the arbitrators’ decisions in *EU – Bananas III* and *US – Upland Cotton*. The EU’s logic is flawed, and the past decisions support neither the “legal obligation” nor the adjustment that the EU proposes. In fact, both of these arbitrator decisions contradict the EU’s novel approach.

5. The EU asserts that “double remedies” could occur if “another {arbitrator} were to grant Japan countermeasures for Japanese content into Boeing LCA.”² But the arbitrator in *EC – Bananas III (US) (22.6 – EC)* specifically explained that the theoretical double-counting issue raised by the EU is avoided because Members *cannot* receive rights to impose countermeasures for these types of “indirect” upstream effects.³ That report stated that lost exports between the original complainant and third countries “do not constitute nullification or impairment of even *indirect* benefits accruing to the {original complainant} under the GATT or the GATS for which the {original respondent or Member concerned} could face suspension of concessions.”⁴ Thus, that report rejected the premise of the EU’s argument – that Japan could receive rights to impose countermeasures against the EU based on lost exports of intermediate goods to a third country, the United States.⁵

6. The second report the EU cites is *US – Upland Cotton (22.6 II)*.⁶ This too is unavailing. In that dispute, the compliance panel had found that U.S. subsidies caused price suppression in the world market for cotton. Brazil (the complaining party) sought to take countermeasures with respect to the entirety of those effects, including as experienced by cotton producers in the

¹ EU RAQ 95, para. 3.

² EU RAQ 95, para. 3.

³ See *EC – Bananas III (US) (22.6 – EC)*, paras. 6.6-6.18.

⁴ *EC – Bananas III (US) (22.6 – EC)*, para. 6.12.

⁵ It is also worth noting that the *EC – Bananas III* arbitrator explicitly premised its finding on the observation that, “{i}n view of the fact that initially five WTO Members participated in the original *Bananas III* dispute, the problem of ‘double-counting’ nullification or impairment is more than a theoretical possibility.”⁵ *EC – Bananas III (US) (22.6 – EC)*, para. 6.17. In this situation, the decade-and-a-half absence of challenges to EC aircraft subsidies from other Members is strong evidence that a finding of adverse effects to another Member is strictly hypothetical. This dispute is in its fifteenth year. Neither Japan nor any other Member has brought a dispute with respect to EU subsidies to Airbus – including in the near-decade since the original panel confirmed that these subsidies are WTO-inconsistent.

⁶ EU RAQ 95, para. 6.

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territories of other Members. The arbitrator stated “{w}e . . . understand the ‘degree and nature of the adverse effects’, in the circumstances of this case, to refer to the extent to which Brazil is affected by the price suppression on the world cotton market caused by the ML and CCPs that has been determined to exist in the underlying proceedings.”⁷

7. The analog in this case would be a request by the United States to take countermeasures with respect to LCA of other Members that lost sales or market share as a result of the EU’s LA/MSF subsidies. However, the compliance panel found that the relevant LCA markets are U.S.-EU duopolies in the real world. It did so in part based on the parties’ agreement that there was no meaningful competition from other Members’ industries, and no such competition at all in the twin-aisle and VLA product markets.⁸ Moreover, the adopted findings in the compliance proceeding establish unambiguously that the U.S. LCA industry – not LCA industries from multiple Members – would have captured the relevant sales and market share in the absence of the EU’s subsidies.⁹ Therefore, the EU misplaces its reliance on *US – Upland Cotton (22.6 II)*.¹⁰

8. Moreover, no arbitrator has deducted from the level of nullification and impairment an amount attributable to upstream components or value added by goods or services of another Member. The EU conveniently overlooks this fact in advancing its newfound proposed approach.

9. In *US – Upland Cotton (22.6 II)*, for example, the arbitrator did not seek to adjust the level of nullification or impairment in light of any imported fertilizer used in the production of the cotton, for example. As another example, in *US – CDSOA (22.6)*, which involved a wide

⁷ *US – Upland Cotton (22.6 II)*, para. 4.89.

⁸ Compliance Panel Report, paras. 6.1215 (“At present, Airbus and Boeing continue to be the world’s only LCA producers offering a full range of aircraft. Several other companies, including Bombardier, Commercial Aircraft Corporation of China, Ltd. (COMAC), Mitsubishi Aircraft Corporation, Sukhoi and United Aircraft Corporation, are attempting to enter the LCA industry with single-aisle aircraft having around 100-150 seats. However, the parties have emphasized the relative weakness of these new potential entrants Thus, as it was during the original proceeding, the LCA industry continues to be characterized by what is effectively an Airbus-Boeing duopoly.”). See also *ibid.*, paras. 6.1223, 6.1348, 6.1411 (“we have found that the United States has demonstrated that it would be appropriate to evaluate the merits of its claims of serious prejudice in this compliance dispute on the basis of the following three separate product markets: . . . (b) the product market for twin-aisle aircraft in which Airbus and Boeing sell the A330, A350XWB, 767, 777 and 787 families of LCA; and (c) the product market for VLA in which Airbus and Boeing sell the A380 and the 747”).

⁹ Compliance Appellate Report, paras. 5.709, 5.715-5.716, 5.726, 5.730-5.731, 5.734-5.742, 6.31, 6.37, 6.39.

¹⁰ Ironically, the arbitrator in *US – Upland Cotton (22.6 II)* was reacting to an argument based on the *US – FSC* arbitration. There, the arbitrator determined a level of countermeasures that was not limited to the impact of the measure on the EU, but instead should reflect an *erga omnes* approach (and thus could result in double counting). After having benefitted from the decision in that arbitration, it is ironic that the EU here raises a concern with any possibility of what the EU would consider to be double counting.

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array of different goods, the arbitrator did not seek to adjust the level of nullification or impairment for the EU or other complaining Members to account for any imported inputs.

10. The approach the EU advocates now is not one that the EU has ever endorsed when it was the EU seeking to obtain authorization to suspend concessions.

11. Even aside from this fundamental, and fatal, flaw in the EU’s argument, the EU’s response contains additional errors. The EU arguments as to the proper metric to determine the value of U.S. content in LCA covered by the adverse effects findings¹¹ are also flawed.

12. The EU begins by attributing to the United States the view that “the proper metric” for non-U.S. content is the figure reported in response to the Arbitrator’s request to “quantify the share that international inputs constitute as a fraction of overall delivery prices.”¹² In fact, at the meeting with the Arbitrator, the United States opposed the use of this figure to adjust the value of countermeasures. Even in responding to the Arbitrator’s written question, the United States made clear that it did not view any use of this information as proper.¹³

13. The EU next attempts to address the Arbitrator’s question by dismissing both subparts of the question as “not pertinent to the task at issue” on the basis that the parties “agree that the relevant metric must be *Boeing LCA sales value*.”¹⁴ The EU is correct that the United States agrees that the relevant metric is LCA values. The use of LCA sales value is appropriate because that is the value of the product subject to the findings of significant lost sales and impedance. However, this is the reason why no reductions for foreign inputs should even be considered in the first place.

14. The EU continues by raising other potential metrics related to “origin” and “ownership.”¹⁵ These potential “metrics” highlight problems with the EU’s theory. The EU argues that these are “wrong” metrics but never addresses the problems they highlight for the EU’s theory, including how to define foreign content where supply chains travel back and forth across borders and where there are no common rules of origin accepted by WTO Members.

¹¹ EU RAQ 95, paras. 8-20.

¹² See EU RAQ 95, para. 10 (citing U.S. RAQ 92, para. 130).

¹³ U.S. RAQ 92, para. 129 (“In its written submission, the United States explained why no basis exists to consider international inputs in determining whether the proposed level of countermeasures is commensurate with the adverse effects determined to exist. Nothing has since changed to warrant a different conclusion.”) (citing U.S. Written Submission, paras. 263-265).

¹⁴ EU RAQ 95, para. 14.

¹⁵ EU RAQ 95, paras. 17-20.

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15. Last, the EU argues that the Arbitrator can ignore all upstream producers other than “first-tier suppliers” – *i.e.*, parts and components manufacturers whose goods and services are directly used by Boeing in the final assembly of its LCA. This is arbitrary and – like the EU’s broader argument – finds no support in the text of the SCM Agreement. The EU’s justification for drawing this line is that collecting data regarding the origin of inputs further upstream from first-tier suppliers would be “time-consuming and exceedingly complex.”¹⁶

16. The United States agrees that it is not necessary to perform time-consuming and complex calculations that do not affect the precision and accuracy of the result. However, the EU’s approach is the opposite – it proposes to eliminate a calculation step that *does* affect accuracy and precision. Dispensing with a consideration of U.S. content in “foreign” inputs will invariably result in a greater deduction and, thus, a lower value for countermeasures. By contrast, the EU has insisted on any number of laborious and complicated “adjustments” that are, in the abstract, neutral with respect to the level of countermeasures. That is, unlike this example of upstream U.S. foreign content, failure to make such adjustments does not bias the accuracy of the calculation in either direction.

17. Thus, while the EU has failed to provide justification for ignoring upstream suppliers of U.S. content – and, more fundamentally, has failed to provide a justification for reducing the value of U.S. LCA at all – it has lent support to the U.S. view that some of the calculations that the EU insists are required are in fact not required and are intended solely to prolong this proceeding and create an appearance of material imprecision where none exists.

Question 96 (EU)

With reference to paragraph 342 of the European Union’s written submission, could the European Union please elaborate on what is the appropriate “contractually agreed escalation rate” to be used to perform the methodology suggested by the European Union? Specifically, to what particular “contract” is the European Union referring in making this statement?

18. The EU divided its response to this question into two parts: (A) the nature of the “contract at issue,” and (B) the nature of the “contractually agreed escalation.”¹⁷ The United States addresses each part in turn.

A. The EU’s Arguments Regarding the Nature of the “Contract at Issue”

19. Section A of the EU’s response takes issue with the comparators proposed by the United States to value lost sales and impedance.¹⁸ The EU even accuses the United States of simply

¹⁶ EU RAQ 95, para. 23.

¹⁷ EU RAQ 96, paras. 29-30, 41.

¹⁸ EU RAQ 96, paras. 30-40.

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asserting, without substantiating, that the U.S. proposed comparators are “‘representative,’ reliable, and robust proxies for the lost sales at issue.”¹⁹ Yet, despite the EU’s rhetoric, there is considerable overlap in the parties’ views as to the appropriate criteria for selecting comparators. Where those views diverge, there is no basis to find that the U.S. approach would result in a level of countermeasures that is not commensurate with the adverse effects determined to exist, which is what the EU must show in order to meet its burden.²⁰

20. With regard to selecting comparators, the EU ostensibly places primary importance on the identity of the customer involved in the lost sale or impedance. Customer identity is the consistent principle running through the EU’s ideal scenario (*i.e.*, a non-existent contract between Boeing and the customer for “the counterfactual order that Boeing could have secured in the absence of the MSF subsidies at issue”), as well as the EU’s first real preference (a “final and binding offer” by Boeing to the customer in the lost sale or impedance situation) and its second-best preference (a “‘comparator order’ between Boeing and the LCA customer of the ‘lost sale’ or ‘impedance’”).²¹ Only after these customer-specific options have been exhausted does the EU propose to use Boeing information pertaining to an “alternative LCA customer.”²²

21. Thus, for all its criticisms of the U.S. methodology, the EU (at least in theory) accords high importance to customer identity. The United States does too, as is evident from its approach of valuing lost sales by using, where available, contemporaneous orders for the closest Boeing model by the same customer involved in the lost sale. The parties of course disagree as to whether a customer-specific comparator order should be used over a customer-specific “final and binding offer.” The United States prefers the former because it offers aircraft price information that the customer, by definition, agreed to, and because comparator orders are available for four of the five lost sales at issue. The EU prefers the latter, but a final offer [BCI] the five lost sales.

22. In any event, the U.S. approach is reasonable, and the EU’s counterarguments provide no basis to consider that the U.S. approach fails to result in countermeasures that are “commensurate.” Indeed, where possible, it uses an order of the closest Boeing model, by the customer in the lost sale at issue, as close in time as possible to the lost sale, which is consistent with the EU’s description of its second-best preference – *i.e.*, a “‘comparator order’ between Boeing and the LCA customer of the ‘lost sale’ or ‘impedance.’”²³

¹⁹ EU RAQ 96, para. 33.

²⁰ See *US – Upland Cotton (22.6 II)*, para. 4.13.

²¹ See EU RAQ 96, para. 31 (emphasis original).

²² See EU RAQ 96, para. 31.

²³ See EU RAQ 96, para. 31 (emphasis original).

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23. In addition to customer identity, the EU in its response to Question 106 has identified other criteria it thinks are relevant for selecting comparators, including “comparator LCA type” (described as the “closest competing Boeing model” in the U.S. methodology paper), “order size, delivery schedule, order year, and competitiveness of the campaign.”²⁴ According to those criteria, the U.S. comparators fare extremely well, as summarized in the table below.

Lost Sale	U.S. Comparator	EU Criteria for Assessing Comparators ²⁵					
		Same customer identity?	Closest Boeing model?	Order size	Order year	Delivery schedule	"Competitive" campaign (according to EU)? ²⁶
2012 Cathay Pacific Order: (10) A350XWB-1000	2013 Cathay Pacific Order: (3) 777-300ER	Yes	Yes	[BCI]	Within one year of lost sale	Originally contracted Airbus delivery schedule	[BCI]
2012 Transaero Airways Order: (4) A380	2013 Transaero Airways Order: (4) 747-8I	Yes	Yes	Same as lost sale	Same as lost sale	Originally contracted Airbus delivery schedule	Yes
2013 Singapore Airlines Order: (30) A350 XWB-900	2013 Singapore Airlines Order: (30) 787-10	Yes	Yes	Same as lost sale	Same as lost sale	Originally contracted Airbus delivery schedule	Yes
2013 United Airlines Order: (10) A350 XWB-1000	2015 United Airlines Order: (10) 777-300ER	Yes	Yes	Same as lost sale	Within two years of lost sale	Originally contracted Airbus delivery schedule	Yes

²⁴ EU RAQ 106, para. 154. The EU’s response to Question 106 focuses on other criteria: buyer-furnished equipment, flight deck equipment, maximum take-off weight, and engine supplier/type/performance. Those criteria are invalid for the reasons explained by the United States in its comments on the EU’s response to Question 106.

²⁵ See also U.S. Comments on EU RAQ 106, *infra*.

²⁶ See EU RAQ 105, para. 147, Table 1.

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<p>2013 Emirates Order: (50) A380</p>	[BCI]	[BCI]	[BCI]	[BCI]	[BCI]	<p>Originally contracted Airbus delivery schedule</p>
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24. Thus, even the EU’s own criteria for selecting Boeing comparator orders confirm the validity of the U.S. approach. Accordingly, there is no basis to use alternative comparators.

25. Nevertheless, the United States addresses the EU’s arguments in favor of certain alternative comparators for the Cathay Pacific and United Airlines lost sales.²⁷ The EU suggests that [BCI] or the [BCI] 2011 Cathay Pacific order for 10 777-300ERs may “be more ‘representative’, reliable, and robust comparators” for the 2012 Cathay Pacific lost sale involving the order of 10 A350XWB-1000s. As discussed above, there is no basis to use [BCI] over the 2013 Cathay Pacific 777-300ER order.

26. In any event, the EU [BCI] the U.S. choice of a comparator. As indicated in Exhibit USA-61-HSBI, the net delivered price in [[HSBI]], a delivery year for the 2012 Cathay Pacific lost sale, using Boeing’s 2013 deal with Cathay Pacific for 777-300ERs as the comparator (*i.e.*, the United States methodology) was [[HSBI]].²⁸ The net delivery price in the same year using the [BCI] 2011 Cathay Pacific order for 10 777-300ERs as the comparator order is [[HSBI]].²⁹ The net delivery price in the same year using the [BCI] as the comparator order is [[HSBI]].³⁰ As this clearly demonstrates, the United States has selected comparator orders based on what is likely to produce the most accurate valuation of the lost sale, [BCI].

27. The EU also contends that the 2013 United Airlines order for 10 787-10s may “be more ‘representative’, reliable, and robust comparators” for the 2013 United Airlines lost sale involving the order of 10 A350 XWB-1000s.³¹ As an initial matter, the EU’s arguments in this regard highlight its inconsistent, results-oriented reasoning. Specifically, it argues for the use of the 2013 United Airlines 787-10 order as a comparator to the 2013 United Airlines lost sale in

²⁷ See EU RAQ, para. 35.

²⁸ Exhibit USA-61(HSBI), p.1.

²⁹ See Exhibit USA-69(HSBI), pp. 37 ([BCI]), 76-81 ([BCI]), and 128 ([BCI]) (calculating the net delivered price [BCI]).

³⁰ See Exhibit USA-59(HSBI), pp. 6 ([BCI]) and 16 ([BCI]).

³¹ EU RAQ, para. 35.

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part because the former is “much closer in time” to the lost sale than the 2015 United Airlines 777-300ER order proposed by the United States.³² Yet, the EU ignores the importance of order timing when it argues elsewhere that the 2006 Lufthansa 747-8I order should be used as a comparator for the 2013 Emirates lost sale when contemporaneous alternatives exist, such as the 2013 Korean Air 747-8I order.

28. In any event, as discussed above, the 2015 United Airlines order for 10 777-300ERs is a good comparator even according to the EU’s criteria. And here too, the EU [BCI] the U.S. choice of a comparator for this lost sale. Indeed, as indicated in Exhibit USA-61-HSBI, the net delivered price in [[HSBI]], a delivery year for the 2013 United Airlines lost sale, using Boeing’s 2013 United Airlines order for 10 787-10s as the comparator (*i.e.*, the U.S. methodology) was [[HSBI]].³³ The net delivery price in the same year using the 2013 United Airlines order for 10 787-10s as the comparator order is [[HSBI]].³⁴ This further confirms that the United States has selected comparator orders based on what is likely to produce the most accurate valuation of the lost sale, [BCI].

29. Regarding impedance, the EU deviates from the comparator selection criteria discussed above. Despite emphasizing the importance of customer identity and previously calling for a customer-specific approach to valuing impedance, the EU abandons those considerations to endorse valuing impedance according to 2012 and 2013 747-8I delivery prices, which now exclusively reflect deliveries pursuant to a 2006 Lufthansa order. The EU’s about face in this respect is transparently results-oriented. Notably, the United States has provided the Arbitrator with two sets of customer-specific impedance calculations that [BCI].³⁵ If one were to value impedance based on order-specific materials akin to the U.S. significant lost sales methodology, the comparator orders proposed by the United States in its response to Question 153 would make far more sense than the 2006 Lufthansa order because they represent more similar customers, including according to geographical location, and in [BCI] instances involve the *same* customer involved in the A380 deliveries.³⁶

30. The remainder of Section A consists of the EU’s complaints regarding the supposed U.S. failure to provide primary evidence concerning comparators and its request that the Arbitrator draw inferences in the EU’s favor if “the United States were to continue withholding such

³² EU RAQ, note 23 (emphasis original).

³³ Exhibit USA-61(HSBI), p.5.

³⁴ See Exhibit USA-67(HSBI), pp. 37 ([BCI]), 55-56 ([BCI]), and 100 ([BCI]).

³⁵ See U.S. RAQ 153; Aggregation of Adverse Effects Determined to Exist by Year, Revised to Include Updated Impedance Calculation Described in Response to Question 153 (Exhibit USA-107(HSBI)); U.S. RAQ 154; Aggregation of Adverse Effects Determined to Exist by Year, Revised to Include Updated Impedance Calculation Described in Response to Question 154(d) (Exhibit USA-109(HSBI)).

³⁶ See U.S. RAQ 153, para. 6.

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evidence.”³⁷ That criticism and the request for inferences are misplaced. The United States has documented its calculations throughout this proceeding, and provided further information in a timely fashion each time the Arbitrator requested that information.

B. The EU’s Arguments Regarding the Nature of the “Contractually Agreed Escalation”

31. In Section B of its response, the EU asserts that, while the parties agree on the basic mechanisms for applying escalation formulas to determine Boeing delivery prices, the parties disagree about what escalation rates should apply.³⁸

32. For already-delivered aircraft, the EU argues that the calculation must use the actual escalation factors that applied on the relevant delivery dates.³⁹ The EU asserts that “the United States effectively acknowledges that it applied what it *knows* to be the wrong method for quantifying adverse effects.”⁴⁰ To the contrary, the United States has explained why its methodology is not “incorrect,”⁴¹ and has not deviated from that view.

33. The escalation formulas in Boeing contracts are somewhat complicated. [BCI] escalation factors are determined – as the EU acknowledges they must be⁴² – at the time of delivery. To implement the approach the EU prefers, it would be necessary to run the relevant escalation formula to calculate an escalation factor for every date on which a delivery was made. By contrast, by picking a single point in time, *i.e.*, the time of the order, one can simply use the [BCI] escalation factor that corresponds to each relevant delivery date associated with that order.

34. For future deliveries, the EU’s approach would require use of [BCI] data to calculate escalation up to some “present” point, and then [BCI].⁴³ The [BCI]. Instead, they rely, as the U.S. methodology does, on the [BCI] from the time of the order.

35. Thus, the EU’s preferred approach would make an already difficult calculation much more complicated and time-consuming. In other words, the “cost” of implementing the EU’s approach would be relatively high.

³⁷ EU RAQ 96, paras. 37-40.

³⁸ EU RAQ 96, para. 43.

³⁹ See EU RAQ 96, para. 44.

⁴⁰ EU RAQ 96, para. 45.

⁴¹ See EU RAQ 96, para. 45.

⁴² EU RAQ 96, para. 47.

⁴³ See EU RAQ 96, para.

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36. On the other side of the ledger, the “benefit” would not be significant. The [BCI] and [BCI] escalation factors only differ to the extent that the [BCI] in the escalation formulas diverge from [BCI]. [BCI].⁴⁴

37. Notably, to the extent that [BCI]. In other words, [BCI]. It is no more likely to help one party’s position than hurt it.⁴⁵

38. Moreover, the countermeasures need only be “commensurate” with the adverse effects determined to exist. As the arbitrator in *US – Upland Cotton (22.6 II)* observed, “‘commensurate’ connotes a less precise degree of equivalence than exact numerical correspondence’.”⁴⁶ The possibilities to make a calculation ever more rigorous, and correspondingly complicated and time-consuming, are infinite. Moreover, these are proxies. Drilling down to ever more detail merely conveys an air of greater precision, but it is unlikely to result in greater accuracy for what is a counterfactual price. Therefore, the EU cannot meet its burden of demonstrating that the U.S. approach would result in a level of proposed countermeasures that is not commensurate merely by raising an arguably, slightly more precise methodology.

39. Finally, the EU suggests that the U.S. approach “appears to be driven by the US desire, in its haste to secure countermeasures, to minimize its efforts and artificially inflate its adverse effects numbers.”⁴⁷ However, the United States has already demonstrated that the [BCI].

40. The United States also takes issue with the EU’s use of the word “haste.” The United States has endured at least 20 years of confirmed adverse effects (starting from the beginning of the original reference period in 2000), and now 15 years of this dispute. We have arrived at the point at which the DSU provides for the DSB to authorize countermeasures to correct the massive imbalance caused by the EU’s subsidies. There is nothing “hasty” about the U.S. approach to this dispute, nor its desire to see this arbitration concluded promptly.

41. Moreover, this desire for a prompt conclusion has a basis in the text of the DSU. Specifically, Article 22.6 of the DSU requires that such arbitrations shall be completed within 60 days after expiry of the RPT. Thus, the Members recognized the importance of a quick resolution to such arbitrations. Inherent in this requirement in the interest of prompt resolution is that methodologies need not be endlessly elaborate without regard for the time they would take to implement or their contribution to overall accuracy.

⁴⁴ See U.S. RAQ 60, paras. 23-31; U.S. RAQ 77, paras. 95-96; Boeing e-mail from [BCI] (Dec. 13, 2018) (Exhibit USA-36(BCI)); Boeing e-mail from [BCI] (Dec. 13, 2018) (Exhibit USA-35(BCI)).

⁴⁵ Technically, it may be more likely to hurt the U.S. position. [BCI].

⁴⁶ *US – Upland Cotton (22.6 II)*, para. 4.39.

⁴⁷ EU RAQ 96, para. 49.

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42. The United States' use of the [BCI] escalation factors is more than reasonable under the circumstances. Accordingly, the EU has failed to show that it results in countermeasures not commensurate with the degree and nature of the adverse effects determined to exist.

Question 97 (EU)

97. With reference to paragraph 421 of the European Union's responses to the first set of Arbitrator questions, paragraphs 234-242 of the European Union's responses to the second set of Arbitrator questions, paragraphs 243-244 of the European Union's written submission, and Exhibit USA-17 (HSBI), could the European Union please explain exactly how it proposes to calculate the value of lost sales to Emirates using the average delivery price of aircrafts delivered to Lufthansa in 2013.

43. In its response to this question, the EU first reiterates its arguments in favor of using the 2006 Lufthansa order as the appropriate comparator order for the 2013 Emirates lost sale. The EU then describes its proposed methodology for valuing the Emirates lost sale based on the Lufthansa order. The EU fails to establish that the Arbitrator should adopt either its proposed comparator or its valuation methodology. The United States has provided a reliable comparator in [BCI],⁴⁸ and if the Arbitrator were to reject that comparator for some reason, then the 2013 Korean Air 747-8I order provides an appropriate alternative, as it was placed by another major airline in Asia in the same year as the Emirates lost sale. The EU has not met its burden of demonstrating that using either of these options would result in countermeasures not commensurate with the adverse effects determined to exist.

The EU's Arguments Regarding the Appropriate Comparator for the Emirates Lost Sale

44. As the United States stated in its response to Question 153, it used the following standard hierarchy to determine comparator orders, [BCI] with respect to the closest Boeing model: (1) same customer order; (2) if there were multiple orders for the closest Boeing model by the same customer, the order closest in time; (3) if there were no such orders, [BCI] to the same customer; (4) a contemporaneous order for the closest Boeing model from another customer in the same country; and finally (5) a contemporaneous order for the closest Boeing model from the same or a nearby region.

45. This hierarchy is based on a ranking of the factors that are most likely to lead to a result that best approximates the aircraft price Boeing would have obtained in the counterfactual situation.⁴⁹ For example, the best indicator of the counterfactual price a customer would have

⁴⁸ See U.S. RAQ 122, paras. 95-100; U.S. RAQ 135.

⁴⁹ At various points, the EU recognizes the importance of these criteria. See EU RAQ 106, para. 154 (affirming the importance of "comparator LCA type" (described as the "closest competing Boeing model" in the U.S. methodology paper), and "order year"); EU RAQ 106, para. 163 (recognizing the importance of customer identity); EU RAQ 96, note 23 (affirming the importance of selecting a comparator order that is relatively close in time to the lost sale).

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paid for a Boeing model is the price that customer paid for that same model around the time of the lost sale.

46. Pursuant to this hierarchy, the U.S. methodology used [BCI] as the comparator for the 2013 Emirates lost sale. The United States indicated that, if the Arbitrator opted not to use a [BCI], then the best comparator would be the 2013 Korean Air 747-8I order, which was placed by another major airline in Asia in the same year as the Emirates lost sale.

47. The EU has not shown that the [BCI] is not a valid comparator for the Emirates lost sale. The EU previously argued that the Arbitrator lacks “proof of Boeing’s internal approvals for the document” that would enable an assessment of this [BCI].⁵⁰ The United States provided [BCI] documentation in Exhibit USA-71(HSBI). The United States also provided evidence that [BCI].⁵¹

48. The EU urges the Arbitrator to use instead Lufthansa’s 2006 order for 20 747-8Is as a comparator order for the Emirates lost sale. As an initial matter, the EU’s proposed comparator does not demonstrate that the comparator used by the U.S. methodology would result in countermeasures that are not commensurate. The EU cannot succeed by merely showing that there is potentially some other approach available.⁵²

49. In any event, the 2006 Lufthansa order is significantly less appropriate as a comparator than the [BCI] or the 2013 Korean Air order.

50. First, the EU states that the Lufthansa order is the only sale with “actual evidence of 2013 prices.”⁵³ The United States understands this statement to refer to the fact that there were deliveries made by Boeing to Lufthansa in 2013. But the lost sale in question was *ordered* in 2013, not delivered in 2013. Therefore, 2013 delivery prices are not particularly helpful, as the counterfactual deliveries from an order placed in 2013 would have taken place years later.

51. Moreover, the delivery price in any year is a function of the order price and the contractual escalation formula. The terms of any contract can be applied to determine a delivery price in 2013 or in any other year. The question is what Emirates would have paid for an aircraft

⁵⁰ EU RAQ 52, para. 3 (first bullet).

⁵¹ Boeing E-mail regarding Questions 116, 118, 121, 124(c), 125, 128-129, 132 (Exhibit USA-66(HSBI)).

⁵² See *US – Upland Cotton (22.6 II)*, para. 4.116 (“We recall in this respect the fact that the burden rests on the United States to demonstrate that Brazil’s proposed countermeasures do not meet this standard. In order to prevail in its argument, the United States must therefore persuade us not only that there may be alternatives to the choice of MY 2005 as the period of reference, but rather that the use of MY 2005 as period of reference would lead to countermeasures that would not be ‘commensurate’ within the meaning of Article 7.9. The United States has not convinced us that this would be the case.”).

⁵³ EU RAQ 97, para. 54.

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ordered in 2013 for deliveries in later years. Therefore, in terms of timing, the best comparator would be an *order* close to 2013, not an order from 2006 with deliveries in 2013. Indeed, the EU itself emphasizes the importance of order timing elsewhere, where it argues (erroneously) for an alternative comparator for the 2013 United Airlines lost sale.⁵⁴

52. Second, the EU argues that the 2006 Lufthansa order is of a somewhat similar size.⁵⁵ However, the order size is not a reliable indicator of the per-aircraft price and would not support such an adjustment, as discussed in the U.S. response to Question 125. The size of an order therefore should not be given any weight in determining the most appropriate comparator for a particular transaction.⁵⁶

53. Third, the EU argues that Lufthansa, like Emirates, “is one of the world’s premier flagship carriers, with a similarly global network and similarities in other LCA-related aspects, such as revenue, passengers carried, passenger-kilometres flown, fleet size, number of countries served, number of destinations, etc.”⁵⁷ The EU provides no evidence to substantiate any of these factual assertions, and no indication that it analyzed any other transactions along these metrics. In any event, [BCI].

54. Finally, the EU ignores the reasons why the 2006 Lufthansa order would be an inferior comparator. As already stated, it took place seven years earlier than the counterfactual 2013 Emirates sale, and therefore reflected market conditions at a markedly different time. In addition, the 2006 Lufthansa sale was a launch order,⁵⁸ which, according to the EU’s own arguments before the original panel, are typically made under conditions that differ from those applicable to other orders.⁵⁹ The 2013 Emirates lost sale, by contrast, would not have been a launch order.

⁵⁴ EU RAQ 96, note 23.

⁵⁵ EU RAQ 97, para. 54.

⁵⁶ Even if it were, [BCI]. See [BCI] at 6 (Exhibit USA-71(HSBI)).

⁵⁷ EU RAQ 97, para. 54.

⁵⁸ *Boeing announces Lufthansa as launch customer for 747-8 Intercontinental passenger variant with 20-aircraft order*, FlightGlobal (Dec. 6, 2006) (Exhibit USA-112).

⁵⁹ See Original Panel Report, para. 7.1829 (“According to the European Communities, Singapore Airlines, Emirates Airlines and Qantas each ordered the A380 not because of its price, but because it offered unique advantages in seating capacity, range, and operating economics not available from any competing LCA Boeing could then offer. The European Communities argues that the terms of sale were consistent with the [BCI] and normal practice for orders by initial launch customers.”).

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55. Fourth, the Lufthansa sale is not in the same or similar geographic region, a criterion that the EU has acknowledged elsewhere would provide the best alternative when a same-customer transaction is unavailable.⁶⁰

56. For these reasons, the 2006 Lufthansa comparator order is inferior as a comparator to the [BCI] and the 2013 Korean Air order. As the U.S. evidence indicated, [BCI]⁶¹

57. And even if the 2006 Lufthansa order were *also* acceptable, proving as much is insufficient to meet the EU's burden of showing that the comparator in the U.S. methodology would render the countermeasures not commensurate.⁶² Accordingly, there is no basis to abandon the proposed comparator in the U.S. methodology in favor of the 2006 Lufthansa order.

The EU's arguments concerning the methodology for valuing the Emirates lost sale

58. The EU explains its preferred methodology for valuing the Emirates lost sale based on the Lufthansa order it urges as the comparator. Specifically, the EU argues that the Arbitrator should take the prices of the 2013 deliveries, which resulted from the 2006 sale, and then adjust them for differences in the order size between the 2006 Lufthansa order and the 2013 Emirates A380 order.⁶³

59. The United States has already explained why using the 2006 order would be problematic. The EU compounds the problems by failing to adjust 2013 delivery prices to reflect the delivery years associated with the 2013 Emirates lost sale. Specifically, the contracted delivery schedule calls for deliveries in [[HSBI]].⁶⁴ Thus, the EU's proposed methodology would fail to provide any escalation after 2013, even though no counterfactual lost sale deliveries would occur in 2013, and some would not occur until [[HSBI]].

60. The United States has also already explained that the evidence provides no basis for making an adjustment to price based on order size.⁶⁵ The EU's two alternative methodologies for making such an adjustment contain additional errors.

⁶⁰ See EU RAQ 97, para. 54.

⁶¹ Boeing E-mail regarding Questions 116, 118, 121, 124(c), 125, 128-129, 132 (Exhibit USA-66(HSBI)).

⁶² See *US – Upland Cotton (22.6 II)*, para. 4.116.

⁶³ EU RAQ 97, para. 583

⁶⁴ Transaero Airlines deposits and pre-delivery payments (Exhibit EU-83-HSBI).

⁶⁵ See, e.g., U.S. RAQ 125, para. 117 (citing Boeing E-mail regarding Questions 116, 118, 121, 124(c), 125, 128-129, 132 (Exhibit USA-66(HSBI))).

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61. The EU recommends deriving an adjustment factor by comparing the pricing between Boeing’s [BCI] final offer for [BCI] and the [BCI] order for [BCI].⁶⁶ The EU does not indicate whether the volume discount it imagines applying would be based on a [BCI] ratio or on [BCI]. Either way presumes that a standard volume discount – already shown by the evidence to be non-existent – is a straight-line function. That is, under the first option, if ordering [BCI] results in a discount of \$X, then ordering [BCI] would necessarily result in a discount of \$5X. Under the second option, if ordering [BCI] results in a discount of \$X (the discount for [BCI]), then ordering [BCI] would necessarily result in a discount of \$5X (the discount for [BCI]).

62. There is also no evidence to suggest that volume discounts, even if they did reliably exist across transactions, would be structured in this way. To the contrary, the evidence indicates that would not be the case.⁶⁷

63. For example, [BCI]:

Transaction	Number of aircraft	Delivery Price in [[HSBI]]
[BCI]	[BCI]	[[HSBI]] ⁶⁸
[BCI]	[BCI]	[[HSBI]] ⁶⁹
[BCI]	[BCI]	[[HSBI]] ⁷⁰
[BCI]	[BCI]	[[HSBI]] ⁷¹

In fact, the above analysis suggests that, under the EU’s approach, the prices calculated for the value of the [BCI].

64. The EU also provides an alternative for deriving an adjustment factor for order size in case its first option cannot be executed on the basis of available evidence.⁷² The alternative posits comparing prices between the 2006 Lufthansa price and a “2006” Korean Air price. Presumably, the EU means the 2009 Korean Air order, since no 2006 Korean Air 747-8I order

⁶⁶ EU RAQ 97, para. 60.

⁶⁷ See Boeing E-mail regarding Questions 116, 118, 121, 124(c), 125, 128-129, 132 (Exhibit USA-66(HSBI)).

⁶⁸ See [BCI].

⁶⁹ See [BCI] to calculate the delivery price for the [BCI].

⁷⁰ [BCI] to calculate the delivery price for the [BCI].

⁷¹ See [BCI] to calculate the delivery price for the [BCI].

⁷² EU RAQ 97, para. 63.

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exists.⁷³ The EU would derive an adjustment factor from the ratio of ordered aircraft in these two campaigns, and then use the adjustment factor to alter the 2006 Lufthansa price to account for the difference in order size between that sale and the 2013 Emirates sale.⁷⁴

65. This suffers from some of the same problems that plague the EU's first approach. Again, no evidence shows that order size reliably alters the per-aircraft price, or that any volume discount that did exist can be extrapolated and then applied linearly. In other words, the EU argues that doubling the volume of any order results in a **[[HSBI]]** discount in price. The EU's methodology would apply this volume discount equally to an increase in volume from 4 to 8 LCA as it would to an increase in volume from 15 to 30 LCA. There is no evidence that such a straight-line application of any purported discount is reasonable.

66. Moreover, as the EU recognizes, Lufthansa and Korean Air are different airlines.⁷⁵ The EU's alternative approach assumes that *the entirety* of the difference in pricing between two orders from two different customers in two different markets is due to order size. However, the evidence shows that, when **[BCI]**. As indicated above, using the example proposed by the EU in paragraphs 59 through 61 of its response to Question 97, **[BCI]**.⁷⁶ Therefore, applying the adjustment the EU would draw from that comparison **[BCI]** for valuing the 2013 Emirates lost sale.⁷⁷ For the reasons discussed above, no such adjustment would be warranted, but in any event, the result confirms that the EU's arguments are based on a false premise.

67. However, recognizing that no two large civil aircraft purchasers are the same, it is notable that the EU chooses to compare the pricing from a Lufthansa order with the pricing from a Korean Air order, which suggests the EU views Lufthansa and Korean Air as comparable customers. Given that is the case, there is no basis for the EU to endorse a 2006 order, when an admittedly comparable customer (Korean Air) ordered the relevant aircraft in 2013 – the same year as the Emirates lost sale in question.

Question 98 (EU)

With reference to Table 7 (HSBI) of the European Union's responses to the second set of Arbitrator questions, could the European Union please explain how the contractually agreed and current delivery schedules of United Airlines have been determined based on Exhibits EU-91 (HSBI) and EU-92 (HSBI)?

⁷³ See Updated Ascend Database (Exhibit EU-79). Korean Air did order 747-8F freighters in 2006, but the United States assumes that the EU is not referring to a freighter order. See *ibid*.

⁷⁴ See EU RAQ 97, para. 63.

⁷⁵ EU RAQ 97, note 59.

⁷⁶ See *supra* U.S. Comments on EU RAQ 97 (demonstrating that the **[BCI]**). See also **[BCI]**.

⁷⁷ Cf. EU RAQ 97, para. 61.

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68. In response to this question, the EU confirms that the contractually agreed delivery schedule information in Exhibit EU-91(HSBI) is “a relevant excerpt from Airbus’ contract with United Airlines for the purchase of 10 A350XWB-1000s.”⁷⁸ As with the contractually agreed delivery schedule information provided by the EU with respect to the other lost sales at issue, the United States used this agreed delivery schedule information for the 2013 United Airlines lost sale to calculate counterfactual delivery prices in the revised countermeasures calculation submitted as Exhibit USA-99(HSBI).⁷⁹ Thus, the revised U.S. lost sales valuations now reflect the delivery schedules that each customer agreed to at the time the lost sales occurred and those instances of serious prejudice arose.⁸⁰

69. Those delivery schedules are a sound basis on which to value lost sales because, by definition, they constitute delivery schedules that were acceptable to the customers for the aircraft ordered in the lost sales at the time those lost sales occurred. Accordingly, it is reasonable to infer that, in the counterfactual situation in which Boeing would have won the sale, the customer would have agreed to take delivery of the closest-competing Boeing model in the same years as indicated in the Airbus contractually agreed delivery schedules.

70. The EU’s response to Question 98 also ventures beyond the information requested by the Arbitrator to offer two arguments. Each is erroneous.

71. First, the EU contends that its preferred “delivery-centric” approach to valuing lost sales is supported by the proposition that “real-world issues in connection with LCA orders, such as cancellations, deferrals, and conversions, occur frequently and have real effects on the LCA markets.”⁸¹ In the first place, the EU overstates the frequency of such events. The United States has presented evidence showing that [BCI] of firm orders for the 747-8I, 777-300ER, and 787-10 have occurred as originally scheduled, and that when delivery delays have occurred (including in response to customer requests), they have typically been of [BCI].⁸² The evidence

⁷⁸ EU RAQ 98, para. 64.

⁷⁹ See Second Revised Aggregation of Adverse Effects Determined to Exist by Year (revision to Exhibit USA-28(HSBI)) (Exhibit USA-99(HSBI)). See also Calculation of Delivery Prices for Comparator Orders (Exhibit USA-61(HSBI)).

⁸⁰ The EU attempts to capitalize on the United States as having “abandoned” its “flawed approach” of using Boeing estimates of the Airbus delivery schedules at the time of order. See EU RAQ 98, footnote 70. There is nothing remarkable in the U.S. approach to counterfactual delivery schedule information: at the outset, it used the best estimates available for Airbus delivery schedule information it did not have, and it is now using the actual Airbus information that the EU has submitted.

⁸¹ EU RAQ 98, para. 69.

⁸² U.S. RAQ 124, para. 110 (“for the 747-8, more than [BCI] percent of the deliveries occurred as originally scheduled, and just under [BCI] percent were delayed by, on average, [BCI]. For the 777-300ER, about [BCI] percent of the deliveries were on time, and about [BCI] percent of the deliveries were delayed by, on average, [BCI]. And for the 787-10, there was [BCI]”).

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also shows that 747-8I, 777-300ER, and 787-10 order conversions have occurred [BCI],⁸³ and that outright order cancellations are [BCI].⁸⁴ Thus, the evidence shows that the EU is relying on a false premise when it repeats its argument in favor of a delivery-centric approach to valuing lost sales.

72. More fundamentally, however, the EU’s argument is misplaced as a legal matter. The task before the Arbitrator under Article 7.10 of the SCM Agreement is a narrow one: to determine whether the countermeasures proposed by the United States “are commensurate with the degree and nature of the adverse effects determined to exist.”⁸⁵ Given this mandate, it would be erroneous to value the instances of lost sales from the first compliance proceeding as if they involved orders for Airbus models other than those identified in the first compliance appellate report, or as if the number of aircraft involved in those lost sales were less than found in that report.⁸⁶ To do so would amount to a collateral attack on the adopted findings of adverse effects.

73. Accordingly, the EU errs in asserting that the Arbitrator should attempt to modify the countermeasures calculations to account for issues such as order deferrals, conversions, and cancellations. Notably, such an attempt – if it were to have a hope of being objective – would also need to consider possible events that would likely *increase* the value of the lost sales, such as the exercise of options for additional orders of Airbus aircraft pursuant to the purchase agreements corresponding to the lost sales at issue. In addition there may be follow-on orders based on the incumbency gained or enhanced through the lost sale. The United States has not attempted to seek countermeasures for such effects because this is not the proper forum to pursue such findings. The same holds true with the EU supposition that United Airlines would have converted and delayed orders of Boeing aircraft in the same way it did the A350 XWB, and arguments based on that supposition that would alter the adverse effects findings from the compliance proceeding. Therefore, the United States has proposed countermeasures that reflect the adopted findings, consistent with Articles 7.9 and 7.10 of the SCM Agreement.

74. Second, the EU contends that the U.S. approach of valuing lost sales based on Airbus delivery schedules at the time of the order “is incapable of properly considering the actual trade effects, as affected by cancellations, deferrals, and conversions.”⁸⁷ In an attempt to support this argument, the EU asserts that “order cancellations, deferrals, and conversions occur for a number

⁸³ U.S. RAQ 118, paras. 69-70.

⁸⁴ See Survival Rate Calculation (Exhibit USA-65(HSBI)).

⁸⁵ SCM Agreement, Art. 7.10.

⁸⁶ See U.S. RAQ 117, para. 60; U.S. RAQ 58, paras. 14-16. See also Compliance Appellate Report, para. 5.705, Table 10 and para. 5.723, Table 12; Compliance Panel Report, para. 6.1781, Table 19.

⁸⁷ EU RAQ 98, para. 71.

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of different reasons – some of which have to do with decisions taken by LCA *customers*, and some of which reflect actions taken by the LCA *manufacturer*.”⁸⁸

75. The United States has already explained why the EU’s focus on “trade effects” is a misguided distraction from the task before the Arbitrator – assessing the proposed countermeasures in terms of the *adverse effects* determined to exist,⁸⁹ which in this case include findings of significant lost sales under Article 6.3(c) of the SCM Agreement based on instances of lost sales that arose *at the time the customers ordered Airbus LCA*. Thus, the EU’s assertion that the U.S. methodology is incapable of capturing “actual trade effects” is beside the point. The U.S. methodology captures “adverse effects.” If the EU’s conception of “actual trade effects” differs from “adverse effects,” there is no need for the U.S. methodology to capture the former.

76. That said, the EU’s argument usefully highlights the errors of following its preferred approach. As the EU observes, post-order events like deferrals and conversions can occur for a variety of reasons, which can originate from the customer or the manufacturer. But it would be unreasonable to assume, as the EU does, that certain post-order events would have occurred in the counterfactual situation. Indeed, the example discussed by the EU bears this out.

77. Discussing the 2013 United Airlines lost sale, the EU predicts that “if Boeing had won the lost sale at issue, United Airlines would have acted in exactly the same manner in the counterfactual as it did in the actual,” supposedly resulting in counterfactual conversions and deferrals of Boeing aircraft.⁹⁰ However, there are many possible reasons for conversions and deferrals, and even if such changes are requested by the customer, the reason(s) could be specific to an Airbus aircraft that would not apply to the closest Boeing model ordered in the counterfactual. There could also be contractual differences. For example, perhaps converting Boeing aircraft would have incurred a higher direct or indirect cost (from the customer’s perspective) than switching minor models of the Airbus aircraft. If so, it is possible that the additional expense could not be justified and would have led to an alternative action.

78. Notably, as the EU’s own evidence shows, United Airlines in September 2017 continued to take deliveries of Boeing 777-300ERs (pursuant to orders placed in 2015, after the 2013 lost sale) and did not plan to defer the entry into service of the 787-10s it had ordered, even as it significantly deferred its A350 XWB orders.⁹¹ Of course, if Boeing had won the 2013 lost sale with an order for 777-300ERs, those counterfactual aircraft would have been able to fill United

⁸⁸ EU RAQ 98, para. 71 (emphasis original).

⁸⁹ See, e.g., U.S. RAQ 94, para. 4.

⁹⁰ EU RAQ 98, para. 75.

⁹¹ *United Airlines Postponing Delivery of Much-Anticipated Airbus-350*, Chicago Business Journal (Sept. 6, 2017) (Exhibit EU-59(HSBI)).

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Airlines’ requirements before the 777-300ERs that the airline ordered in 2015 and did not defer. Thus, it is at least doubtful that, in the counterfactual, United Airlines would have converted and deferred the counterfactual 777-300ER orders as it did with the actual A350 XWB orders.

79. Yet, the EU would have the Arbitrator posit a counterfactual in which United Airlines would have initially ordered the 777-300ER in 2013, converted those orders to 787-10 orders in 2017, and then deferred the 787-10 orders by several years. This would be an unnecessary and inappropriately speculative exercise. It would also result in the use of 787-10 prices to value the lost sale, and these [BCI].⁹²

80. In addition, the EU objects that the U.S. approach to valuing lost sales fails to capture Boeing’s supply-side constraints.⁹³ As explained in the U.S. comments on the EU’s response to Question 146, the EU’s arguments regarding Boeing’s supposed supply-side constraints are yet another collateral attack on the adopted findings, which already found that the U.S. LCA industry would have captured the relevant orders and deliveries in the counterfactual. These arguments thus seek erroneously to use Boeing’s actual production capabilities under the profoundly distortive effects of LA/MSF subsidies as a reason to ignore adopted findings of serious prejudice and, instead, improperly reduce the countermeasures designed to address those adverse effects.

81. Finally, the EU concludes its response by stating that the Arbitrator “is under an obligation to base its award on a ‘plausible or reasonable’ counterfactual.”⁹⁴ As the United States explains in its response to Question 101, the EU’s quotation of the “plausible or reasonable” “counterfactual” language from *US – Washing Machines (22.6)* is grossly misleading. The EU’s suggestion that the Arbitrator should be analyzing a counterfactual in a more recent or future period to re-assess adverse effects finds no support in *US – Washing Machines (22.6)* or any other previous report, nor does it find support in the text of the SCM Agreement. To the contrary, the SCM Agreement requires that the countermeasures reflect the adverse effects determined to exist in the compliance proceeding.

1.3 For both parties

Question 99 (both parties)

Certain previous arbitration decisions have included discussions regarding the propriety of taking a "short-run" or "short-term" perspective with respect to certain issues. Are those

⁹² Compare U.S. RAQ 135, para. [BCI] (calculating the [BCI] of [[HSBI]] for [BCI] and [BCI], pp.37 ([BCI]), 55-56 ([BCI]) to calculate a [BCI] of [[HSBI]] [BCI] with U.S. RAQ 135, para. [BCI] (providing the [BCI] of [[HSBI]] for [BCI]).

⁹³ See EU RAQ 98, para. 72.

⁹⁴ EU RAQ 98, para. 77 (quoting *US – Washing Machines (22.6)*, para. 3.11).

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principles and considerations relevant to this arbitration proceeding and how, especially with respect to the selection of an appropriate reference period?

82. The EU responds that the discussions of “short-run” or “short-term” in the cited arbitration reports are “not relevant.” The United States of course agrees that this proceeding does not involve an econometric model.⁹⁵ But the EU ignores the reasoning in the arbitration reports cited in the Arbitrator’s question and, in the process of arguing for the irrelevance of those discussions, misconstrues *US – Upland Cotton (22.6 II)*.

83. The cited reports justified their selection of short-term or short-run perspectives because they saw their task as focused on the period immediately following the end of the RPT.⁹⁶ This is consonant with the arbitrator’s finding in *US – Upland Cotton (22.6 II)* that a reference period immediately following the RPT “is in principle legitimate.”⁹⁷ These reports and their common rationale support an evaluation of commensurateness with reference to the valuation of the instances of adverse effects in the December 2011 – 2013 period, which immediately followed the end of the RPT.

84. Finally, the United States again cautions that it contests EU characterizations of U.S. positions and purported agreements between the parties, which have frequently been inaccurate and misleading.⁹⁸

Question 100 (both parties)

With reference to, inter alia, the European Union's response to question No. 26, if the level of countermeasures were to be determined with respect to "trade effects", how should the Arbitrator take into account the apparent fact that, in the counterfactual, Boeing (a US company) would have won the "lost sale" to United (a US customer)?

85. The EU responds to the Arbitrator’s question that “the word ‘trade’ in ‘trade effects’ is properly interpreted in a broad sense as ‘transactions’, or ‘transfers of goods and services’, and not in the narrow sense as ‘cross-border transactions; *i.e.*, imports or exports.”⁹⁹ The EU does not explain what exactly it is “interpreting.” This reinforces the completely non-textual nature of

⁹⁵ Cf. EU RAQ 99, para. 79.

⁹⁶ See, e.g., *US – Gambling (22.6)*, para. 3.144 (“We understand it to be part of our task to determine what the level of Antigua exports of remote gambling services to the United States would have been had the United States come into compliance within the reasonable period of time, *i.e.* by 3 April 2006.”); *US – Tuna II (22.6)*, para. 4.18 (“Our task is to assess the level of nullification or impairment caused by the United States’ failure to bring the 2013 Tuna Measure into compliance by the expiry of the RPT.”)

⁹⁷ *US – Upland Cotton (Article 22.6 II)*, para. 4.118.

⁹⁸ See EU RAQ 99, para. 85.

⁹⁹ EU RAQ 100, para. 88.

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the EU’s focus on “trade effects” as a term of art that should determine the level of countermeasures.

86. Of course, “trade effects” does not appear in the SCM Agreement and, therefore, there is no basis to “interpret” it at all. The EU is merely imbuing a colloquial term with a meaning that serves the EU’s interests in this proceeding. On the one hand, the EU favors a broad “interpretation” to avoid excluding domestic lost sales, which are clearly covered by Article 6.3 of the SCM Agreement. On the other hand, the EU defines it in a way that allows the EU to argue that orders found to represent lost sales should be ignored in favor of an approach that focuses exclusively on deliveries.

87. The approach is inconsistent with the SCM Agreement. Article 7.9 and 7.10 unambiguously state that the countermeasures must be commensurate with the adverse effects determined to exist. In this dispute, significant lost sales were found on the basis of orders. To the extent that the EU has some conception of “trade effects” that differs from “adverse effects” – and requires abandoning the order-centric approach to significant lost sales in the adopted findings in favor of an approach focused exclusively on deliveries – it errs.

88. References to trade effects in previous reports did not use these words as a term of art or established concept. It may be useful to distinguish between an approach based on the amount of the subsidy, and one based on the trade or economic effects of that subsidy.¹⁰⁰ But that usage – which explains a broad distinction that is relatively easy to understand – does not somehow establish “trade effects” as a term of art or established concept that should guide an arbitrator’s assessment of the level of countermeasures commensurate with the degree and nature of the adverse effects determined to exist.

89. In fact, the EU has it backwards. The language of the text guides the determination of the proper level of countermeasures or suspension of concessions. Thus, the economic effects or trade effects that should be valued in one dispute may differ from those in another because the facts are different, and therefore the benefits that are nullified or impaired differ. As one arbitrator put it, in *US – 1916 Act (EC) (22.6)*, “reliance on a broader concept of economic impact was dictated by the nature of the measures at issue.”¹⁰¹ The legal provisions may also differ (*e.g.*, DSU Article 22.4, SCM Article 4, SCM Article 7), which shapes how the proper level of countermeasures or suspension of concessions is set.¹⁰² Thus, while there is nothing wrong with using the words trade effects to explain a distinction or to discuss the effects of

¹⁰⁰ See *US – FSC (22.6)*, paras. 5.42-5.43.

¹⁰¹ *US – 1916 Act (22.6)*, para. 3.40.

¹⁰² See *US – CDSOA (22.6) (EC)*, paras. 3.44-3.46.

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certain measures, the phrase “trade effects” is not a term of art that somehow serves as the standard upon which the level of countermeasures should be based.

90. As the United States has explained previously, if the EU’s (or any other) concept of “trade effects” differs from “adverse effects,” that difference cannot alter the measure of countermeasures.¹⁰³ Rather, under Article 7 of the SCM Agreement, the countermeasures *must* reflect the “adverse effects” determined to exist.

Question 101 (both parties)

With reference to, inter alia, paragraph 36 of the European Union's responses to the first set of Arbitrator questions, and the European Union's response to question No. 4, could the parties please elaborate on the relationship between the "dissipation" of the effects of the subsidies at issue in this proceeding, and the counterfactual launch dates of the A380 and A350XWB? In particular: (i) are the counterfactual launch dates the, and the only, mechanism through which the effects of the subsidies will "dissipate"; or (ii) is the "dissipation" of such effects related to some other process? If it is the latter, please describe what those other processes are that contribute to the "dissipation" of relevant effects and describe how these processes result in the relevant "dissipation" of the direct and indirect effects of LA/MSF. Additionally, please describe how the relevant "effects" (both direct and indirect) of the subsidies would be affected by the counterfactual launch dates of the A380 and A350XWB.

91. Although the Arbitrator asked about the relationship between the dissipation of adverse effects and the counterfactual launch dates of the A380 and A350 XWB, the EU starts by repeating its previous arguments opposing what it refers to as “recurring” countermeasures. It then argues in favor of its erroneous characterization of the compliance proceeding findings, namely that the only effect of LA/MSF was to accelerate launch of the A380 and A350 XWB by, at most, two years. Finally, the EU simply cross-references arguments it made in the second compliance proceeding that supposed compliance steps have led to the dissipation of the adverse effects found to exist in the first compliance proceeding.

92. All of this is wrong. It is impossible to reconcile the compliance findings that LA/MSF caused adverse effects in the December 2011 – 2013 period with the EU’s assertion now that those same reports consider that the A380 and the A350 XWB would have launched soon after the respective actual launch dates. The EU is also wrong in asserting that the Arbitrator may preempt the findings of the second compliance panel by finding, based on arguments and evidence submitted to that panel, that the adverse effects of LA/MSF have “dissipated” as of the present day. And, finally, the EU errs when it purports to address the substance of this question with a cursory discussion of the relationship between counterfactual launch and the dissipation of adverse effects.

¹⁰³ U.S. RAQ 94, para. 4; U.S. RAQ 100, paras. 10-13.

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The EU has misrepresented the adopted findings of product effects from the first compliance proceeding

93. The EU again repeats its position that the product effects found in the compliance proceeding were mere acceleration effects rather than the enabling of the market presence of the A380 and A350 XWB.¹⁰⁴ The EU even argues that the United States specifically pursued a finding of mere acceleration effects in that proceeding. Specifically, according to the EU, “the United States chose, and succeeded with, an approach to establishing causation based on so-called ‘product effects’ of the subsidies on the ‘as and when’ launch of an aircraft *at specific moments in time* – that is, an *acceleration effect*.”¹⁰⁵ Both the argument that infers a mere acceleration effect from the phrase “as and when,” and the EU’s attempt to ascribe this causal theory to the United States, do not withstand scrutiny.

94. The adopted panel and appellate findings throughout this dispute have found that each Airbus aircraft family would not have come into existence without LA/MSF, and described this in terms of the aircraft program not launching “as and when” it did. The original proceeding focused on the 2001 – 2006 period.¹⁰⁶ The original panel found that, absent LA/MSF, Airbus and all of its LCA *likely would not exist at all*,¹⁰⁷ and it used the term “as and when” in its findings.¹⁰⁸ This is impossible to square with the EU’s view that the phrase “as and when” can only be interpreted to signify that LA/MSF merely accelerated launch. As the first compliance panel noted:

The adopted causation findings from the original proceeding established that, under all four counterfactual scenarios, the market presence of the relevant models of Airbus LCA that were sold in the 2001-2006 period could be explained by the effects of the pre-A350XWB LA/MSF subsidies.¹⁰⁹

95. The compliance proceeding focused on the December 2011 – 2013 period, and the compliance panel found:

¹⁰⁴ See EU RAQ 101, para. 95.

¹⁰⁵ EU RAQ 101, para. 94 (emphasis original).

¹⁰⁶ See Original Panel Report, para. 7.2105.

¹⁰⁷ See Original Panel Report, para. 7.1984.

¹⁰⁸ See Original Panel Report, para. 7.2025 (“For all of the foregoing reasons, and recalling our findings in respect of the Article 6.3 phenomena observed during the 2001 to 2006 period, we are satisfied that the specific subsidies the United States has shown to exist enabled Airbus to bring to the market LCA that it would not otherwise have been able to develop and launch *as and when it did* . . .”) (emphasis added).

¹⁰⁹ Compliance Panel Report, para. 6.1534.

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{T}he European Union’s core argument in response to *the United States’ allegations concerning the present-day “product” effects of the challenged LA/MSF subsidies* is centred on its view that “the passage of time, and events occurring during the time that passed, must, *legally* result in the dissipation of adverse effects”.¹¹⁰ . . . {W}e find that the direct and indirect effects of the pre-A350XWB LA/MSF subsidies continue to be a genuine and substantial cause of the *present-day market presence* of the A320, A330 and A380 families. *In other words, we find that in the absence of the pre-A350XWB LA/MSF subsidies, Airbus would not be selling those aircraft today.*¹¹¹

96. Although the compliance appellate report found that adverse effects of the pre-A380 LA/MSF were not actionable in the December 2011 – 2013 period, it confirmed the conclusion in the compliance panel report that, absent LA/MSF for the A380 and A350 XWB, Airbus would not have been able to offer the A380 or A350 XWB in the December 2011 – 2013 period.¹¹² The compliance appellate report further confirmed the compliance panel’s findings that, due to the unavailability of the A380 and A350 XWB in the counterfactual, the U.S. LCA industry would have captured the relevant sales and deliveries.¹¹³

97. Thus, it is clear that the U.S. arguments and the findings were that the relevant Airbus aircraft would not have been in the market in the absence of LA/MSF. At times, the EU itself appears to concede that this was the case. It states:

Where the *market presence of a model* of aircraft, *at the time of a sales campaign*, was attributable to the direct effects and indirect effects from subsidies, *this served as the basis* for findings of significant lost sales, on the notion that, *absent the subsidies*, the *Airbus product would not have competed* in the sales campaign, and Boeing would instead have won the sale. Similarly, these *findings relating to the market presence of Airbus’ models* also served as the

¹¹⁰ European Union's second written submission, para. 593. (emphasis added; footnote omitted)

¹¹¹ Compliance Panel Report, para. 6.1534 (emphasis added).

¹¹² See Compliance Appellate Report, paras. 5.726 (“in the absence of these subsidies, Airbus would not have been able to be ‘present in {both} of the relevant sales campaigns as exactly the same competitor selling identical aircraft’ in the post-implementation period”), 5.734 (“in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did” – *i.e.*, the December 2011 – 2013 period).

¹¹³ See Compliance Appellate Report, paras. 5.709, 5.715-5.716, 5.726, 5.730-5.731, 5.734-5.742, 6.31, 6.37, 6.39.

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eventual basis for findings of other forms of volume effects (and specifically, impedance).¹¹⁴

98. The EU now however seeks to avoid the inescapable conclusion regarding the meaning of the product effects findings, which it conceded elsewhere, by conjuring an alternative causal theory to explain the findings of WTO inconsistency against its measures. Specifically, the EU asserts:

The counterfactual launch date has a highly significant impact on the “dissipation” of adverse effects over time, because, from that moment onwards, the same aircraft would be in the marketplace – with or without the subsidies. The difference between the actual (with subsidy) and counterfactual (without subsidy) world is that, at the moment of the counterfactual launch date (that is, 2002 for the A380, and 2007/2008 for the A350XWB), the relevant aircraft in the actual world was already on the market for up to two years.

This means that, while much of the adverse effect dissipates with the counterfactual launch date, there may remain, for a period of time, some “diminishing” effects that flow from the accelerated launch caused by the MSF subsidies. A two-year delay in the launch date of the A380 and A350XWB may still have resulted in some delay in the counterfactually available delivery positions that Airbus would have been able to offer in subsequent sales campaigns after 2002 (for the A380) and 2007/2008 (for the A350XWB), respectively.¹¹⁵

99. The problem for the EU is that this hypothetical basis for the compliance findings was not the analysis of the four panel and appellate reports in this dispute. The compliance panel and appellate reports make clear that, in the counterfactual, Airbus would not have been able to even offer the A380 or A350 XWB in the December 2011 – 2013 period.¹¹⁶ Neither report states that Airbus would have been able to offer the A380 or the A350 XWB in the December 2011 – 2013 sales campaigns at issue, but with less attractive delivery positions. And neither report takes the next step of then assessing counterfactual competition between Boeing and Airbus aircraft in such campaigns. Understandably, the EU fails to provide a single citation to any of the reports (or to any other source) to support this alternative causation theory.¹¹⁷

¹¹⁴ Exhibit A to EU Preliminary Ruling Request, para. 41 (citing Compliance Panel Report, paras. 6.1785-6.1789, 6.1806-6.1817) (emphasis added).

¹¹⁵ EU RAQ 101, paras. 101-102.

¹¹⁶ See Compliance Appellate Report, paras. 5.709, 5.726, 5.734; Compliance Panel Report, paras. 6.1528-6.1534, 6.1776-6.1778.

¹¹⁷ See EU RAQ 101, paras. 101-102.

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100. Finally, the EU attempts to draw a false equivalence between the findings in *US – Large Civil Aircraft* and those here. It states: “In both cases, the subsidies at issue caused an acceleration effect of approximately two years.”¹¹⁸ The United States has already explained why it is impossible to impute such a finding to any of the *EC – Large Civil Aircraft* reports.¹¹⁹ The original panel in *US – Large Civil Aircraft* explicitly found that the *only* effect of the challenged R&D subsidies was to accelerate the development of the 787.

101. As the compliance panel in that dispute explained:

{T}he original panel and the Appellate Body found that the aeronautics R&D subsidies accelerated Boeing’s development of technologies for the 787, which in turn enabled Boeing to launch the 787 earlier than otherwise would have been possible, thereby reducing Boeing’s time to market with the 787.

It is clear from the foregoing that neither the panel nor the Appellate Body considered that the 787 technologies were themselves the effects of the aeronautics R&D subsidies. ***The aeronautics R&D subsidies were not found to have brought into existence any technology or product that would not otherwise exist.*** Rather, they ***accelerated*** Boeing’s development of various technologies and reduced the time to market of a technologically-advanced product that would otherwise have taken Boeing longer to develop and place on the market.¹²⁰

102. As a result, in the compliance proceeding, the United States put forward a detailed evidentiary showing regarding when the 787 would have launched in the absence of the R&D subsidies. The compliance panel did not determine that the acceleration effect was exactly two years. However, it considered the extensive U.S. evidence and argumentation probative, while it found the EU rebuttal attempts “highly-generalized in nature,” “unpersuasive,” and “not plausible.”¹²¹ As a result, it found that the 787 would have launched several years prior to the end of the RPT.¹²²

¹¹⁸ EU RAQ 101, para. 108.

¹¹⁹ See EU RAQ 101, paras. 108-109.

¹²⁰ *US – Large Civil Aircraft (21.5) (Panel)*, paras. 9.126-9.127 (emphasis added).

¹²¹ *US – Large Civil Aircraft (21.5) (Panel)*, paras. 9.162, 9.176.

¹²² The *US – Large Civil Aircraft* compliance appellate report then made clear that, even if a counterfactual launch date would have arrived, a panel would need to look closely at whether the subsidies nevertheless continued to cause adverse effects. See *US – Large Civil Aircraft (21.5) (AB)*, paras. 5.411, 5.415. The compliance panel did not specify an exact year of the counterfactual launch. However, the compliance appellate report interpreted (and accepted) findings by the panel as indicating that counterfactual launch would have occurred as early as 2006 but no later than 2010. *Ibid.*, para. 5.441.

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103. By contrast, the EU made no effort in the compliance proceeding in this dispute to show when the A380 or A350 XWB would have launched in the counterfactual. It is hard to square the EU's silence on this point with its assertion now that the "as and when" findings throughout this dispute signified merely that LA/MSF accelerated launch. It follows, of course, that there were no findings in the compliance proceeding in this dispute regarding counterfactual launch dates for the A380 or A350 XWB.

104. In fact, the compliance panel in *US – Large Civil Aircraft* explicitly contrasted the acceleration effects in that dispute with the product effects found in the original and compliance proceedings in this dispute. Specifically, the compliance panel there stated:

The findings of the panel in the original proceeding regarding the nature and effects of the aeronautics R&D subsidies (i.e. *an acceleration effect* providing a time to market advantage) *can be contrasted* with certain of the findings in *EC and certain member States - Large Civil Aircraft* regarding the nature and effects of certain of the subsidies at issue in that dispute. In *EC and certain member States - Large Civil Aircraft*, the panel concluded, among other things, that Airbus would have been unable to bring to market the LCA that it launched but for certain of the subsidies in question. In other words, certain of the subsidies in question in that dispute *enabled the creation and market presence of products that would not otherwise exist*.¹²³

105. Thus, the false equivalence on which the EU premises its argument is just that – false. Moreover, there simply can be no reasonable disagreement about the fact that the product effects in this dispute were the very existence in the market of the relevant Airbus LCA models. As the compliance panel in *US – Large Civil Aircraft* noted, these product effects stood *in contrast* to mere acceleration effects. Therefore, the EU arguments premised on the erroneous contrary interpretation of the findings are invalid.

*Assuming arguendo that the EU were correct regarding the product effects findings,
annual countermeasures would remain appropriate.*

106. The EU considers that the U.S. request for annual countermeasures is premised on the subsidies having enabled the existence of the relevant Airbus LCA in the market.¹²⁴ This is only indirectly true. At base, the United States is entitled to ongoing countermeasures because the EU remains out of compliance with its WTO obligations, as confirmed in the compliance reports

¹²³ *US – Large Civil Aircraft (21.5) (Panel)*, note 2849 (citing Original Panel Report, paras. 7.1949, 7.1984; Original Appellate Report, paras. 1261, 1264-1270, 1300; Compliance Panel Report, paras. 6.1464-6.1477) (emphasis added).

¹²⁴ See EU RAQ 101, paras.

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adopted by the DSB and in the absence of any subsequent adopted finding to the contrary. The United States is entitled to seek authorization to impose countermeasures until the EU establishes that it has achieved compliance.¹²⁵

107. The compliance panel’s finding that A380 LA/MSF and A350 LA/MSF continue to cause adverse effects in the post-implementation period is based on a causal pathway in which the subsidies cause product effects, and those product effects in turn cause significant lost sales and impedance to the U.S. LCA industry. As explained in the preceding paragraphs, the product effects are the enabling of the very market presence of the relevant Airbus aircraft. But even if the EU were correct that the product effects actually refer to something else, this would not change the conclusion that the United States is authorized to apply countermeasures annually until a mutually agreed solution is reached or the EU achieves compliance.

108. This is because, whatever the meaning of product effects, their continuation in the post-implementation period was sufficient to support findings that the subsidies continue to cause adverse effects. In other words, it would remain the case that the EU is out of compliance with its WTO obligations because the product effects of its subsidies continue to cause the U.S. LCA industry to lose sales and market share. Notwithstanding the EU’s new theory of how those adverse effects diminish quickly after the compliance reference period, there were no findings whatsoever to this effect in the compliance proceeding. Nothing suggested that the cessation of adverse effects was imminent or rapidly approaching. Nor were there any findings that the adverse effects that the product effects of existing LA/MSF subsidies continue to cause had diminished or were on some linear downward trajectory as the EU now contends.¹²⁶

109. Therefore, much as it would try, the EU can no longer avoid the consequences of its WTO-inconsistent behavior. For as long as the EU fails to achieve real compliance or reach a mutually agreed solution with the United States, it should face countermeasures. It has put off those consequences for close to a decade, at the expense of U.S. interests.

Continued EU attempts to divert the proper focus of this arbitration

110. Article 7.10 charges the arbitrator with a single task – to “determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.” It does not authorize the arbitrator to reverse the adopted findings in past panel or

¹²⁵ See U.S. Written Submission, paras. 104-107; *US – Tuna II (Article 22.6)*, note 70.

¹²⁶ See U.S. Written Submission, para. 106 (noting that no analysis even discussed the possibility that, if the causal link remained intact, the adverse effects caused by A380 LA/MSF nevertheless were declining between the 2000 – 2006 period analyzed in the original proceeding and the December 2011 – 2013 period analyzed in the compliance proceeding).

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appellate reports. The EU response to this question nonetheless continues past efforts to divert this proceeding by:

- arguing for the Arbitrator to find, based on evidence and argumentation the EU has supposedly put before it, that the counterfactual launch dates establish either present compliance or imminent compliance;¹²⁷
- submitting a February 14, 2019, announcement from Airbus regarding the A380 as evidence of the alleged cessation of adverse effects;¹²⁸ and
- importing the entirety of its arguments from the second compliance proceeding regarding purported compliance steps to support the proposition that the EU has come into compliance.¹²⁹

111. The EU asserts that these arguments go to the “plausibility and reasonability of the counterfactual.”¹³⁰ But the EU ignores that the relevant counterfactual exists to value the adverse effects determined to exist in the first compliance proceeding, and not to determine, based on new evidence and argumentation, whether adverse effects exist in the present. The DSB has already established a panel to engage in those inquiries; this arbitration is not the appropriate proceeding for inquiries referred by the DSB to the second compliance panel.

112. In essence, these arguments circle back the EU’s efforts to foist upon the United States the burden of proving adverse effects anew, both in the present and into the future.¹³¹ The United States showed in its written submission that it bears no such burden,¹³² and it will not repeat those arguments here.

113. The EU seeks to find support for its ill-conceived call to conduct a new adverse effects analysis by citing the report in the recent *US – Washing Machines* arbitration. However, its reliance on that report is unavailing.

114. The arbitrator there based its calculation on a counterfactual, framed as “a hypothetical scenario” that describes what would have happened in the absence of the WTO inconsistency

¹²⁷ See EU RAQ 101, paras. 96-97.

¹²⁸ EU RAQ 101, para. 98.

¹²⁹ See EU RAQ 101, paras. 111-116.

¹³⁰ EU RAQ 101, para. 114.

¹³¹ See, e.g., EU RAQ 101, paras. 92-93, 97, 100.

¹³² U.S. Written Submission, paras. 99-107.

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reflected in the DSB recommendations and rulings.¹³³ The compliance panel and appellate reports had found that certain methodologies applied by the United States in antidumping proceedings were WTO-inconsistent.¹³⁴ Korea argued for a hypothetical in which, *as of the end of the RPT*, there was no antidumping duty order at all.¹³⁵ The United States argued for a counterfactual in which the WTO-inconsistent aspects were replaced with WTO-consistent aspects, which would have resulted in lower margins of dumping and corresponding duty rates in some cases, but there still would have been an antidumping duty order in place.

115. The arbitrator found that an appropriate counterfactual “should ‘reflect at least a plausible or ‘reasonable’ compliance scenario.’”¹³⁶ The arbitrator accordingly examined first whether Korea’s scenario of no antidumping duty order was a reasonable baseline against which to measure the benefits nullified or impaired by the WTO-inconsistent measure. It concluded that because the adopted findings did not apply to one of the Korean exporters (Daewoo), it was not “reasonable” to assume that the United States would have had no antidumping duty order in place at all as of the end of the RPT.¹³⁷

116. Thus, the focus was on the period covered by the compliance proceeding – the end of the RPT. The arbitrator did not seek to evaluate whether it was “plausible” or “reasonable” to consider that Daewoo would continue to dump or the United States would otherwise keep the order in place as of the date of the arbitration and into the future. Therefore, the EU’s reliance on the *US – Washing Machines* arbitrator decision to infer that the United States must address the counterfactual availability of Airbus aircraft now and in the future – in essence, to demonstrate adverse effects anew starting with causation – is misplaced.

117. As the EU argues for an inquiry that has no place in this arbitration, the United States need not address the EU assertion that “it is not ‘plausible or reasonable’¹³⁸ that, in the present proceedings, adverse effects would still be present, *to the same degree*, more than *17 years* (for the A380) or *11 years* (for the A350XWB) after the counterfactual launch date of the relevant aircraft.”¹³⁹ However, the United States briefly observes that it succeeded in proving every single instance of VLA significant lost sales and impedance it alleged during the compliance

¹³³ *US – Washing Machines (22.6)*, para. 3.7.

¹³⁴ *US – Washing Machines (22.6)*, para. 3.17.

¹³⁵ *See US – Washing Machines (22.6)*, para. 3.13.

¹³⁶ *US – Washing Machines (22.6)*, para. 3.10 (quoting *US – Gambling (22.6)*, para. 3.27).

¹³⁷ *US – Washing Machines (22.6)*, para. 3.

¹³⁸ Decision by the Arbitration Panel, *US – Washing Machines (Article 22.6 – US)*, paras. 3.10-3.11. *See also* Decision by Arbitration Panel, *US – Gambling (Article 22.6 – US)*, paras. 3.27, 3.30.

¹³⁹ EU RAQ 101, para. 109 (emphasis original).

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reference period ending in 2013, which was more than 11 years after the purported counterfactual launch date (according to the EU¹⁴⁰) of the A380.

118. The EU also attempts, yet again, to rely on the *US – Upland Cotton* arbitration to establish a requirement to evaluate the reasonableness and plausibility of the counterfactual in the present and in the future.¹⁴¹ The EU argues that the arbitrator there tested – based on evidence submitted by the parties, including recent evidence – whether past adverse effects provided a reasonable estimation of actual continued adverse effects of the measure over time.¹⁴² This argument suggests that the parties introduced evidence of adverse effects in a recent or future period, which the arbitrator assessed, and then the arbitrator compared its conclusions about the more recent or future adverse effects to those determined in the compliance proceeding. This is not what occurred.

119. The arbitrator acknowledged the inherent uncertainty as to how closely a fixed annual amount of countermeasures will represent the actual continued adverse effects of the measure over time.¹⁴³ The arbitrator noted simply that there must be a legitimate basis for assuming that the chosen period of reference may lead to a reasonable estimation of these effects.¹⁴⁴ The arbitrator then explained that data from the period immediately following the RPT is in principle legitimate.¹⁴⁵

120. There was no effort to assess future adverse effects or consider whether developments since the compliance proceeding had altered the degree or nature of the adverse effects determined to exist.

121. As the United States has explained before, the arbitrator in that proceeding did not conduct a forward-looking analysis, or re-assess causation or the degree or nature of the adverse effects. It simply assessed whether the data for one of the inputs for valuing those adverse effects – cotton prices – were unrepresentative.¹⁴⁶ Thus, that report does not support the EU's

¹⁴⁰ Of course, as shown elsewhere, the EU's counterfactual launch dates are fundamentally inconsistent with the adopted compliance proceeding findings. See U.S. Written Submission, paras. 165-175; U.S. RAQ 112, paras. 38-40; U.S. Comments on EU RAQ 112, *infra*; U.S. Comments on EU RAQ 113, *infra*. See also Compliance Appellate Report, paras. 5.709, 5.715-5.716, 5.726, 5.730-5.731, 5.734-5.742, 6.31, 6.37, 6.39.

¹⁴¹ See EU RAQ 101, para. 115.

¹⁴² See EU RAQ 101, para. 115.

¹⁴³ *US – Upland Cotton (22.6 II)*, para. 4.117.

¹⁴⁴ *US – Upland Cotton (22.6 II)*, para. 4.117.

¹⁴⁵ *US – Upland Cotton (22.6 II)*, para. 4.118.

¹⁴⁶ U.S. Written submission, paras. 100-103 and 152-153; U.S. RAQ 19, paras. 31-35; US RAQ 21, paras. 44-47, and U.S. RAQ 103, paras. 27-28.

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request for a separate assessment of the plausibility or reasonableness of the compliance counterfactual based on current or future conditions.

122. The EU also mischaracterizes the U.S. view of the relationship between counterfactual launch dates and the dissipation of adverse effects.

123. The EU does not argue in this response that adverse effects cease as of the counterfactual launch date of the A380 and the A350 XWB. The EU instead attempts to attribute this position to the United States.¹⁴⁷ The EU's characterization, however, is erroneous.

124. The EU notes U.S. statements that, as long as the subsidies enable the market presence of the A380 and A350 XWB, they continue to cause adverse effects. The EU then reasons that, at the time those aircraft would be in the market in the counterfactual, the adverse effects would no longer continue to exist.¹⁴⁸ This is a logical fallacy. It assumes that a necessary condition is always a sufficient condition, which is not true.¹⁴⁹

125. The United States has explained the many reasons why adverse effects would continue even after the counterfactual launch of the A380 or A350 XWB in its response to this question.¹⁵⁰ However, the EU did not establish any counterfactual launch for either aircraft in the compliance proceeding. This arbitration is not an appropriate forum for the EU to make such arguments. The Arbitrator's task is to determine a level of countermeasures commensurate with the degree and nature of the adverse effects determined to exist, not to re-assess those adverse effects.¹⁵¹

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¹⁴⁷ See EU RAQ 101, para. 104.

¹⁴⁸ EU RAQ 101, para. 104.

¹⁴⁹ The United States notes that, consistent with its response to this question, getting past the point at which the counterfactual launch of these aircraft would have occurred is not strictly necessary to the EU achieving compliance. As the compliance panel discussed, over time, if multiple generations of unsubsidized aircraft rendered the link to these subsidies and these aircraft tenuous, the subsidies may no longer be found to be causing adverse effects. But the counterfactual launch is necessary in this context, where the EU argues that it has already achieved compliance.

¹⁵⁰ See U.S. RAQ 101, paras. 14-22.

¹⁵¹ See SCM Agreement, Arts. 7.9 and 7.10; *US – Upland Cotton (22.6 II)*, paras. 4.55 (“The clear difference in the wording of both provisions {Articles 4.10 and 7.9} within the SCM Agreement confirms to us that the terms of Article 7.9, which expressly refer to the ‘degree and nature of the adverse effects determined to exist’, are intended to closely tailor, in all cases, the countermeasures to the legal basis for the underlying findings. We also note that there is no suggestion, in Article 7.9, that there would be any flexibility to take into account any considerations other than the ‘degree and nature of the adverse effects determined to exist.’”); *ibid.*, paras. 4.60, 4.62; U.S. Written Submission, paras. 99-107; U.S. RAQ 112, para. 40; U.S. RAQ 54, paras. 7-9; U.S. RAQ 43, paras. 95-96, 98-100.

2.1 For the United States

Question 102 (US)

With reference to paragraph 81 of the European Union's opening statement, could the United States please explain whether it agrees with the contention of the European Union that the Arbitrator "is required to determine, separately for each product market, a level of countermeasures corresponding to the adverse effects determined to exist"?

Question 103 (US)

With reference to paragraphs 33 and 35 of the United States' opening statement, could the United States please explain whether the Arbitrator can adjust actual data associated with the Reference Period if that data were deemed to be unrepresentative?

2.2 For the European Union

Question 104 (EU)

With respect to paragraphs 11 and 56 of the European Union's opening statement, could the European Union please clarify the legal basis for its position that the United States should have provided an estimate of adverse effects "today, and in the future"?

126. The EU asserts that, by requesting ongoing countermeasures for the EU's ongoing failure to comply, the United States triggered a requirement to prove ongoing adverse effects today, and in the future. The EU never provides a straight answer as to the legal basis for its position, instead opting to mischaracterize the U.S. position as a justification to repeat arguments made in previous submissions that are not relevant to the question. In reality, there is no legal basis for the EU position.

127. In Section A of the EU's response, the EU again asserts that the United States chose a "static" approach applicable only to events in the December 2011 – 2013 period. The United States has done no such thing. In making this argument, the EU again asserts supposed U.S. positions and posits agreement between the parties on certain issues.¹⁵² As the United States has explained before, the U.S. approach is not "static." Rather, the U.S. methodology appropriately evaluates the annual value of the "adverse effects determined to exist" with reference to the confirmed instances of adverse effects that serve as the basis for that determination. Moreover, the United States does not agree with the positions the EU ascribes to it in paragraphs 119-121.¹⁵³

128. In Section B, the EU repeats its argument that, to justify ongoing or annual countermeasures, the United States must prove the existence and degree of adverse effects in the

¹⁵² See EU RAQ 104, para. 120-121.

¹⁵³ Compare EU RAQ 104, paras. 119-121, with U.S. Written Submission, paras. 85-107.

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future.¹⁵⁴ However, the U.S. statements cited by the EU merely reflect the conceptual underpinnings of the covered agreements. Recognition of the role of countermeasures in the WTO's prospective framework¹⁵⁵ does not mean that a party seeking countermeasures must prove again the validity of the findings of WTO non-compliance for which it seeks countermeasures, both as of the time of the arbitration and into the future. Furthermore, that the EU's A380 and A350 XWB LA/MSF subsidies cause adverse effects is not a "factual assertion," as the EU suggests.¹⁵⁶ It is a legal conclusion reached in the compliance proceeding reports that the DSB adopted.

129. These arguments from the EU are well worn at this point. The United States has fully rebutted them, including again in its comments on the EU response to Question 101. We will not repeat those arguments here.

130. However, for the sake of completeness, it is important to correct a mistake the EU has now made repeatedly – accusing the United States of some error in what it presented in its methodology paper.¹⁵⁷ The task in a methodology paper is to explain how the party calculated the level of countermeasures it proposes.

131. The United States had no reason to put forth argument showing why countermeasures would remain in place until compliance or a mutually agreed solution is achieved. As the United States has stated previously, in no prior arbitration had any original respondent objected to annual countermeasures and, at that point in this arbitration, neither had the EU. The United States explained clearly in its methodology paper how it calculated the annual value of the adverse effects determined to exist. It was not obligated to anticipate the EU's novel and erroneous argument that countermeasures should be limited to the specific instances of adverse effects underlying the adopted findings of adverse effects, even though the DSB-adopted findings that the EU has failed to achieve compliance have not been superseded.

132. In Section C, the EU again resorts to representing that agreement exists between the parties where it does not.¹⁵⁸ It suffices to say that the United States does not agree with the EU on these points, as has been made clear throughout this proceeding.¹⁵⁹

¹⁵⁴ See EU RAQ 104, paras. 125-126.

¹⁵⁵ See *US – Upland Cotton (21.5) (AB)*, note 494.

¹⁵⁶ See EU RAQ 104, paras. 126-127.

¹⁵⁷ See EU RAQ 104, paras. 123-124.

¹⁵⁸ See EU RAQ 104, paras. 132-134, 138.

¹⁵⁹ See *infra* U.S. Comments on EU RAQ 147. See also U.S. RAQ 73, para. 82; U.S. RAQ 58, paras. 13-16; U.S. RAQ 43, paras. 95-100; U.S. RAQ 19, paras. 31-35.

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133. The EU also suggests that the gap of six to eight years between December 2011 – 2013 and the present provides a basis for the Arbitrator to assess adverse effects in a more recent period or in the future.¹⁶⁰ Again, this is not the purpose of this arbitration. The EU and the United States jointly requested the Arbitrator to suspend this proceeding so that it could be based on the findings from the compliance proceeding. The EU took every opportunity to draw out that proceeding, which ultimately took over six years. As the arbitration has now arrived, following confirmation that the EU did not achieve compliance, the EU now attempts to use the time that elapsed during the pendency of the compliance proceeding as an excuse to ignore the resulting findings. This is a cynical tack by the EU, but fortunately for the United States, there is no basis to ignore the compliance findings.

134. The EU then reiterates previous arguments that in its view show reduced adverse effects in the more recent period.¹⁶¹ Conspicuously, while the EU highlights changes in the level of A380 orders, it never mentions that, whereas there were no deliveries of the A350 XWB during the December 2011 – 2013 period, Airbus delivered more than 100 A350 XWBs in 2018.¹⁶² In any event, the EU's arguments are beside the point, as the Arbitrator's terms of reference do not include re-litigating the findings from the compliance proceeding.

135. Finally, the United States has lamented that, after nearly 20 years of confirmed adverse effects (since the beginning of the original reference period in 2000) and seven years of recalcitrance in refusing to come into compliance after findings of WTO inconsistency, the EU has continued in this proceeding its attempts to draw out the dispute as long as possible and avoid any accountability for its pernicious, WTO-inconsistent subsidies. The arguments in Sections A and B of the EU's response to this question are further examples of this pattern. The WTO dispute settlement process has informed the EU over and over and over again that its LA/MSF subsidies breach its obligations under the SCM Agreement. The adopted reports too have provided analysis as to the profound and long-lasting effects of these subsidies. With its requests to have the Arbitrator in essence allow it to avoid any real repercussions for the massive, WTO-inconsistent subsidies, the EU raises the question of whether the WTO is at all capable of dealing with these types of harmful subsidies.

136. Troublingly, the EU states:

To be clear, the European Union would certainly not accept an award of countermeasures made on this basis.¹⁶³

¹⁶⁰ See EU RAQ 104, paras. 136-137.

¹⁶¹ See EU RAQ 104, para. 137.

¹⁶² Compare EU RAQ 104, para. 137, with Updated Ascend Database (Exhibit EU-79).

¹⁶³ EU RAQ 104, para. 131.

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The EU then reiterates at the conclusion of Section C that there is no basis for it to accept an award authorizing ongoing or annual countermeasures.¹⁶⁴

137. DSU Article 22.7 states that the parties to the dispute “shall accept the arbitrator's decision as final.” The EU’s statement is difficult to square with its WTO obligations. The EU’s statement is made even more absurd by the fact that the eventuality underlying this potential threat – that countermeasures will remain in place until compliance is achieved or a mutually achieved solution is reached – has characterized every single Article 22.6 arbitration to date but one. No other Member even argued the EU’s position, much less suggested that it would refuse to accept a report that did not adopt this novel and erroneous position. The United States hopes that this is an example of careless word choice and nothing more.

Question 105 (EU)

With reference to paragraph 250 of the European Union's written submission, discussing alleged shortcomings of the United States' evidence in the context of valuing lost sales, could the European Union please explain what it means by the relevant order being "competitive"? Would such a "competitive" order only arise if Airbus also competed for the relevant sales campaign that resulted in the order? And if so, could Airbus confirm whether the order was "competitive"?

138. In its response to Question 105, the EU admits that three of the five comparators proposed by the United States for valuing significant lost sales constitute “competitive campaigns”¹⁶⁵ and therefore, according to the EU’s reasoning, do not “risk artificially inflating the real level of adverse effects.”¹⁶⁶ Those three comparators are (1) the 2013 Singapore Airlines order for 30 787-10s; (2) the 2015 United Airlines order for 10 777-300ERs; and (3) the 2013 Transaero Airlines order for four 747-8Is.¹⁶⁷ Those three comparators were not only made under “competitive” conditions according to the EU; they also involved the same customers and the same number of firm orders as the corresponding lost sales listed in Table 19 of the Compliance Panel Report: (a) the 2013 Singapore Airlines order for 30 A350 XWB-900s in 2013; (b) the 2013 United Airlines order for 10 A350 XWB-1000s; and (c) the 2012 Transaero order for four A380s.¹⁶⁸ Thus, there is considerable convergence in the parties’ views as to validity of these transactions as comparators.

¹⁶⁴ EU RAQ 104, para. 138.

¹⁶⁵ EU RAQ 105, para. 147, Table 1.

¹⁶⁶ See EU RAQ 105, para. 141.

¹⁶⁷ EU RAQ 105, para. 147, Table 1.

¹⁶⁸ Compliance Panel Report, para. 6.1781, Table 19. See also Compliance Appellate Report, para. 5.705, Table 10 and para. 5.723, Table 12.

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139. This leaves the other two comparators proposed by the United States: (4) the 2013 Cathay Pacific order for three 777-300ERs; and (5) the [BCI].

140. The EU contends that the Cathay Pacific sale was not a “competitive campaign” because Airbus did not submit an offer.¹⁶⁹ As an initial matter, the evidence shows that the per-aircraft pricing from the 2013 Cathay Pacific order for three 777-300ERs [BCI].¹⁷⁰ In any event, the EU’s reasoning is that, if Airbus did not compete directly, a campaign may not be as price-sensitive as when an Airbus model and a Boeing model compete actively and vigorously for an order. But the situation in which the Airbus competitor model is not in the campaign actually more closely replicates the counterfactual, where the findings establish that the relevant Airbus aircraft would not have been present in the campaign.

141. Therefore, the EU has it exactly backwards. Using pricing from “competitive” campaigns that reflect vigorous competition from the closest competing Airbus model entails a significant risk of artificially *understating* the real level of adverse effects because such pricing may reflect competition with an Airbus model that would not have been offered in the counterfactual, and therefore is conservative.

142. The [BCI] example actually offers a concrete example of this point. In the [BCI].¹⁷¹ In the counterfactual situation, Airbus would not have been unable to offer the A350 XWB, and there would have been [BCI]. If such [BCI], the adverse effects would be artificially understated. This is the opposite of the EU’s suggestion that there is a risk of “artificially inflating the real level of adverse effects.”¹⁷²

143. The EU’s response to this question includes only a passing mention of the [BCI] that the United States has used as a comparator for the Emirates lost sale.¹⁷³ Elsewhere, the United States has shown that the EU’s previous criticisms of this comparator are meritless.¹⁷⁴ In any event, the same principles discussed above apply. Insisting on pricing from “competitive” campaigns that reflect vigorous competition from the closest competing Airbus model entails a significant risk of artificially *understating* the real level of adverse effects.

¹⁶⁹ EU RAQ 105, para. 147, Table 1.

¹⁷⁰ Compare net delivery price of [[HSBI]] established by using the [BCI] with net delivery price of [[HSBI]] established using the [BCI] (see [BCI], p.1 ([BCI])).

¹⁷¹ [BCI], pp. 4, 6-11 (Exhibit USA-59(HSBI)).

¹⁷² See EU RAQ 105, para. 141.

¹⁷³ See EU RAQ 105, note 182.

¹⁷⁴ See U.S. RAQ 122, paras. 95-100. See also U.S. RAQ 121, paras. 87-90.

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Question 106 (EU)

With reference to paragraphs 250 of the European Union's written submission, and paragraph 3 (sixth bullet) of the European Union's response to question No. 52, discussing alleged shortcomings of evidence offered by the United States to determine the value of lost sales, could the European Union please elaborate on how the Arbitrator would use additional information regarding engines, flight deck equipment, buyer-furnished equipment, and maximum take-off weights, in determining the counterfactual prices of the Boeing LCA that would have been ordered had Boeing won the five "lost sales" identified in the Reference Period? Is the European Union suggesting that the prices of the Boeing LCA that were ordered pursuant to the comparator orders (whatever those prices actually are) should be adjusted somehow?

A. Burden of proof

144. The burden of proof in an arbitration under DSU Article 22.6 should not be in dispute. Arbitrators have consistently followed the approach laid out in *EC – Hormones (22.6)*:

A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency. The act at issue here is the US proposal to suspend concessions. The WTO rule in question is Article 22.4 prescribing that the level of suspension be equivalent to the level of nullification and impairment. The EC challenges the conformity of the US proposal with the said WTO rule. It is thus for the EC to prove that the US proposal is inconsistent with Article 22.4. Following well-established WTO jurisprudence, this means that it is for the EC to submit arguments and evidence sufficient to establish a *prima facie* case or presumption that the level of suspension proposed by the US is *not* equivalent to the level of nullification and impairment caused by the EC hormone ban. Once the EC has done so, however, it is for the US to submit arguments and evidence sufficient to rebut that presumption. Should all arguments and evidence remain in equipoise, the EC, as the party bearing the original burden of proof, would lose.¹⁷⁵

145. In this proceeding, it is again the EU objecting to a U.S. request for authority to suspend concessions, on the basis that “the procedures set forth in Article 22.3 of the DSU had not been followed” and the “United States’ proposal is not allowed under the covered agreements.”¹⁷⁶ The EU bears the burden of proof with respect to these assertions. As the *US – COOL (22.6)* arbitrator explained, “{t}he onus is therefore on the {party opposing countermeasures} to show that the proposed level of suspension is inconsistent with the DSU by engaging with the methodologies proposed by {the party seeking authority}, and demonstrating that they do not

¹⁷⁵ *EC – Hormones (22.6 – US)*, para. 9 (emphasis in original); *accord US – COOL (22.6)*, para. 4.7; *US – Gambling (22.6)*, para. 2.22; *Canada – Aircraft Credits and Guarantees (22.6)*, paras. 2.5-2.8; *US – FSC (22.6)*, paras. 2.8-2.11; *Brazil – Aircraft (22.6)*, para. 2.8; and *EC – Bananas III (Ecuador) (22.6 – EC)*, para. 159.

¹⁷⁶ Constitution of the Arbitrator, WT/DS316/20 (13 January 2012).

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lead to a result that is equivalent to the level of nullification or impairment.”¹⁷⁷ This is equally true in an arbitration regarding countermeasures under Article 7.10 of the SCM Agreement.¹⁷⁸

146. As part of its opposition to the requested level of countermeasures, the EU has challenged the validity of the comparator orders selected by the United States to determine the value of sales that Boeing would have made in the absence of the LA/MSF subsidies.¹⁷⁹ One such assertion has been to question whether prices for comparator orders featured the same engines, flight deck equipment, or buyer-furnished equipment as the Airbus aircraft subject to lost sales findings.¹⁸⁰ Thus, the EU bears the burden of establishing that such differences exist, and that those are “sufficient to establish a *prima facie* case or presumption that the level of {countermeasures} proposed by the US is *not* {commensurate}” with the adverse effects determined to exist.

147. Nonetheless, in response to this question, the EU asserts that “{t}he burden of proving ‘representativeness’ of ‘comparator orders’ lies with the United States.”¹⁸¹ The only support it provides for this burden-shifting exercise is to contend that “the United States is making affirmative assertions about the ‘representativeness,’ reliability and robustness for the orders it considers to be ‘comparator orders,’” and to observe that in WTO dispute settlement, the party asserting a fact bears the burden of establishing that fact.¹⁸²

148. This framing ignores the juridical posture of the parties to this proceeding. The EU is challenging the level of countermeasures requested by the United States, so it bears the burden of proof with respect to its own arguments in this regard. As the EU assertion that the comparator sales are not “representative” is one of those arguments, the EU bears the burden of proof. The United States may rebut those assertions by showing – as it has – that the EU has failed to meet that burden. The United States may also rebut the EU by demonstrating – as it has – that the comparators are valid in terms of representing the closest Boeing model to the same customer or a comparable customer during the relevant period. The United States bears – and has met – the burden of proof on these affirmative showings. It does not bear the added burden of anticipating other factors that the EU may consider relevant and demonstrating that the comparators are “representative” with respect to those factors.

B. “Representativeness” of comparator orders

¹⁷⁷ *US – COOL (22.6)*, para. 4.13.

¹⁷⁸ *US – Upland Cotton (22.6 II)*, para. 4.13.

¹⁷⁹ *E.g.*, EU Written Submission, para. 213.

¹⁸⁰ EU Written Submission, para. 250.

¹⁸¹ EU RAQ 106, para. 150, heading A.

¹⁸² EU RAQ 106, para. 106

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149. In Section B of its response, the EU purports to “identify the relevant criteria that may enable” the Arbitrator “to evaluate the comparability between the original lost sales campaigns (counterfactually won by Boeing) and the ‘comparator orders’ (actually won by Boeing).”¹⁸³ It lists a variety of factors it considers to be “important” because they “have important implications for LCA prices.”¹⁸⁴ The EU focuses on buyer-furnished equipment, flight deck equipment, maximum take-off weight, and engine supplier/type/performance, though it also mentions the “comparator LCA type” (described as the “closest competing Boeing model” in the U.S. methodology paper), “order size, delivery schedule, order year, and competitiveness of the campaign.”¹⁸⁵ Curiously, the EU fails to include “customer identity” in its list, though it has frequently recognized the importance of this factor, including in its response to this question.¹⁸⁶

150. As presented by the EU, these criteria provide no basis to consider that the level of countermeasures requested by the United States is not commensurate with the adverse effects determined to exist.

151. **“Comparator LCA type”/closest Boeing model.** For all five of the lost sales, the United States selected comparators involving the Boeing model that most closely competes with the Airbus model ordered in the lost sale: a 747-8I comparator for an A380 order, a 777-300ER for an A350 XWB-1000, and a 787-10 for an A350 XWB-900. The EU does not appear to disagree with identification of the closest Boeing model being the first step of the calculation, or with the model pairings. Its point with regard to this criterion is that, where conversions occurred after the time of the Airbus order, the Boeing comparator model should change accordingly.¹⁸⁷ That is not a matter of the validity of the Boeing comparator, but a question of identifying the proper Airbus model for purposes of comparison in the event of a conversion. The EU addresses this issue in more detail in response to Question 96, and the United States has commented on it in that context.¹⁸⁸

152. **Customer identity.** For four of the five lost sales, the United States selected comparator orders placed by the exact same customer that ordered the Airbus aircraft in the lost sale. The EU has agreed that same-customer comparisons are preferable to different-customer comparisons,¹⁸⁹ so the EU again has no reason to object to the U.S. comparators on this basis.

¹⁸³ EU RAQ 106, para. 152.

¹⁸⁴ EU RAQ 106, para. 154.

¹⁸⁵ EU RAQ 106, para. 154.

¹⁸⁶ See EU RAQ 106, para. 163. See also U.S. RAQ 125, para. 117; U.S. RAQ 122, para. 99; U.S. RAQ 61, para. 31.

¹⁸⁷ EU RAQ 106, para. 169.

¹⁸⁸ See, e.g., U.S. Comments on EU RAQ 98, *supra*.

¹⁸⁹ See EU RAQ 106, para. 163.

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[BCI]. The EU objects to the use of [BCI], but on the basis of the nature of the transaction rather than the identity of the customer. In fact, it is the EU that ignores this factor when it argues that the 2013 Emirates lost sale should be valued using the 2006 Lufthansa 747-8I order.

153. **“Order year.”** The EU recognizes that the timing of the comparator order is important.¹⁹⁰ The United States agrees. The price of an aircraft is largely determined at the time of order,¹⁹¹ and using a comparator relatively close in time to the lost sale helps to approximate the counterfactual price Boeing would have obtained at the time of the lost sale. In this regard, [BCI] of the U.S. comparators occurred within two years of the order in the corresponding lost sale, and four of the five comparators arose within one year.¹⁹² There can be no legitimate complaint that the U.S. comparators fall short of this “objective” criterion. Again, it is the EU that ignores its own criteria, in this instance by asking that the Arbitrator value the 2013 Emirates lost sale – in particular, the future deliveries from that sale – using the 2013 *delivery* prices from the Lufthansa 747-8I launch *order* placed in 2006. Under this approach, if Emirates were scheduled to take delivery of an A380 in 2019 pursuant to the 2013 lost sale, the EU would have the Arbitrator value that delivery according to the 747-8I pricing established in an order that occurred approximately 13 years earlier, when the 747-8I program was just beginning.¹⁹³

154. **“Competitiveness of the campaign.”** In its response to Question 105, the EU admits that three of the five comparators proposed by the United States for valuing significant lost sales constitute “competitive campaigns.”¹⁹⁴ According to the EU’s reasoning, these would not “risk artificially inflating the real level of adverse effects.”¹⁹⁵ However, with regard to the remaining transactions, it has provided no reason to conclude that lack of “competitiveness” invalidates the U.S. comparator:

¹⁹⁰ See EU RAQ 106, para. 154.

¹⁹¹ Original Panel Report, para. 7.1719 (“In general, the terms and conditions of an aircraft purchase are set at the time of order, including aircraft specifications, net price, discounts, non-price concessions and financing arrangements.”).

¹⁹² See U.S. Methodology Paper, para. 46; [BCI] (Exhibit USA-71(HSBI)).

¹⁹³ See *Boeing announces Lufthansa as launch customer for 747-8 Intercontinental passenger variant with 20-aircraft order*, FlightGlobal (Dec. 6, 2006)(Exhibit USA-112).

¹⁹⁴ EU RAQ 105, para. 147, Table 1.

¹⁹⁵ See EU RAQ 105, para. 141.

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- **The 2013 Cathay Pacific 777-300ER order (proposed as a comparator for the 2012 Cathay Pacific lost sale).** The evidence shows that [BCI]¹⁹⁶ [BCI].¹⁹⁷ As these are [BCI], they do not invalidate the comparator.¹⁹⁸
- **[BCI] (proposed comparator for the 2013 Emirates lost sale).** The EU does not contend that the United States could have used [BCI] satisfies the “competitiveness” criterion. Rather, the EU proposes using delivery price information from the 2006 Lufthansa 747-8I order. However, the EU has provided no reason to consider this transaction to be superior from a competitiveness perspective

155. **Order size.** The EU has repeatedly asserted that strong correlations exist between order size and per-aircraft prices, but the United States has shown [BCI].¹⁹⁹ In any event, three of the five U.S. comparators (the 2013 Singapore Airlines order for 30 787-10s; the 2015 United Airlines order for 10 777-300ERs; and the 2013 Transaero Airlines order for four 747-8Is) involve the same number of firm orders as the corresponding lost sales listed in Table 19 of the Compliance Panel Report: (a) the 2013 Singapore Airlines order for 30 A350 XWB-900s in 2013; (b) the 2013 United Airlines order for 10 A350 XWB-1000s; and (c) the 2012 Transaero order for four A380s.²⁰⁰ Moreover, with respect to the 2013 Emirates lost sale, the [BCI].²⁰¹ Meanwhile, the net delivered prices for the 2013 Cathay Pacific 777-300ER order [BCI].²⁰¹ Accordingly, the EU has no basis to contend that the U.S. comparators are flawed in terms of order size.

156. **Delivery schedule.** The EU does not explain what it means by citing “delivery schedule” as a criterion for choosing among possible Boeing comparators. Regardless, the U.S. approach uses Airbus’s actual delivery schedules at the time of the lost sale, so “delivery schedule” is not a relevant criterion for criticizing the U.S. comparators. The EU’s objections to using Airbus’s delivery schedules are a separate issue, but those arguments fail as well, as the United States has demonstrated.²⁰²

¹⁹⁶ See *Compare* net delivery price of [[HSBI]] established by using the [BCI] as the comparator (see [BCI]) with net delivery price of [[HSBI]] established using the [BCI] (see [BCI], p.1 ([BCI])).

¹⁹⁷ [BCI], pp. 4-11 ([BCI]).

¹⁹⁸ See also U.S. Comments on EU RAQ 105, *supra*.

¹⁹⁹ See, e.g., U.S. Comments on EU RAQ 105, *supra*.

²⁰⁰ Compliance Panel Report, para. 6.1781, Table 19. See also Compliance Appellate Report, para. 5.705, Table 10 and para. 5.723, Table 12.

²⁰¹ See, e.g., U.S. Comments on EU RAQ 95, *supra*.

²⁰² U.S. Written Submission, paras. 186-198. See also U.S. RAQ 80, para. 112.

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157. Section B of the EU’s response also identifies physical or performance characteristics of an aircraft that the EU characterizes as “critical,” “important,” or simply “salient”: buyer-furnished equipment (“BFE”), flight-deck equipment (“FDE”), and maximum take-off weight (“MTOW”), and engine supplier/type/performance. But the EU is wrong to argue that they should affect selection of comparators.²⁰³

158. Most fundamentally, the EU’s focus on these items is conceptually misguided. It is uncontested that Airbus and Boeing LCA are differentiated products, and highly complex ones at that. In real-world sales campaigns, the Boeing and Airbus offerings frequently feature different physical or performance characteristics. Thus, where the customer in a given lost sale ordered a certain Airbus model with particular characteristics, in the counterfactual, it would have ordered a Boeing LCA model with characteristics that would have differed to some degree. The task before the Arbitrator is to value the lost sale by reference to the *Boeing* LCA that the customer would have ordered in the counterfactual situation. In the U.S. view, the best way to do that is, where possible, to use the order price of the closest Boeing model that was ordered by the same customer that ordered the Airbus model in the lost sale. This results in an actual order price for the relevant Boeing aircraft configured as the relevant customer has actually configured it.

159. In other words, the best way to value a counterfactual sale of 777-300ERs to Cathay Pacific is to value 777-300ERs that Cathay Pacific has actually ordered. In contrast, the EU appears to suggest that, in the counterfactual, the customer would have configured the Boeing model to approximate, as closely as possible, the characteristics of the Airbus aircraft it ordered. The EU never establishes that the customer would actually have done this as a general matter, or with respect to BFE, FDE, MTOW, or engine supplier/type/performance in particular. Rather, the EU would have the Arbitrator assess countermeasures based on needless speculation about, for instance, the possibility that Cathay Pacific would have ordered counterfactual 777-300ERs with FDE that differs from the FDE on the 777-300ERs it actually ordered.

160. Moreover, the EU is also unable to cite any real bases for concern in this regard. Its focus on BFE is irrelevant. Boeing [BCI].²⁰⁴ Moreover, the only example the EU cites regarding BFE (747-8 VIP sales)²⁰⁵ is not included in the U.S. revised impedance calculations.

²⁰³ Cf. EU RAQ 106, para. 155.

²⁰⁴ For example, the [BCI] in the order documentation for Boeing’s 2015 order with United Airlines for 777-300ERs calculates the [[HSBI]]. This [[HSBI]], which are listed separately. Exhibit USA-74(HSBI), p.6. In its response to Question 135, the United States explained that the Base Year Gross Price of [[HSBI]] included in its Net Delivery Prices calculations based on this order is calculated by [[HSBI]], as reported in the [BCI] in Exhibit USA-74(HSBI). US RAQ 135, para. 200, note 161; *see also* Exhibit USA-66(HSBI), p. 5. [BCI].

²⁰⁵ *See* EU RAQ 106, para. 160(1).

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161. The only other EU example concerns MTOW and engine thrust with respect to a comparator for the 2013 Singapore Airlines lost sale involving 30 A350 XWB-900s that the EU describes as “regional” variants.²⁰⁶ The United States has proposed using Singapore Airlines’ 2013 order for 30 787-10s (in what the EU describes as a “competitive” campaign).²⁰⁷ But as the United States demonstrated previously, the EU’s argument is baseless, including because Airbus developed this “regional” A350 XWB-900 *precisely to compete against the 787-10*.²⁰⁸

162. The remainder of part B to the EU’s response consists of complaints about the supposed failure of the United States to provide information.²⁰⁹ These complaints are moot. The United States has provided the information requested by the Arbitrator,²¹⁰ and as the above discussion demonstrates, no further information is necessary to assess the commensurateness of the requested countermeasures.

C. No need for adjustments to the U.S. comparator orders

163. In part C of its response to this question, the EU finally addresses the question posed by the Arbitrator: how to use information on the aircraft characteristics the EU highlights in determining counterfactual Boeing prices, and whether some type of price adjustment is necessary. The EU’s response is that, “{i}f the United States fails to demonstrate comparability between lost sales counterfactually won by Boeing and ‘comparator orders’ actually secured by Boeing,” then the Arbitrator should either select alternative comparator orders or “determine substantial price adjustments to the ‘comparator orders.’”²¹¹ However, this is not a live issue, as it is the EU that bears the burden of showing that the proposed countermeasures are not commensurate, and the U.S. comments on Section B of the EU response demonstrate that it has not met this burden.

164. In any event, the EU’s suggestions for *how* the Arbitrator should take account of these characteristics only serves to demonstrate the futility of the exercise. When it comes to using them in selecting comparators, the EU simply states that the information requested by the Arbitrator might indicate differences in these characteristics, and asserts that “it will be relatively straightforward for the {Arbitrator} to determine which of the two ‘comparator orders’ is more

²⁰⁶ See EU RAQ 106, para. 160(1).

²⁰⁷ See EU RAQ 106, para. 160(1).

²⁰⁸ See U.S. RAQ 120, paras. 75-77.

²⁰⁹ See, e.g., EU RAQ 106, paras. 159, 161-164.

²¹⁰ See, e.g., U.S. RAQ 135.

²¹¹ EU RAQ 106, para. 166.

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appropriate.”²¹² This provides no guidance, as the EU does not indicate how these considerations would fit into the hierarchy of comparator selection criteria.

165. When it comes to price adjustments, the EU first proposes ratios based on Boeing list prices for large civil aircraft containing the various options. However, the EU has provided no basis to conclude that there is in fact a proportionate relationship between list prices and actual prices in this regard.

166. The only other option the EU proposes is a 50 percent deduction to the prices of the U.S. comparator orders if the United States “continues to withhold evidence.”²¹³ This proposal only highlights the results-oriented nature of the EU’s entire argument on this point. The United States has not withheld evidence. In any event, the EU has provided no basis to consider that a difference in one, or even all, of these criteria would result in a 50 percent reduction in price. Adopting such an approach would certainly be inconsistent with the Arbitrator’s mandate under Article 7.10 of the SCM Agreement to “determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.”

2.3 For both parties

Question 107 (both parties)

If the Arbitrator were to use December 2011–2013 as the Reference Period, could the Arbitrator:

- a. choose to value the lost sales and impedance that occurred only during a temporal subset of the Reference Period (e.g. the calendar year 2012 or 2013 only)?**
- b. use different temporal periods within the Reference Period for purposes of quantifying adverse effects resulting from lost sales involving A380 aircraft and A350XWB aircraft, considering that these are different LCA in different product markets?**

167. The EU states that it “provides a combined response to sub-parts (a) and (b) of this Question.”²¹⁴ In truth, it never responds to either question. Instead it goes on for pages about “recurring” countermeasures and the supposed over-counting problem it has raised in the past, about which neither subpart of the question inquired. The United States has thoroughly rebutted the EU’s “recurring” countermeasures argument elsewhere and will not repeat that rebuttal

²¹² EU RAQ 106, para. 172.

²¹³ EU RAQ 106, para. 174.

²¹⁴ EU RAQ 107, para. 175.

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here.²¹⁵ However, for the sake of completeness, the United States will address two major errors in the EU's discussion of its highly abstracted examples.

168. First, in attempting to show a risk of over-counting, the EU actually exposes error in its own premise that the Arbitrator must select an exclusively order-centric or an exclusively delivery-centric approach. The EU ignores that significant lost sales, which in this dispute were based on orders, and impedance, which in this dispute was based on deliveries, are separate phenomena under the SCM Agreement. The compliance panel and appellate reports found both significant lost sales *and* impedance in the post-implementation period. The EU asserts that “orders (lost sales) and deliveries (impedance) cannot *both* be attributed to the December 2011 to 2013 period.”²¹⁶

169. But the compliance reports unquestionably *did* find both phenomenon to occur during that period, and they did not indicate that there was any overlap between the two. Indeed, the EU did not even assert that concurrent findings of lost sales and displacement or impedance created a risk of double counting.

170. Second, the EU examples assume that there is 100 percent overlap between orders underlying lost sales and deliveries underlying impedance. In each of its tables, 100 percent of the “Lost sales (orders)” in a given year corresponds to 100 percent of the “Impedance (deliveries)” in the same year (Table 1) or a different year (Tables 2-4). However, in the compliance proceeding, there was no overlap whatsoever. That is, none of the orders underlying the significant lost sales findings corresponded to deliveries underlying the impedance findings.

171. Moreover, it is not the case that the United States made lost sales claims with respect to orders from customers whose nationalities graft on perfectly to the country markets in which the United States demonstrated impedance. Rather, five out of the six impedance country markets – the EU, Australia, China, Korea, and Singapore – do not correspond to any customer associated with findings of significant lost sales in the post-implementation period.

172. The findings from the compliance proceeding were of two distinct – and non-overlapping – phenomena occurring in the post-implementation period. There is no assumption that the lost sales that the EU subsidies cause will continue to involve the same customers as in the December 2011 – 2013 period. Nor is there an assumption that impedance will occur in the exact same country markets. But even if one were to assume the contrary – that is, that the same customers and country markets would continue to be involved in the significant lost sales and impedance

²¹⁵ U.S. Written Submission, paras. 85-98; U.S. RAQ 108, para. 32; U.S. RAQ 21, paras. 44-47; U.S. RAQ 20, paras. 36-43.

²¹⁶ EU RAQ 197, para. 37 (emphasis original).

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that the EU LA/MSF subsidies cause – this still would not justify ignoring significant lost sales or impedance altogether.

173. Assuming *arguendo* that there could be a cognizable possibility of over-counting to begin with, over-counting would only become an issue when, and to the extent that, deliveries underlying impedance corresponded to orders underlying significant lost sales. The EU provides a lag time of more than [BCI] years.²¹⁷ Notably, in the context of its cancellation rate argument, the EU assumes lag time of eight years.²¹⁸ Therefore, over-counting would only become a concern in the [BCI] or ninth year. But, even then, there would be no basis to phase out impedance countermeasures entirely. Again, this is all based on an *arguendo* assumption that the same customers and country markets will be involved. But the only country market covered by the impedance findings that actually corresponded to the nationality of a lost sales customer was the UAE market and Emirates.²¹⁹ Thus, there would be no basis to eliminate or even diminish the countermeasures calculated on the basis of impeded deliveries to the EU, Australia, China, Korea, and Singapore VLA markets.

174. Therefore, assuming *arguendo* that the adverse effects will continue to manifest with respect to the exact customers and country markets underlying the compliance proceeding findings, the only permissible adjustment to account for over-counting would be to phase out, starting in year nine (*i.e.*, sometime in 2028), the portion of the countermeasures corresponding to impedance in the UAE VLA market.

Question 108 (both parties)

Could the parties please explain, with respect to the decisions by previous arbitrators that authorized "ongoing" or "annual" countermeasures (as the United States uses those terms in footnote 77 of its written submission), what was the justification for such authorizations in those arbitrations?

175. In its response to this question, the EU repeats its argument that ongoing or annual countermeasures are only justified where the measure at issue is “recurring.” It asserts that there is a perfect fit in previous decisions in which recurring measures led to recurring countermeasures and non-recurring measures led to non-recurring countermeasures.²²⁰ It

²¹⁷ See EU RAQ 107, para. 197; *ibid.*, Figure 1.

²¹⁸ EU RAQ 29, para. 432.

²¹⁹ It is also important to recognize that Emirates is not the only customer in the UAE VLA market. Etihad Airways is another UAE customer that has also ordered the A380. See Updated Ascend Database (Exhibit EU-79).

²²⁰ EU RAQ 108, para. 203.

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provides no analysis even attempting to show that this EU assertion served as the justification for ongoing or annual countermeasures in any of the reports,²²¹ which is the focus of the question.

176. The EU asserts that the United States “agrees” with it that the arbitrators have authorized only non-recurring countermeasures when the measure at issue was non-recurring, and authorized recurring countermeasures when, and because, the measures at issue were recurring.²²² That is incorrect.

177. The EU treats all but one²²³ of the measures that have been subject to an arbitration as “recurring.” The United States has noted that this term risks confusion because it is a term of art in the subsidies context, typically applying to subsidies with benefits conferred on an annual or otherwise regular basis.²²⁴ Therefore, references to “recurring” countermeasures inherently risks a high level of confusion. The Appellate Body has cautioned against confusing the benefit of a subsidy with the effects a subsidy causes.²²⁵

178. The terminology becomes even more problematic when applied to measures that do not confer subsidies, which have been the subject of most of the arbitrations to date.²²⁶ For example, the EU argues that, because the measures in *US – Washing Machines* purportedly were “recurring,” the arbitrator authorized recurring countermeasures.²²⁷ However, the “as applied” findings at issue in the *US – Washing Machines* proceeding concerned a large number of measures: decision memoranda in separate antidumping and countervailing duty investigations, the determinations themselves, the use of “zeroing,” and the use of the “Nails II methodology.”²²⁸ Each decision memorandum and determination was a one-time administrative action, while the antidumping and countervailing duty orders applied on an ongoing basis. The methodologies subject to DSB findings in that dispute might or might not apply to particular transactions or producers depending on the facts of the situation. It is accordingly difficult to

²²¹ Although the EU asserts that its opening statement at the parties’ meeting with the Arbitrator addressed this question in detail, the cited paragraphs contained only one reference to an arbitral report (*US – Upland Cotton (22.6 II)*), and provided no analysis of the reasoning in that report. EU RAQ 108, para. 199 (citing EU Opening Statement, paras. 33-38).

²²² See EU RAQ 108, paras. 201-202.

²²³ The sole exception is transaction-specific measures at issue in *Canada – Aircraft Credits and Guarantees (22.6)*.

²²⁴ See *Japan – DRAMs CVDs (Panel)*, note 542,

²²⁵ Original Appellate Report, para. 712.

²²⁶ Although, it should be noted that drawing a line between recurring and non-recurring subsidy benefits even in the subsidies context is not always clear-cut.

²²⁷ EU RAQ 108, para. 204.

²²⁸ *US – Washing Machines (22.6)*, para. 3.1, note 29.

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understand how the terms “recurring” or “non-recurring” would apply in any meaningful way to the measures in *US – Washing Machines*.

179. It is also significant that, no form of the word “recur” has ever appeared in any report issued by an arbitrator under Article 22.6 of the DSU. Therefore, it is quite a stretch for the EU to contend that all of these arbitrators justified annual or ongoing countermeasures on the basis that the measures at issue were recurring.

180. In all past arbitration reports but one, countermeasures or suspension of concessions have been authorized on a per-year basis, without a defined end point other than compliance by the Member concerned. The United States refers to this as ongoing or annual countermeasures, and this is exactly what the United States is pursuing in this arbitration. The characteristics of the particular measures, which now lead the EU to retroactively characterize them as “recurring,” are not what justified ongoing or annual countermeasures in all but one of the previous reports. It is instead the juridical fact of findings that the responding Member was out of compliance with its WTO obligations. The same applies to the EU in this situation – it is subject to a finding that its A380 and A350 XWB LA/MSF subsidies are inconsistent with the Articles 5 and 6.3 of the SCM Agreement because they cause *adverse effects* in the post-implementation period. That is not open to debate. That juridical fact remains true absent and until adoption of a subsequent finding to the contrary.

Question 109 (both parties)

With reference to, inter alia, the parties' responses to question Nos. 42 and 43, if it were determined that the value of the Transaero A380 sale was zero in the light of its cancellation, could the "lost sale" still, even at this time, be deemed "significant" due to the non-price factors discussed in paragraph 7.1845 of the report of the original panel?

181. The EU’s response to this question contradicts itself and, accordingly, can provide no meaningful guidance to the Arbitrator.

182. The EU’s response begins with the following unambiguous, matter-of-fact statement:

The {Arbitrator} asks whether the Transaero Airlines lost sale can still be deemed “significant” by virtue of non-price factors, such as those discussed in paragraph 7.1845 of the original panel report.

The answer to this question is “no”.²²⁹

183. The EU then argues that the value of the lost sale should be zero, and that non-price factors do not justify treating it as “significant.” Thus, the EU takes the position that the

²²⁹ EU RAQ 109, paras. 206-207 (internal citation omitted).

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Transaero sale is not significant *because* it has a value of zero, and non-price factors do not indicate that it is significant.²³⁰ But the significance of this lost sale is *not* open to debate. It is a finding from the compliance panel and appellate reports, adopted by the DSB.

184. Elsewhere in its response, the EU asserts that “the issue of ‘significance’ of the Transaero Airlines lost sale is distinct from the quantum of harm suffered by the United States as a result of that lost sale.”²³¹ It also states that there is no conflict between the compliance proceeding finding that the Transaero lost sale is significant, and the Arbitrator determining that the value of the lost sale is zero.²³² In other words, here, the EU is answering that “yes,” the value can be determined to be zero while the sale is still deemed significant. This, of course, is the opposite of the emphatic “no” with which the EU began its response.

185. The United States agrees with one of the EU’s two positions. As explained in the U.S. response to Question 109, it is theoretically possible that a sale valued at zero based on revenue effects from Boeing’s perspective could nevertheless be considered significant. However, as a factual matter, in the compliance proceeding this particular sale was not deemed significant on the basis of the cited non-price factors.

Question 110 (both parties)

With reference to, inter alia, footnotes 176 and 177 of the European Union's written submission, in cases where certain LCA ordered pursuant to the five "lost sales" are converted, should the Arbitrator take account of that conversion in its valuation of the lost sales, and if so how should the Arbitrator do so?

186. The U.S. response to this question explained why the Arbitrator should not take account of any such conversions.²³³ The adopted reports found that each of the aircraft ordered by the relevant customers represented a significant lost sale, and it made those findings with respect to specific Airbus aircraft ordered in those lost sales.²³⁴ Reflecting a conversion from the model found to be associated with particular lost sales to a different model would be altering the adopted findings based on a new factual record. This is not appropriate in the context of this

²³⁰ It is worth noting that the “non-price factors” that the EU cites all relate to the impact of the sale *on Airbus*. EU RAQ 109, para. 211. However, the legal question under Articles 5 and 6.3 of the SCM Agreement is the existence of serious prejudice *to the interests of the United States*. The EU’s failure to address the significance of the Transaero lost sale *to Boeing* accordingly leaves its response incomplete.

²³¹ EU RAQ 109, para. 210.

²³² EU RAQ 109, para. 209.

²³³ See U.S. RAQ 110, paras. 34-35.

²³⁴ See Compliance Panel Report, para. 6.1781, Table 19. See also Compliance Appellate Report, para. 5.705, Table 10 and para. 5.723, Table 12.

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arbitration pursuant to Article 22.6 of the DSU and Articles 7.9 and 7.10 of the SCM Agreement.²³⁵

187. The EU argues that this view confuses the compliance panel and appellate report findings of adverse effects with the calculation exercise before the Arbitrator, and accuses the United States of making contradictory arguments.²³⁶ But the U.S. position is both correct and consistent. Where the adopted compliance reports made findings that certain customers' orders of a certain number of a certain Airbus model represented significant lost sales, the Arbitrator is not permitted to re-assess whether any of those orders indeed represent significant lost sales, as the EU proposes with respect to all of the Transaero orders and some of the Emirates orders. Nor can it alter the DSB-adopted findings regarding which Airbus models were associated with these lost sales, as the EU proposes for the Cathay Pacific and United Airlines lost sales. To do otherwise would be to make new findings that contradict the adopted findings, which the Arbitrator is not empowered to do.

188. In contrast, the Arbitrator *is* permitted to assess whether, given the adopted findings, the EU has carried its burden of showing that the level of countermeasures requested by the United States is not commensurate with the adverse effects determined to exist. As part of that analysis, the Arbitrator may properly inquire, for example, as to whether a counterfactual Boeing price proposed by the United States is appropriate for valuing an Airbus order for ten A350 XWB-1000s that was found to be a lost sale. But as discussed, it cannot treat that lost sale as if it were an order for a different Airbus model because the adopted findings have already settled the question. In asking the Arbitrator to do just that, the EU, and not the United States, “confounds” the distinction between the underlying findings and the task properly before the Arbitrator.²³⁷

189. The United States has also observed that the EU incorrectly assumes that a counterfactual Boeing order would be subject to the same conversions as the real-world Airbus order.²³⁸ In the EU response to this question, the EU discusses the conversions following the 2012 Cathay Pacific and 2013 United Airlines lost sales, but these examples only highlight the problems with the EU's approach.

190. With respect to the Cathay Pacific lost sale, the EU asserts that, because the airline actually converted its original A350 XWB-1000 orders into orders for the A350 XWB-900, the Arbitrator should assume that the airline in the counterfactual would have first ordered the

²³⁵ See U.S. RAQ 110, paras. 34-35.

²³⁶ See EU RAQ 110, paras. 216-217.

²³⁷ See EU RAQ 110, para. 216.

²³⁸ See U.S. RAQ 98, *supra*; U.S. RAQ 110, para. 35; U.S. RAQ 117, para. 61.

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777-300ER (a point on which the parties agree) but then assume that the airline would have converted those 777-300ER orders “to the 787-10 or -9.”²³⁹

191. The facts do not support this assumption. Before and after the 2012 lost sale, Cathay Pacific has had a large fleet of 777-300ERs,²⁴⁰ and the EU has not identified a single instance of the airline converting 777-300ER orders into orders for other Boeing aircraft. Moreover, the airline has never ordered the 787,²⁴¹ which would mean that converting to the 787-10 or -9 would require introducing a new aircraft type into its fleet (as opposed to adding to its large, installed fleet of 777-300ERs). Yet, the EU simply assumes that this would occur. The EU never considers the possibility that Airbus’s redesign of the A350 XWB-1000 (which Airbus decided to undertake in 2011)²⁴² eventually prompted airlines like Cathay Pacific (and United Airlines) to modify their views as to how the model would fit into their fleets. That would not have been the case with the well-understood 777-300ER, which had been in service since 2004.

192. Similar erroneous assumptions afflict the EU’s arguments with respect to the conversions following the 2013 United Airlines lost sale. As the United States observes in its comments on the EU’s response to Question 98, United Airlines’ conversions and deferrals of its A350 XWB orders were not matched by changes to its actual 777-300ER and 787-10 orders, and there is no basis to assume that counterfactual United Airlines orders for the 777-300ER (or 787-10) would have undergone conversions and deferrals matching those that occurred with respect to the airline’s A350 XWB orders.

193. To account for these conversions in the countermeasures calculation, the EU offers two approaches. First, the EU states that the Arbitrator could select an alternative Boeing comparator order corresponding to the post-conversion aircraft model(s) on order.²⁴³ At the Arbitrator’s request, the United States has proposed such alternative comparators in its response to Question 117, while still maintaining that no alternative comparators are necessary.²⁴⁴

²³⁹ EU RAQ 110, para. 224.

²⁴⁰ Orders & Deliveries – Cathay Pacific 777-300ER Orders (2005-2013), Boeing Website (Exhibit USA-31).

²⁴¹ See Updated Ascend Database (Exhibit EU-79).

²⁴² See *Cathay swaps batch of A350-1000s to smaller -900*, FlightGlobal (Sept. 13, 2017) (Exhibit EU-58) (stating that Cathay Pacific “had notably been the first carrier to commit to the revamped -1000 following Airbus’s decision to redesign the type in 2011. . . .But the latest switch will convert six -1000s back to the -900, the second such high-profile conversion in a matter of days, following United Airlines’ decision to swap its 35 -1000s for the smaller variant”).

²⁴³ EU RAQ 110, para. 218.

²⁴⁴ See U.S. RAQ 117, paras. 62-64.

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194. The EU’s second option includes proposed “downward” price adjustments to reflect the conversions, using an assumed relationship between list prices and net prices for the models at issue.²⁴⁵ That assumed relationship [BCI].²⁴⁶ Thus, there is no basis for downward adjustments, even if the Arbitrator agreed to attempt to reflect conversion activity in the countermeasures calculation. The United States has proposed alternative comparators that would minimize distortions to the calculation.

195. However, as described above, both options would impermissibly alter the findings adopted by the DSU and therefore are improper within the scope of this arbitration.

Question 111 (both parties)

With reference to paragraph 435 of the European Union's response to question No. 29, paragraph 272 of the European Union's written submission, and paragraph 85 of the European Union's opening statement, could the parties please explain whether Boeing's borrowing rate can be used as a proxy for Boeing's discount rate?

196. As an initial matter, the United States recalls its response to this question, which made two primary points. First, the proper “discount rate” is that of the United States, not Boeing, because the SCM Agreement disciplines subsidies that cause adverse effects to the interests of a Member, not a private company. Second, if the calculation were instead performed from Boeing’s perspective, consistent with arguments by the EU, then there would be no need to first escalate and then discount the price.²⁴⁷

197. The EU opposes the use of Boeing’s borrowing rate as a proxy for Boeing’s discount rate. It evaluates the use of Boeing’s borrowing rate with reference to three “insights” or criteria it suggests a discount rate must meet.²⁴⁸ The EU’s analysis in this respect contains several errors.

198. The EU’s first contention is that “the proper discount rate must be *Boeing-centric*, and and not be specific to the US Government.”²⁴⁹ This is incorrect. The SCM Agreement disciplines subsidies that cause adverse effects to the interests of a Member, not a private company. Here, the United States is the Member experiencing the adverse effects determined to exist.

²⁴⁵ EU RAQ 110, paras. 218, 222-224.

²⁴⁶ Compare [BCI] (providing the [BCI] of [[HSBI]] for [BCI] with [BCI] (providing the [BCI] of [[HSBI]] for [BCI].

²⁴⁷ See *infra* U.S. Comments on EU RAQ 148. See also U.S. RAQ 111, paras. 36-37.

²⁴⁸ See U.S. RAQ 111, paras. 231-233.

²⁴⁹ EU RAQ 111, para. 231 (emphasis original).

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199. In addition, the EU erroneously disregards the conceptual difference between – and the fundamental roles of – escalation and discounting in the U.S. methodology.²⁵⁰ The EU’s criticism of the U.S. methodology’s use of the interest rate on 10-year U.S. Treasury bonds as the discount rate demonstrates this error.²⁵¹ The EU contends that there is a logical disconnect in combining Boeing-specific escalation factors with Government-related discount rates.²⁵² The EU errs.

200. Escalation factors have nothing to do with the discounting applied in the U.S. methodology. Thus, these are in no meaningful sense “combined” in the U.S methodology. Rather, the United States values aircraft by reference to their prices. As a factual matter, the final price paid for an aircraft in this industry is a delivery price, which reflects contractually determined escalation factors. Again, the use of escalation factors is solely an effort to determine the *price* of a given aircraft.

201. Separately, discounting is used to re-state that value in the year the adverse effects arose. Thus, for significant lost sales that the United States suffered in 2012, the associated aircraft may have been scheduled for delivery in, for example, 2016. As a consequence, the values of those aircraft, when set equal to the delivery price, would be stated in 2016 dollars. The United States applied discounting so that the significant lost sales suffered by the United States in 2012 (in this example) would be stated in 2012 dollars. Thus, the EU’s point is meritless because the EU fundamentally misunderstands the unrelated reasons for escalation and discounting.

202. As the United States has stated previously,²⁵³ if discounting is viewed from Boeing’s perspective, then there is no reason to escalate out to the delivery year and then discount to the order year. One can simply use the order year price – that is, the base year price if the base year is the order year, or if not, the base year price escalated to the order year.

203. Furthermore, the EU is mistaken when it states that “{i}t is undisputed between the Parties that the concept of a discount rate represents the time value of money when a company faces an intertemporal choice.”²⁵⁴ That can be one reason for the use of a discount rate. However, that is not the role of the discount rate in the U.S. methodology, which does not seek to establish equivalence from Boeing’s perspective between lower revenues at the time of order and

²⁵⁰ The United States has explained the distinction between escalation and discounting in previous submissions. See U.S. RAQ 73, paras. 71-90; U.S. RAQ 78, paras. 97-98. See also U.S. RAQ 69, para. 46; U.S. RAQ 39, paras. 81-82; U.S. RAQ 33, paras. 51-62.

²⁵¹ See U.S. Methodology Paper, paras. 51-53 (describing the U.S. discount rate approach).

²⁵² See EU RAQ 111, note 246.

²⁵³ U.S. RAQ 111, para. 37.

²⁵⁴ EU RAQ 111, para. 229.

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higher revenues in the future.²⁵⁵ Rather, consistent with the text of the SCM Agreement, the United States is seeking to determine the value of the instances of adverse effects suffered by the United States, *e.g.*, certain significant lost sales in 2012.

204. The EU also reiterates its argument that a proper discount rate must contain a customer-specific element, namely the probability of customer default.²⁵⁶ The United States has already explained that this would be improper because it would ignore a portion of the orders found to represent significant lost sales in the reports adopted by the DSB. In addition, the United States explained how, if such an exercise were undertaken anyway, the use of a survival rate adjustment would properly reflect the probability that an order might be cancelled prior to delivery.²⁵⁷

205. Moreover, the EU's proposed cancellation rate is flawed. By definition, the cancellation rate is the ratio of the number of aircraft orders cancelled in a given year to the number of orders that potentially could be cancelled in a given year (*i.e.*, all outstanding aircraft orders). The survival rate is the inverse – 1 minus the cancellation rate. First, the EU calculation systematically inflates the annual cancellation rate by incorrectly dividing the net orders (which reflect both cancellations and conversions) in a given year by the gross orders in the same year. This assumes that the number of (gross) orders in a given year is the universe of orders that may be cancelled in that year. However, that assumption is wrong. In any given year, not only could an order placed in that year be cancelled, but an order from a previous year that is already in Boeing's backlog at the beginning of the year could also be cancelled.

206. In addition, as explained previously in the U.S. response to Question 73, the EU derives its annual cancellation rate based on a period that is not indicative of the likelihood of cancellation of aircraft ordered in 2012 or 2013.²⁵⁸ But, again, this is all beside the point because there is no basis to reduce the orders found to represent significant lost sales in the compliance proceeding.

Question 112 (both parties)

With reference to, inter alia, paragraph 94 of the European Union's opening statement, in the event of limited delays of one to three years in the delivery of ordered LCA, how do airline customers commonly react? Do they generally wait for the originally ordered LCA regardless; cancel the orders; and/or lease LCA similar to the LCA ordered pending delivery of the delayed aircraft? In the case of leasing, is it easy for airlines to get access to the type of

²⁵⁵ Cf. EU RAQ 111, para. 229.

²⁵⁶ See EU RAQ 111, para. 233.

²⁵⁷ See U.S. RAQ 115.

²⁵⁸ See U.S. RAQ 73, paras. 86-87.

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aircraft that they ordered or is there very limited access? As much as possible, please focus your answers on delays in VLA deliveries.

207. The EU’s response to this question is premised on its erroneous argument that, in the counterfactual situation absent existing LA/MSF subsidies in the post-implementation period, the A380 would have been available in the market, such that “LCA customers may well have reacted to the delayed launch and a consequential delayed first delivery of the A380 by simply deferring the planned purchase of A380s to a time when they become available.”²⁵⁹

208. However, as the United States observed in its response to this question, the EU’s argument addresses a scenario that is not consistent with the adopted reports from the compliance proceeding.²⁶⁰ The EU in paragraph 94 of its oral statement presumed that, despite adopted findings that Airbus would have been unable to offer the A380 through at least 2013, customers in the December 2011 – 2013 period would have somehow known enough about the A380 to consider waiting for it – even if they could not order it – and that the A380 would somehow have had a delivery schedule such that it could be said to be delayed rather than non-existent.²⁶¹

209. In the compliance proceeding, the EU tried, and failed, to establish that customer- and campaign-specific factors severed the causal link between LA/MSF and adverse effects. Instead, the panel and appellate reports made findings of significant lost sales and impedance in the VLA market based on the unavailability of the A380, and neither report suggested in any way that the A380 was only slightly delayed (and therefore a realistic option in customers’ planning) or even that the A380 would have benefitted from a delay in the 747-8’s entry into service.²⁶² Thus, any EU arguments based on “limited delays” for the A380 must fail. Similarly, the EU’s arguments regarding the “multiple strategies” used by LCA customers “to bridge any delays for availability of their preferred LCA” cannot justify a reduction to the proposed level of countermeasures, since those arguments assume – contrary to the adopted findings – that the A380 was sufficiently imminent that customers would base their acquisition strategies around it, or that customers would otherwise do something other than take delivery of U.S. LCA.²⁶³

210. To be sure, there is considerable convergence in the parties’ views as to the typical customer response to limited delivery delays – *i.e.*, that customers will not typically cancel

²⁵⁹ EU RAQ 112, para. 240.

²⁶⁰ U.S. RAQ 112, para. 39.

²⁶¹ See EU Oral Statement, para. 94.

²⁶² See, *e.g.*, Compliance Appellate Report, paras. 5.734-5.735, 5.740.

²⁶³ EU RAQ 112, para. 249. The United States discusses the EU’s “multiple strategies” arguments in greater detail in its comments on the EU response to Question 113.

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orders.²⁶⁴ The EU offers an Airbus declaration to make the point that no A380 customer “cancelled its A380 order as a result of the delayed deliveries occasioned by delays in the programme.”²⁶⁵ But even assuming *arguendo* that the statement is accurate, it only serves to show that the EU’s arguments regarding A380 “limited delivery delays” are inconsistent with the adopted findings and have no place in this arbitration. That is, the willingness of A380 customers to retain their orders was not an impediment to the original or the compliance findings of adverse effects involving the A380.²⁶⁶ Accordingly, that willingness cannot now serve as a basis to retroactively reduce the degree of adverse effects determined to exist.

211. In addition, the EU misunderstands a previous statement by the United States. The EU argued in its written submission that, while impeded VLA deliveries began in December 2011, in the real world Boeing did not deliver the first 747-8I until April 2012.²⁶⁷ As one of the responses to this point, the United States noted that, assuming *arguendo* that the actual A380 deliveries that occurred in December 2011 and early 2012 were pushed back until the real-world entry into service date of the 747-8I, “{t}his would have no real effect on the extent of the countermeasures.”²⁶⁸

212. The EU argues that this statement implies that counterfactual LCA customers would not have altered their behavior when faced with the non-availability of the A380.²⁶⁹ The EU errs. In that instance, the compliance proceeding already determined that the U.S. industry would have made those deliveries. Thus, there is no occasion to consider customer behavior, and the United States certainly does not agree that customers’ behavior would have been “unaltered.”²⁷⁰ The U.S. statement regarding the effect on the extent of the countermeasures addressed two consequences that treating December 2011 and early 2012 deliveries as occurring a few months later would have on the calculation proposed by the United States.

213. First, assuming a slightly later delivery date would result in applying the average 2012 delivery price to deliveries previously valued at the 2011 delivery price. Second, in the step where the United States calculates a single value of the annual adverse effects in 2013 dollars,

²⁶⁴ See U.S. RAQ 113, para. 41; EU RAQ 113, para. 241.

²⁶⁵ EU RAQ 113, para. 243.

²⁶⁶ As the United States has observed, despite the A380 delays, Emirates took delivery of A380 passenger models it had already ordered pursuant to Emirates’ original A380 launch order, which was found to be a significant lost sale in the original proceeding. Emirates also continued to order A380s in the future, which resulted in additional findings of significant lost sales in the compliance proceeding. See U.S. RAQ 113, para. 42.

²⁶⁷ EU Written Submission, para. 301.

²⁶⁸ U.S. Written Submission, para. 241.

²⁶⁹ EU RAQ 112, para. 246.

²⁷⁰ EU RAQ 112, para. 246.

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deliveries originally treated as December 2011 deliveries would only be adjusted from 2012 to 2013 using PPI instead of being adjusted from December 2011 to 2013. The U.S. point was simply that these differences are relatively minor. In that sense, assuming counterfactual Boeing deliveries a few months later than real-world Airbus deliveries “would have no real effect on the extent of the countermeasures.”²⁷¹

Question 113 (both parties)

With reference to, inter alia, paragraph 177 of the United States’ written submission, if Boeing under the counterfactual had had a monopoly in the VLA product market with the 747-8I in the Reference Period, would there have been incentives for Boeing to decrease supply of the 747-8I to the market and/or raise prices such that customers would have opted out of buying Boeing LCA? Assume for purposes of this question that the A380 would not have been launched before 2014.

214. Much of the EU’s response consists of an objection to this question’s premise (*i.e.*, a monopoly position for the 747-8I during the December 2011 – 2013 period) and yet another attempt to re-litigate the adopted causation and impedance findings from the compliance reports, rather than an answer to the question actually posed by the Arbitrator.²⁷² Each aspect of the EU’s response is without merit.

215. In terms of the question posed by the Arbitrator, the EU offers only generalized assertions about “monopoly pricing,” unsupported by any evidence, let alone any analysis accounting for the conditions of competition that would prevail in the VLA market absent the effects of LA/MSF subsidies.²⁷³ In contrast, the United States has presented evidence that Boeing would not have faced incentives to decrease 747-8I supply or raise prices to an extent that customers likely would have opted out of buying the 747-8I.²⁷⁴ The real-world experience of Boeing in the 1990s shows that it achieved much higher 747 sales and production rates compared to the situation after the A380’s launch.²⁷⁵ Thus, “even where Boeing had the only 400+ seat airplane offering, it priced and produced the 747 to meet customer demand; it did not choke off demand in an attempt to reap unusually high profits on a smaller number of sales.”²⁷⁶

²⁷¹ U.S. Written Submission, para. 241.

²⁷² See EU RAQ 113, paras. 252-261, 264-268.

²⁷³ EU RAQ 113, para. 262. This does not stop the EU from then faulting the United States for a supposed lack of evidence. See EU RAQ 113, paras. 264-265.

²⁷⁴ Boeing E-mail regarding Question 113 (Exhibit USA-63(BCI)).

²⁷⁵ See *infra* U.S. RAQ 116.

²⁷⁶ Boeing E-mail regarding Question 113 (Exhibit USA-63(BCI)).

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This evidence refutes the EU’s vague assertions that, in the counterfactual, Boeing would have engaged in “monopoly pricing.”²⁷⁷

216. Moreover, the EU’s objection to the “basic premise of this question” is wholly unwarranted.²⁷⁸ In fact, the premise of this question – *i.e.*, a 747-8I monopoly in the VLA market and no A380 launch – accurately reflects the adopted findings. In contrast, as the United States has shown previously,²⁷⁹ the EU’s assertion that “the A380 would have existed, and been ready for delivery, in the six country markets at issue during the December 2011 to 2013 period”²⁸⁰ is impossible to reconcile with the compliance panel and appellate report findings. In particular, they found that LA/MSF caused impedance in the December 2011 – 2013 period because “in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did.”²⁸¹

217. In reaching those findings, the compliance reports rejected the EU’s argument that the 747-8 delays were a non-attribution factor.²⁸² In doing so, the reports affirmed that Boeing or the U.S. LCA industry would “‘have won the orders corresponding to the deliveries made in the different markets’ for VLA.”²⁸³ They also affirmed that, “in the absence of Airbus’ VLA offerings,” any customers that “could not wait for the 747-8 to become available”²⁸⁴ “would have turned to other Boeing LCA products – for instance, the larger versions of the 777.”²⁸⁵ Thus, there is no basis for the EU’s objections to impedance-related countermeasures based on counterfactual Boeing delivery replacing each A380 delivery.²⁸⁶ Nor is there a basis for the

²⁷⁷ EU RAQ 113, para. 262.

²⁷⁸ See EU RAQ 113, para. 252.

²⁷⁹ See U.S. Written Submission, paras. 164-172; U.S. RAQ 112, paras. 39-.

²⁸⁰ EU RAQ 113, para. 266.

²⁸¹ Compliance Appellate Report, paras. 5.734 (emphasis added). See also Compliance Panel Report, para. 6.1816 (“Lastly, we do not see the delays in the development and production of the 787 and the 747-8 to mean that, in the absence of the ‘product’ effects of the LA/MSF subsidies, Boeing or the United States’ LCA industry would not have won the orders corresponding to the deliveries made in the different markets for twin-aisle and very large LCA. The fact that Airbus would not have existed in the absence of the LA/MSF subsidies means that **customers that could not wait for the 787 and 747-8** to become available would have turned to either Boeing’s other twin-aisle LCA, the 767 and the 777, or the twin-aisle LCA of the other United States’ LCA producer.”) (emphasis added).

²⁸² Compliance Appellate Report, para. 5.735; Compliance Panel Report, para. 6.1816.

²⁸³ Compliance Appellate Report, para. 5.735 (quoting Compliance Panel Report, para. 6.1816).

²⁸⁴ Compliance Panel Report, para. 6.1816.

²⁸⁵ Compliance Appellate Report, para. 5.735 (citing Compliance Panel Report, para. 6.1816).

²⁸⁶ Cf. EU RAQ 113, paras. 253-262.

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EU’s assertions that, in the counterfactual, customers could have pursued multiple alternative “strategies” to taking delivery of Boeing LCA.²⁸⁷

218. After unsuccessfully opposing the premise of the question, and then providing an unsupported and unconvincing response to the substance of the question, the EU turns to an unrelated issue – the U.S. demonstration that in the counterfactual, Boeing would have made the deliveries in the markets subject to impedance findings. The EU begins by mischaracterizing the U.S. approach as “speculation” that “LCA customers would have substituted 747-8Is for A380s, one-for-one.”²⁸⁸ The United States *valued* impedance conservatively based on the 747-8I as the closest substitute for the A380.²⁸⁹

219. Moreover, in raising multiple “strategies” that customers supposedly *could* have followed, the EU does not actually take a position on any alternative scenario that it asserts *would* have occurred in the counterfactual.²⁹⁰ Most interestingly, the EU omits by far the most logical and likely deviation from the one-to-one substitution premise it criticizes – namely, that VLA customers would have taken delivery of more counterfactual 747s than they did actual A380s to account for the fact that the A380 has a seating capacity of 525-555 passengers, whereas the 747-8I has a seating capacity of 405-467 passengers.²⁹¹ Thus, the one-to-one substitution premise is actually conservative, and likely understates the true adverse effects. (The United States has also noted the compliance panel and appellate findings that even if the 747-8I were unavailable for a period and certain customers could have waited for it, “in the absence of Airbus’ VLA offerings, customers would have turned to other Boeing LCA products – for instance, the larger versions of the 777.”²⁹²)

220. The EU then seeks to rebut the straw man argument it created by asserting that even ten additional 787-8I deliveries to the impedance markets in the December 2011 – 2013 period “would not be a reasonable or plausible counterfactual in light of Boeing’s production constraints . . . and the competitive presence of the A380 in the six country markets at issue.”²⁹³

²⁸⁷ Cf. EU RAQ 113, para. 261.

²⁸⁸ EU RAQ 113, para. 264.

²⁸⁹ E.g., U.S. RAQ 72, paras. 68-69 (given the 747-8I’s smaller seating capacity, “{w}here the customer purchased, or took delivery of, the A380 due, in part, to its larger seating capacity, it is likely that in at least some circumstances the customer would have ordered more total aircraft so that the number of seats it could offer passengers more closely matched the demand it expected.”).

²⁹⁰ See EU RAQ 113, paras. 261-262.

²⁹¹ Compliance Panel Report, para. 6.1373, Table 18.

²⁹² U.S. RAQ 46, paras. 112-113, *quoting* Compliance Appellate Report, para. 5.735 (citing Compliance Panel Report, para. 6.1816 and note 3326) (emphasis added).

²⁹³ EU RAQ 113, para. 268.

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The United States explained above that the A380 market presence posited by the EU is in error. In response to Question 113, the United States demonstrated that in the counterfactual without existing LA/MSF, Boeing could have supplied enough 787-8Is to fulfill all of the relevant A380 deliveries into the six markets in the December 2011 – 2013 period.

221. An example that exposes the absurdity of the EU position, and reinforces the U.S. characterization of the product effects findings, is the impedance found in the Australia VLA market. In the Australia market, Airbus delivered one A380 in December 2011, zero in 2012, and zero in 2013.²⁹⁴ Boeing did not deliver any 747s to the Australia market during the December 2011 – 2013 period. There were no other facts or analysis specific to the Australia market.²⁹⁵ And yet, there was a finding of impedance, which necessarily means that the U.S. LCA industry would have made the one delivery.

222. If the U.S. characterization of the impedance findings, based principally on the products effects and substitutability findings, were not correct – and if it would not be reasonable or plausible to conclude that Boeing would have made even 10 additional deliveries across six markets – then on what basis would the compliance reports have determined that the U.S. LCA industry would have made the one delivery to the Australia market in the counterfactual? There would have been no such basis or reasoning. This proves that the U.S. position is correct, and disproves the EU position.

223. The EU also seeks to find support for counterfactual market presence of the A380 in the December 2011 – 2013 period on the grounds that the United States did not allege displacement or impedance with respect to the Malaysian and Thai VLA markets²⁹⁶ To state the obvious, the United States was not required to challenge every single A380 sale and delivery as a lost sale or an instance of displacement or impedance. The United States certainly did not do so in the original proceeding either, and this choice did not prevent the panel or appellate report finding that, in the absence of LA/MSF, the most likely counterfactual scenario was that Airbus would not have existed.²⁹⁷

224. Thus, the decision not to pursue legal findings of displacement or impedance in every country market in no way establishes or concedes that the A380 would have been present in the market in the counterfactual situation. And, as a result, the United States has not included deliveries to those markets in its countermeasures calculation. Accordingly, as a legal matter,

²⁹⁴ Compliance Appellate Report, Table 13.

²⁹⁵ See Compliance Panel Report, paras. 6.1805-6.1818; Compliance Appellate Report, paras. 5.732-5.741.

²⁹⁶ EU RAQ 113, para. 257.

²⁹⁷ See, e.g., Original Panel Report, paras. 7.1801, 7.1828 (showing that the U.S. lost sales allegations concerned, *inter alia*, A380 launch orders by Singapore Airlines, Emirates, and Qantas, but not other A380 launch orders, such those from Air France and Lufthansa). See also Updated Ascend Database (Exhibit EU-79) (showing all A380 orders in the 2000 – 2006 period, including launch orders by Air France and Lufthansa).

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the United States has not treated those deliveries as impeding U.S. deliveries resulting from the LA/MSF subsidies. Nevertheless, the decision not to pursue legal findings with respect to those markets in no way constitutes a concession or the establishment of the proposition the EU now urges.

3 ADDITIONAL QUESTIONS FOR THE PARTIES

3.1 For the United States

Question 114 (US)

With reference to Table 13 of the Appellate Body report in the first compliance proceeding and paragraphs 238–243 of the United States' written submission, if, during an established Boeing LCA program that is producing LCA at full capacity, an unexpected order arrives for approximately 50 new LCA, how long would it take Boeing to produce and deliver these LCA?

Question 115 (US)

With reference to, inter alia, paragraphs 429–433 of the European Union's response to question No. 29(a) and paragraphs 83–87 of the United States' response to question No. 73, could the United States please elaborate on the cancellation rate that the Arbitrator should use (assuming that the Arbitrator uses one) to estimate the probability that a particular Boeing LCA ordered pursuant to the "lost sales" in the Reference Period and that would not yet have been delivered in the counterfactual would be cancelled? That is, could the United States please provide an alternative cancellation rate from that offered by the European Union in its response to question No. 29(a)?

Question 116 (US)

With reference to, inter alia, Exhibit USA-43 and the United States' response to question No. 71, could the United States please explain:

- a. how many total 747-8I aircraft Boeing delivered in the December 2011–2013 Reference Period, and into how many country markets Boeing delivered them? For each year, please specify the number of aircraft delivered and into which country markets they were delivered that year;**
- b. how many total 747-400 aircraft Boeing delivered in the 1990s (i.e. before the launch of the A380), and into how many country markets Boeing delivered them? For each year, please specify the number of aircraft delivered and into which country markets they were delivered that year; and**
- c. how long it took Boeing, following the launch of 747-400, to deliver, in a single calendar year, at least 54 747-400 aircraft to all customers worldwide?**

Question 117 (US)

With reference to, inter alia, footnotes 176 and 177 of the European Union's written submission, could the United States please provide:

- a. a comparator order for the United Airlines lost sale if the Arbitrator were to value the order as a sale of ten 787-10 aircraft in 2013; and**

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- b. a comparator order for the Cathay Pacific lost sale if the Arbitrator were to value the order as for eight 777-300ER aircraft and two 787-10 aircraft?

With respect to the comparator orders that the United States proposes in response to this question, please provide, at minimum, the information specified in the "Explanatory Note: Evidentiary Requests" in Section 4, below, and please provide that information in accordance with the other instructions in that Section.

Question 118 (US)

With reference to, inter alia, footnotes 176 and 177 of the European Union's written submission, could the United States please explain whether a customer's ability to convert an LCA order into another LCA model or variant is contractually controlled? If not, please describe how customers convert orders. If so, how common are such rights in Boeing contracts, in general and with respect to sales for the "closest Boeing model[BCI]" listed in paragraph 33 of the United States' Methodology Paper? If such a conversion right is exercised, how does that affect the price that the customer ultimately pays for the LCA that is ultimately delivered? How often do conversions occur, especially with respect to original orders for the "closest Boeing model[BCI]" listed in paragraph 33 of the United States' Methodology Paper? Could the United States provide an estimate of the respective average number of converted orders of the 787-10, 777-300ER and 747-8I based on historic data?

Question 119 (US)

With reference to, inter alia, the United States' oral response to question Nos. 101 and 103 at the substantive meeting regarding the propriety of adjusting data in a reference period if anomalous market conditions arose, assuming that any data from the Reference Period pertaining to orders and deliveries that are reflected in Tables 10, 12, and 13 of the Appellate Body report in the first compliance proceeding appear anomalous, could the United States please explain whether, and if so, how would the Arbitrator go about making an adjustment with regard to the data pertaining to orders and deliveries within the Reference Period to make it more representative?

Question 120 (US)

With reference to the European Union's response to question No. 52, discussing alleged shortcomings of evidence offered by the United States to determine the value of lost sales, could the United States please respond to the arguments contained therein?

Question 121 (US)

With respect to, inter alia, paragraph 48 of the Methodology Paper, paragraph 181 of the United States' written submission, and Exhibits USA-5 (BCI) and USA-24 (BCI), could the United States please explain:

- a. what is a [BCI]?
- b. how was the price in this [BCI] formulated?
- c. was this [BCI]?

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- d. what is the United States' response to the European Union's arguments in this context in paragraphs 243–244 of the European Union's written submission and paragraph 3 (first bullet point) of the European Union's response to question No. 52?**
- e. could the United States further elaborate on the status of negotiations between Boeing and [BCI] and the processes that Boeing went through to [BCI]?**
- f. if the Arbitrator rejects this [BCI] as a basis upon which to illustrate the sales price of a counterfactual sale of 747-8I aircraft to [BCI], what would be the United States' suggestion for an alternative?**

Question 122 (US)

With reference to the European Union's response to question Nos. 52 (para 3) and 28 (para. 421) that the pricing information contained in the [BCI] (Exhibit USA-16 (HSBI)) should not be used for the purpose of valuing the [BCI] lost sales and that, instead, the Lufthansa 2013 per-aircraft delivery prices should be used for valuing the [BCI] lost sale, could the United States please respond to these arguments/approaches?

Question 123 (US)

With reference to paragraphs 86–87 of the United States' Methodology Paper, could the United States please explain whether the delivery price expressed in delivery year dollars could be discounted directly to 2013 using the discount rate, instead of being discounted to the order year and re-inflated to 2013 using a PPI-based ratio?

Question 124 (US)

With reference to the United States' response to the question No. 78, could the United States please provide:

- a. an estimate of the respective average monthly and yearly production of the 787-10, 777-300ER and 747-8I based on historic data;**
- b. an estimate of the respective average production/delivery delay of the 787-10, 777-300ER and 747-8I based on historic data; and**
- c. an estimate of the average amount of penalty payments for late deliveries for the 787-10, 777-300ER and 747-8I based on historic data?**

Question 125 (US)

With reference to the European Union's response to question No. 28, could the United States please:

- a. explain whether and how the price in the comparator orders should be adjusted in the counterfactual when the number of aircraft ordered in the comparator order differs from the number of aircraft that would have been ordered in the counterfactual; and**
- b. provide an estimate of any typical volume discounts, when they are granted, by Boeing on orders of the 787-10, 777-300ER and 747-8I based on historic data?**

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Question 126 (US)

With reference to the United States' response to question No. 69, could the United States please explain whether it disagrees that there is an inherent risk of order cancellation and delivery delay associated with each order, and if so why?

Question 127 (US)

With reference to, inter alia, paragraph 122 of the United States' response to question No. 87, could the United States please explain the extent to which Boeing would have been in a position to take additional orders for 777-300ER aircraft such that they could have been delivered to customers during the Reference Period instead of the A380 aircraft that are reflected in Table 13 of the Appellate Body report in the first compliance proceeding? What was Boeing's production capacity vis-à-vis the 777-300ER like in the years leading up to the Reference Period?

Question 128 (US)

With reference to, inter alia, paragraph 122 of the United States' response to question No. 87, could the United States please explain how the sale price of a 747-8I aircraft generally compares to that of the sale price of a 777-300ER aircraft? If possible, please use prices that would have been applicable for the time-period in which the orders for A380 aircraft were placed that resulted in the deliveries reflected in Table 13 of the Appellate Body report in the first compliance proceeding.

Question 129 (US)

Could the United States please explain how the sale price of a 747-8F aircraft compared to the sale price of a 747-8I aircraft in the years leading up to the Reference Period?

Question 130 (US)

With reference to the United States' response to question No. 88, could the United States please elaborate on the ease or difficulty with which Boeing could have switched production capacity between 747-8I and 747-8F aircraft in the years leading up to the Reference Period? Has Boeing ever actually traded off production capacity between these two LCA programs in the past? If so, please elaborate on the details of such production changes.

Question 131 (US)

With reference to paragraph 126 of the United States' response to question No. 88, could the United States please elaborate on the reasons behind Boeing delaying the delivery of the first 747-8I from 2010 to 2012? In particular, was this delay the result of, for example, production difficulties, customer requests, and/or other factors? Further, what exactly was the "work stoppage" referred to in Exhibit USA-56 (BCI)?

Question 132 (US)

Can a customer who has previously placed an LCA order cancel the order at any time or are there limitations on when the customer can cancel the order?

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Question 133 (US)

With reference to paragraph 18 of the European Union's oral statement, could the United States please comment on the European Union's view that the United States' Article 22.2 request asks for countermeasures corresponding to lost sales and displacement, but not impedance and thus provides no basis for requesting countermeasures for findings of impedance?

Question 134 (US)

With reference to the European Union's response to question No. 2, could the United States please provide, with respect to the 2011 Cathay Pacific order for 14 777-300ER aircraft, the information specified in the "Explanatory Note: Evidentiary Requests" in Section 4, below, and please provide that information in accordance with the other instructions in that Section?

Question 135 (US)

With reference to Exhibits USA-12 (HSBI) to USA-16 (HSBI) and USA-47 (HSBI) to USA-52 (HSBI) and the LCA orders to which such exhibits pertain, could the United States please provide the information specified in the "Explanatory Note: Evidentiary Requests" in Section 4, below, and please provide that information in accordance with the other instructions in that Section?

Question 136 (US)

With reference to Exhibits USA-12 (HSBI) to USA-16 (HSBI) and USA-47 (HSBI) to USA-52 (HSBI), could the United States explain with illustrative examples how the escalation factors are computed for the different escalation formulae reported in Exhibits USA-12 (HSBI) to USA-16 (HSBI) and USA-47 (HSBI) to USA-52 (HSBI)?

Question 137 (US)

With reference to paragraph 182 of the United States' written submission, and in the light of the European Union's response to question No. 40, with respect to the actual [BCI], could the United States please provide the information specified in the "Explanatory Note: Evidentiary Requests" in Section 4, below, and please provide that information in accordance with the other instructions in that Section?

Question 138 (US)

With reference to Exhibit EU-79 and the 2013 United Airlines order contract for ten 787-10 aircraft could the United States please provide the information specified in the "Explanatory Note: Evidentiary Requests" in Section 4, below, and please provide that information in accordance with the other instructions in that Section?

Question 139 (US)

With reference to the United States' Exhibits USA-17 (HSBI), USA-18 (HSBI) and USA-26 (HSBI) and the LCA orders to which such exhibits pertain, could the United States please provide the information specified in the "Explanatory Note: Evidentiary Requests" in Section 4, below, and please provide that information in accordance with the other instructions in that Section, and additionally:

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- a. **explain whether the [BCI] were used to compute the net revenue for Boeing 747-8I aircraft delivered in 2012 and 2013 as reported in Exhibits USA-17 (HSBI) and USA-26 (HSBI); and**
- b. **indicate whether the delivery prices reported in Exhibits USA-17 (HSBI) and USA-26 (HSBI) are associated with the order information reported in Exhibit USA-47 (HSBI)?**

Question 140 (US)

With reference to the United States' Exhibits USA-18 (HSBI) and USA-49 (HSBI), could the United States please explain the difference in order prices for Air China reported in those two exhibits?

Question 141 (US)

With reference to the United States' Exhibits USA-38 (BCI) to USA-41 (BCI), could the United States please:

- a. **explain how the monthly escalation is calculated based on quarterly indices; and**
- b. **explain what interpolation methodology the United States applies to determine monthly escalation rates from quarterly data?**

Question 142 (US)

With reference to the United States' Exhibit USA-18 (HSBI), could the United States please explain why the same 2011 campaigns [BCI] show up with two different order prices?

Question 143 (US)

With reference to the United States' Exhibits USA-19 (HSBI) and USA-27 (HSBI), could the United States please provide the underlying 2012 and 2013 Boeing 747-8I order prices used to compute the average order price for 2012 and 2013, respectively?

Question 144 (US)

With reference to paragraph 82 of the United States' Methodology Paper, could the United States please explain how its approach to valuing impedance would have to be modified if the assumption of Boeing counterfactual deliveries occurring in the same year as actual Airbus deliveries were to be relaxed?

Question 145 (US)

Further to question No. 111 previously posed to the parties for oral response, could the United States please provide historic annual and monthly Boeing's borrowing interest rate series?

3.2 For the European Union

Question 146 (EU)

With reference to the United States' response to question No. 71, regarding issues surrounding Boeing's VLA production capacity, could the European Union please respond to the arguments and data contained therein?

225. The EU's response to this question is legally misplaced and relies on specious characterizations of Boeing and Airbus production data. The U.S. response to Question 71 made three key points: (1) that "747 production rates in the 1990s" were "much higher than those Boeing experienced since the A380's launch;"²⁹⁸ (2) that "those pre-A380 production rates are a good indication of Boeing's counterfactual ability to meet demand for VLA deliveries in the absence of LA/MSF's product effects;"²⁹⁹ and (3) that "if the A380 deliveries supporting the impedance findings in the compliance appellate report are added to Boeing's actual 747-8 deliveries over the 2011 – 2013 period, each of the annual counterfactual production figures is well below the 747 production high of 70 aircraft during the 1990 – 1999 period, and the counterfactual average annual production of 37 aircraft per year is also well below the 1990 – 1999 average of 48.1 aircraft per year."³⁰⁰

226. The EU responds with two arguments. First, the EU contends that Boeing's 747 production in the 1990s is not probative of Boeing's counterfactual 747-8I production because the latter is "more advanced and complex" than the 747s Boeing produced in the 1990s.³⁰¹ Second, the EU cites production ramp-up data for the 747-8, A380, and 777-300ER and alleges that the counterfactual 747-8I deliveries proposed by the United States assume "a dramatically over-ambitious counterfactual production ramp-up."³⁰² Neither argument withstands scrutiny.

227. As an initial matter, the EU's arguments constitute both a re-litigation of a settled issue in this dispute and an attempt to lead the Arbitrator into the error of assuming that the counterfactual situation would be characterized by conditions that actually resulted from LA/MSF's product effects. Before the original panel, the EU argued that Boeing's supposed inability or unwillingness to increase production to meet demand was a non-attribution factor that precluded findings of serious prejudice.³⁰³ The EU also tried to show that A380 launch

²⁹⁸ U.S. RAQ 71, para. 57.

²⁹⁹ U.S. RAQ 71, para. 57.

³⁰⁰ U.S. RAQ 71, para. 62.

³⁰¹ EU RAQ 146, para. 272.

³⁰² EU RAQ 146, para. 272.

³⁰³ See Original Panel Report, para. 4.547 (restating EU arguments that Boeing was allegedly "unable to meet demand" and that Boeing allegedly "put a limit on its increases in production capacity"); *ibid.* 4.585.

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orders were not lost sales because Boeing could only offer the 747X, a proposed improved version of the 747 that was never launched.³⁰⁴ The original panel disagreed and made findings of significant lost sales, including with respect to A380 orders during the 2000 – 2006 period by Emirates, Qantas, and Singapore Airlines.

228. The EU appealed the lost sales finding with respect to Emirates, but did not make sales-specific appeals concerning the Qantas or Singapore Airlines lost sales.³⁰⁵ On appeal, the EU argued that the Emirates A380 order should not constitute a lost sale because Boeing did not “turn up” to compete for the sale and because Boeing had not launched the 747-X.³⁰⁶ In rejecting the EU’s appeal and upholding the original panel’s finding, the appellate report explicitly noted that the EU did not attempt to show that production capacity constraints would have prevented Boeing from making the relevant deliveries:

Given the conditions of competition in the LCA industry, it was not necessary for Boeing to have made a formal offer to Emirates Airlines—or “turn up” to use the European Union’s expression—for the sales to qualify as sales that Boeing “failed to obtain”. As the Panel explained, even in the absence of a formal offer from Boeing, Emirates could be expected to have considered the products manufactured by Boeing before making its purchase decision. *We do not understand the European Union to have argued that Boeing would not have had the production capacity to fill the order and offer a 747.*³⁰⁷

229. Similarly, the EU argued unsuccessfully in the first compliance proceeding that 747-8I “development delays” constituted a non-attribution factor that severed the causal link. As discussed in the U.S. comments on the EU’s response to Question 113, the compliance reports rejected that argument in finding impedance in six VLA country markets:

We recall that *the Panel did not see these delays “to mean that, in the absence of the ‘product’ effects of the LA/MSF subsidies, Boeing or the United States’ LCA industry would not have won the orders corresponding to the deliveries made in the different markets” for VLA.*³⁰⁸ We also note the Panel’s observation that “there is evidence that the larger versions of the 777 may also at times challenge for

³⁰⁴ Original Panel Report, para. 7.1832 (recounting EU arguments that Boeing did not experience lost sales from the Singapore Airlines, Emirates Airlines and Qantas A380 orders because Boeing never seriously considered launching the 747-X).

³⁰⁵ Original Appellate Body Report, para. 1222.

³⁰⁶ Original Appellate Body Report, paras. 1223, 1226.

³⁰⁷ Original Appellate Body Report, para. 1223 (emphasis added).

³⁰⁸ Panel Report, para. 6.1816.

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sales in the market for {VLA}”.³⁰⁹ Thus, the Panel's reasoning that, in the absence of Airbus' VLA offerings, customers would have turned to other Boeing LCA products – for instance, the larger versions of the 777 – appears to us to be reasonable.³¹⁰ Consequently, we see no reason to disturb the Panel's finding that this non-attribution factor would not be capable of diluting the genuine and substantial relationship of cause and effect between LA/MSF subsidies and the alleged market phenomena.³¹¹

230. The compliance findings of significant lost sales and impedance also placed considerable importance on the substitutability of the 747-8I and the A380,³¹² including evidence of competition between those models in the “VLA market,” which “as the Panel found, comprises the Boeing 747-8 and the Airbus A380.”³¹³ All told, those serious prejudice findings involved 54 A380 orders and 47 A380 deliveries over a 25-month period.

231. These original and compliance findings underscore two key points that are fatal to the EU's arguments regarding Boeing's supposed supply constraints. The first is essentially procedural. Those proceedings – *not* this arbitration – were the appropriate forums in which to assess whether an alleged Boeing supply constraint would partially or completely prevent the U.S. LCA industry from experiencing specific instances of significant lost sales and impedance. The EU had its chance to make such arguments in the first compliance proceeding, and any such arguments were duly considered by the compliance panel and in any relevant appeal. This arbitration does not provide a forum to re-litigate those issues or raise new arguments in this respect.

232. Second, as a substantive matter, the original and compliance findings rejected EU attempts to show that the U.S. LCA industry did not experience specific instances of significant lost sales and impedance because of alleged production capacity constraints, a supposed failure

³⁰⁹ Panel Report, fn 3326 to para. 6.1816.

³¹⁰ Panel Report, para. 6.1816.

³¹¹ First Compliance Appellate Report, para. 5.735.

³¹² First Compliance Appellate Report, paras. 5.730 (“This conclusion {regarding significant lost sales involving the A380} also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the “product effects” of the LA/MSF subsidies existing in the post-implementation period on Airbus' continued offering of the A380, and *the existence of sufficient substitutability between Boeing's and Airbus' VLA product offerings.*”) (emphasis added), 5.741 (“This conclusion {regarding impedance in VLA country markets} also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the ‘product effects’ of the LA/MSF subsidies existing in the post-implementation period on Airbus' continued offering of the A380, and the existence of sufficient substitutability between Boeing's and Airbus' VLA product offerings.”).

³¹³ First Compliance Appellate Report, para. 5.727. *See also ibid.*, paras. 5.728-5.729.

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to timely launch the 747-X, or the alleged impact of 747-8 development delays, as the case may be. It would be improper now, when the Arbitrator is tasked with assessing whether the proposed countermeasures are commensurate with the degree and nature of the adverse effects determined to exist, to find that the degree of adverse effects is somehow *less* than what was already determined in the compliance proceeding.

233. Accordingly, the EU’s arguments regarding alleged 747-8I supply-side constraints are wholly misplaced. But even if the Arbitrator were to consider them as relevant to the commensurateness analysis, it would find that they are meritless.

234. First, the EU fails to show that Boeing’s 747 production in the 1990s is not a useful indicator of Boeing’s counterfactual 747-8I production in the post-implementation period. The EU makes much of the differences it identifies between the 1990s-era 747-400 and the 747-8I that was launched in 2005, but it never explains why those differences would prevent Boeing from achieving 747-8I production levels similar to those experienced in the 1990s.³¹⁴ It could not be the fact, cited by the EU, that the 747-8I incorporates engines and other technology from the 787.³¹⁵ After all, those same technologies did not prevent Boeing from producing 142 787s in 2018.³¹⁶

235. In reality, it is actual and expected aircraft orders that drive decisions as to the production capacity and deliveries.³¹⁷ Notably, the EU stresses the importance of differences in “market circumstances and conditions of competition” over time.³¹⁸ However, it fails to address the key factor in that regard: the presence of the A380 in the VLA market, which by lowering Boeing’s expected order volume would likely lead to lower planned production capacity.

236. Of course, the A380’s subsidy-enabled market presence was central to the original and compliance findings of serious prejudice involving the A380. The United States has also presented evidence consistent with those findings:

³¹⁴ See EU RAQ 146, paras. 272-275.

³¹⁵ See EU RAQ 146, para. 273.

³¹⁶ Updated Ascend Database (Exhibit EU-79).

³¹⁷ U.S. RAQ 113, para. 45; Boeing E-mail regarding Question 113 (Exhibit USA-63(BCI)). The EU made precisely this point in the original proceedings in *US – Large Civil Aircraft*:

The European Communities asserts that in the LCA industry, a manufacturer creates its production capacity based on the number of orders already received for the airplane in question as well as on orders that it forecasts it will secure.

US – Large Civil Aircraft (Panel), para. 7.1553.

³¹⁸ See EU RAQ 146, para. 272.

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- Boeing’s 747 sales and production in the 1990s (*i.e.*, before the A380’s launch) shows that “even where Boeing had the only 400+ seat airplane offering, it priced and produced the 747 to meet customer demand; it did not choke off demand in an attempt to reap unusually high profits on a smaller number of sales.”³¹⁹
- Boeing’s 747-8 production rate in 2013 was [BCI];³²⁰
- “If Boeing had more 747-8I orders (which is what would have occurred if the A380 were not in the market), Boeing would have produced more 747-8Is, including by increasing production rates,”³²¹ and
- At its actual 747-8I production rate during the first compliance reference period, Boeing was [BCI].³²²

Thus, the EU fails to undermine the U.S. arguments regarding Boeing’s production capacity in the counterfactual situation, even if one sets aside the strong reasons why this issue should not be considered in the context of this arbitration.

237. Second, the EU contends that the United States has proposed “a dramatically over-ambitious counterfactual production ramp-up” for the 747-8I,³²³ but that EU argument is based on specious comparisons of delivery data for the 747-8, A380, and 777-300ER.

238. As an initial matter, the U.S. request for countermeasures with respect to impedance is, consistent with the adopted impedance findings, based on the additional, counterfactual 747-8I deliveries indicated in the table below. Covering full-year 2011 (the year in which the first 747-8 deliveries occurred) through full-year 2013, the table shows actual 747-8 deliveries for all variants; additional counterfactual 747-8I deliveries (that in actuality were impeded by LA/MSF subsidies); and total counterfactual 747-8 deliveries for all variants (which is a sum of the two prior figures):³²⁴

747-8 Deliveries	2011	2012	2013

³¹⁹ U.S. RAQ 113, para. 45 (quoting Boeing E-mail regarding Question 113 (Exhibit USA-63(BCI))).

³²⁰ U.S. RAQ 114, para. 47.

³²¹ U.S. RAQ 130, para. 136 (citing Boeing E-mail regarding Questions 130-131 (Exhibit USA-84(BCI))).

³²² U.S. RAQ 114, para. 47-48.

³²³ EU RAQ 146, para. 272.

³²⁴ See also U.S. RAQ 71, para. 62 (providing a similar table).

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Actual 747-8 Deliveries (all variants) ³²⁵	9	31	24
<i>Year-over-Year Change</i>	N/A	244%	-23%
Additional, Counterfactual Deliveries ³²⁶	4	23	20
Total Counterfactual Deliveries	13	54	44
<i>Year-over-Year Change</i>	N/A	315%	-19%

239. These data show that Boeing’s actual 747-8 deliveries increased by 244 percent from 2011 to 2012 and then declined by 23 percent from 2012 to 2013. They also show that Boeing’s total counterfactual deliveries would have increased by 315 percent from 2011 to 2012 and then decreased by 20 percent from 2012 to 2013 – figures not significantly out of line with the actual data.

240. The EU contends that the counterfactual 747-8 production ramp-up would somehow be unprecedented compared to actual 747-8, A380, and 777-300ER ramp-ups, but that is not so. As the EU’s own data show, Boeing’s actual 747-8 deliveries (9) in the first year were 900 percent greater compared to the A380’s lone delivery. The EU’s data also show that the A380 experienced a much steeper production ramp up from the first to the second year (1,100 percent) compared to the total counterfactual 747-8 ramp up (315 percent), and that the A380 had a steeper decline from year two to year three (-25 percent) compared to total counterfactual 747-8 production (-20 percent).³²⁷

241. For there to have been impedance, Boeing obviously would have had to increase its production to some degree in the counterfactual to make the additional deliveries. There is nothing implausible on its face of suggesting that, rather than the real-world increase in production by 244 percent from year one to year two, production instead would have increased by 315 percent in the counterfactual. And the EU fails to provide any reason to doubt this.

³²⁵ See Boeing Historical Deliveries through October 2018, Boeing website (Exhibit USA-43). The United States notes a discrepancy between the 24 actual 747-8 deliveries shown in the table above and the 23 747-8 deliveries shown in Figure 2 of the EU’s response to Question 146, which follows paragraph 279. The United States believes 24 is the correct figure, given the data from Boeing’s website. The EU has apparently used 23 because that is the figure indicated in the Ascend database contained in Exhibit EU-79. The United States does not believe this discrepancy is material.

³²⁶ Compliance Appellate Report, para. 5.732, Table 13.

³²⁷ See EU RAQ 146, para. 279, Figures 2, 3.

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242. The fact remains that, in this industry, manufacturers’ “production capacity” is set to meet expected demand, which of course is informed by actual demand once the aircraft is available for offer. There is no manufacturing for inventory. Production rates are therefore intended to align with demand.³²⁸ Where the A380 was not present in the market, Boeing would have planned its production capacity to meet the greater expected demand, just as it did to serve the 400+ seat market prior to the A380 entering the market.

243. The EU effort to benchmark the counterfactual 747-8I deliveries against production levels for other programs fails to establish that they are valid proxies. The 747-8I was a variant of an immensely popular airframe incorporating some new technologies that, in the counterfactual, would have been the sole VLA in the market. In contrast:

- The A380 was an entirely new airframe with no history, facing competition from the preexisting 747-400, and experiencing one of the most troubled entries into service of any aircraft;
- The actual 747-8I was identical in technology to the counterfactual 747-8I, but faced intense competition from the A380; and
- The 777-300ER competed in a different market segment that already contained a number of aircraft, including the A330 and A340.

Question 147 (EU)

Could the European Union please provide an update on the status of the Emirates order for 50 A380 aircraft in 2013?

244. In response to this question, the EU begins by informing the Arbitrator that Emirates has cancelled some, but not all, of its outstanding orders, that Airbus has “announced that it is winding down the A380 programme,” and that Airbus has announced that A380 deliveries “will cease” in the future.³²⁹ From this starting point, the EU attempts over several pages to show that “{t}he wind-down of the A380 programme is highly relevant to the task before” the Arbitrator.³³⁰

245. To the contrary, the asserted “wind-down” of the A380 program, even if it unfolds as portrayed by the EU, is irrelevant to this arbitration.³³¹ Under Articles 7.9 and 7.10 of the SCM

³²⁸ U.S. RAQ 124, para. 106; U.S. RAQ 127, para. 124; Boeing E-mail regarding Question 127 (Exhibit USA-105(BCI)).

³²⁹ EU RAQ 147, para. 286.

³³⁰ See EU RAQ 147, para. 289.

³³¹ See U.S. Response to EU Question 1.

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Agreement, the Arbitrator’s task is to determine whether the proposed countermeasures are “commensurate with the degree and nature of the adverse effects determined to exist.” The information the EU supplies in response to Question 147 does not, and cannot, disturb the “degree and nature of the adverse effects determined to exist.” Accordingly, it is irrelevant for the EU to opine at length that Airbus’s announcement (a) provides “yet another reason to reject the US request for recurring countermeasures,” and (b) should be taken into account in a non-recurring countermeasures calculation.³³² For the sake of completeness, the United States will address the numerous additional errors in those EU arguments.

A. EU Arguments Concerning the A380 “Wind-Down” and the U.S. Request for “Recurring Countermeasures”

246. In Section A of its response, the EU contends that the A380 “wind-down” provides further support to its prior arguments that the proposed level of ongoing countermeasures “do not achieve the required correspondence” that the EU argues must exist with current and future adverse effects, based on its view of continuously updated information.³³³ However, the EU’s prior arguments are baseless as a legal matter,³³⁴ and Airbus’s announcement of a “wind-down” cannot alter the degree and nature of the adverse effects determined to exist.

247. The EU cites *US – Upland Cotton (22.6 II)* as support for the proposition that the countermeasures in this dispute must achieve “the required correspondence with ‘the actual continued adverse effects of the {subsidies} over time’ either today, in 2019, or in any future year.”³³⁵ The EU mischaracterizes that decision as if it required countermeasures under Article 7.9 and 7.10 to correspond to evidence of adverse effects as of the time of the arbitration and into the future. But that is simply untrue, as the United States has explained repeatedly.³³⁶ In fact, the arbitration decision in that dispute was issued in 2009 but accepted Brazil’s proposal of calculating countermeasures based solely on data from MY 2005 – “the first moment at which the United States should have come into compliance” – and it did so without inquiring about market conditions “into the future,” as the EU would have it.³³⁷

248. The EU also discredits its arguments by seeking to attribute arguments to the United States that it has not made. For example, the EU contends that “the United States has argued that

³³² See EU RAQ 147, para. 290.

³³³ See EU RAQ 147, para. 302; *ibid.*, paras. 291-301.

³³⁴ See U.S. Written Submission, paras. 99-107; U.S. RAQ 18, paras. 24-27.

³³⁵ EU RAQ 147, para. 302.

³³⁶ See, e.g., U.S. RAQ 73, para. 82; U.S. RAQ 58, paras. 13-16; U.S. RAQ 43, paras. 95-100; U.S. RAQ 19, paras. 31-35.

³³⁷ See *US – Upland Cotton (22.6 II)*, paras. 4.116-4.118.

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the 2018 Emirates order must be taken into account to assess correspondence between its request for recurring countermeasures and the adverse effects determined to exist.”³³⁸ But in the cited passage from the U.S. written submission, the United States did nothing more than demonstrate that the EU’s numerical comparison of market data from different periods was invalid *on its own terms*, because it committed an apples-to-oranges error by omitting the 2018 Emirates order that, under the EU’s reasoning, would need to be taken into account.³³⁹ At no point did the United States abandon its own position that such numerical comparisons are incapable of invalidating the U.S. approach of basing countermeasures on the instances of adverse effects determined in the December 2011 – 2013 period.³⁴⁰

249. But most telling is what the EU ignores: that the “degree and nature of the adverse effects determined to exist” include findings of significant lost sales involving 54 A380 orders and findings of impedance in six VLA country markets where 47 A380s were delivered in the December 2011 – 2013 period. The A380 “wind-down” cannot change the degree or the nature of the adverse effects determined to exist. And it is those adverse effects with which the countermeasures must be commensurate.

250. The EU also ignores the increased deliveries of A350 XWBs in recent years – growing from zero A350 XWB deliveries in the compliance reference period to hundreds of deliveries since then.³⁴¹ It is unreasonable to take account of the *announced* “wind-down” of the A380 – which has not yet occurred – but ignore the much larger “wind-up” of the A350 XWB – which actually has occurred.

251. Furthermore, the EU does not suggest that demand for air travel is declining. Of course, it is not.³⁴² If, as the EU asserts, the VLA market will decline in size, then the twin aisle market would increase sufficient to satisfy the passenger demand. The task of this arbitration is to determine whether the U.S. proposed countermeasures are commensurate with the degree and nature of the adverse effects determined to exist; it is not to allow the EU to re-litigate them. Therefore, the EU’s arguments related to the Airbus announcement have no place in this proceeding.

**B. EU Arguments Concerning the A380 “Wind-Down” and Its Proposal for
“Non-Recurring Countermeasures”**

³³⁸ EU RAQ 147, para. 297. *See also ibid.*, paras. 296, 298.

³³⁹ *See* U.S. Written Submission, paras. 108-110.

³⁴⁰ *See* U.S. Written Submission, paras. 103-104; U.S. RAQ 22, paras. 48-49; U.S. RAQ 19, paras. 31-35.

³⁴¹ *See* Updated Ascend Database (Exhibit EU-79).

³⁴² Press release, Airbus, *Global Market Forecast, 2018-2037* (Exhibit USA-113).

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252. The EU begins Section B of its response by repeating its arguments in favor of “non-recurring” countermeasures and asking the Arbitrator to account for the A380 “wind-down” under that approach. The United States has already refuted these arguments,³⁴³ and it will not repeat those points here. It suffices to say that there is no legal or factual basis to reject the U.S. proposal for ongoing countermeasures, which would be wholly consistent with Article 22.4 of the DSU, Articles 7.9 and 7.10 of the SCM Agreement, and prior reports pursuant to those provisions. Accordingly, there should be no “non-recurring” countermeasures to “calibrate” by accounting for the A380 “wind-down.”

253. That is not the only error in Section B of the EU’s response, however. The EU contends that the level of countermeasures should be adjusted downward to account for Emirates’ cancellation of [BCI] of the [BCI] outstanding A380 deliveries from the 2013 Emirates lost sale.³⁴⁴ As with the EU’s prior arguments in favor of adjusting the countermeasures to account for order conversions, this argument reflects an unsupported presumption that, in the counterfactual, Emirates would have cancelled some of the 747-8Is that even the EU admits the airline would have ordered. But the EU never attempts to explain why that would be the case. Thus, the EU provides no justification for adjusting the value of countermeasures to reflect the Airbus announcement. And, of course, there is no basis in any event to alter the degree and nature of the adverse effects determined to exist in the context of this arbitration.

Question 148 (EU)

With reference to paragraphs 267–268 of the European Union’s written submission, could the European Union please:

- a. provide a concrete example of how to use the escalation rate contained in the sales contracts to discount the price paid to Boeing on delivery for each type of escalation factor formula reported in Exhibits USA-12 (HSBI) to USA-16 (HSBI)? In particular, could the European Union please explain which specific year of the escalation factor should be used (e.g. base year, order year, delivery year or ratio); and**
- b. confirm that if the escalation rate is used to both inflate the order price to the delivery year and to discount the delivery price to the order year, the two operations cancel each other?**

254. In its response to this question, the EU again completely disregards the conceptual difference between the escalation rates or factors, and discount rates. The United States has explained this error multiple times, including in its comments on the EU response to Question 111. The United States has also explained that the “inflation,” or time consistency adjustment, (represented by the PPI in the U.S. methodology) serves a third, distinct function – namely, taking the annual value of the adverse effects determined to exist as stated in 2013 dollars, and

³⁴³ See, e.g., *supra* U.S. Comments on EU RAQ 108. See also U.S. Comments on EU RAQ 104.

³⁴⁴ EU RAQ 147, paras. 306-308.

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updating the value to the year in which countermeasures will be applied.³⁴⁵ The United States therefore will not repeat these explanations here.

255. However, the United States notes the EU's statement that the value of a particular LCA should remain constant over time.³⁴⁶ As the EU acknowledges,³⁴⁷ this means that, if the Arbitrator did not adopt the conceptual framework of the U.S. methodology and its distinct purposes for using escalation and discounting, then there would be no reason to escalate the base year price to the delivery year and then discount it back to the order year. In that case, the Arbitrator should just use the order year price. This would be the base year price if the base year is the order year. And if not, the base year price would need to be adjusted to the order year by applying the contractual escalation formula.

256. The order year price would then be multiplied by the number of aircraft in the relevant sale. And then the remainder of the U.S. methodology would be implemented, meaning the adverse effects would all be placed on a common basis in 2013 dollars. And the formula would then be applied to update this value for any particular year in which countermeasures were applied.

Question 149 (EU)

With respect to the A380 aircraft, the deliveries of which are reflected in Table 13 of the Appellate Body report in the first compliance proceeding, could the European Union please explain how many seats each of these A380 aircraft had? Further, with respect to these deliveries, and with reference to paragraph 28 of the United States' Methodology Paper, could the European Union please:

- a. **identify the customers to which these A380 aircraft were delivered in the relevant geographic markets; and**
- b. **with respect to the orders that resulted in the deliveries reflected in Table 13 of the Appellate Body report, please provide the information specified in the "Explanatory Note: Evidentiary Requests" in Section 4, below, and please provide that information in accordance with the other instructions in that Section?**

Question 150 (EU)

With reference to paragraph 27 of the United States' Methodology Paper, and with respect to each of the lost sales identified in Table 19 therein, could the European Union please provide the information specified in the "Explanatory Note: Evidentiary Requests" in Section 4, below, and please provide that information in accordance with the other instructions in that Section?

³⁴⁵ U.S. Methodology Paper, paras. 90-100.

³⁴⁶ EU RAQ 148, para. 314.

³⁴⁷ See EU RAQ 148, note 334.

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257. The United States provides below joint comments on the EU's responses to Questions 149 and 150.

258. Since its first submission, the EU has complained that the United States did not voluntarily submit order documentation to support its calculations.³⁴⁸ At no point did the EU proffer Airbus documentation regarding the lost sales, even though it has consistently castigated the United States for failing to reflect details – which can only be known to Airbus – of those sales. Thus, it is particularly incongruous that, when presented with a request from the Arbitrator to provide such information – in the same degree and detail as the United States has for lost sale comparators – the EU declined to do so.

259. In particular, there are numerous ways in which the EU order documentation submitted in Exhibits EU-133-HSBI through EU-137-HSBI in response to Questions 149 and 150 fail to fully respond to the Arbitrator's requests in the *Explanatory Note*:

- *The EU failed to provide requested information.* The EU failed entirely to provide documentation responsive to certain information requests. For example, the EU failed to provide information regarding the escalation formula for several of the orders.³⁴⁹ Further, it failed entirely to provide the **[BCI]** escalation factors applied to calculate delivered prices in the documentation provided in Exhibits EU-125-HSBI to EU-137-HSBI.³⁵⁰
- *The EU provided incomplete information.* Although partially responsive, the EU in several instances failed to provide complete information responding to the Arbitrator's requests with respect to delivery prices³⁵¹ and order size.³⁵²
- *The EU provided apparently inaccurate or unresponsive information in lieu of responsive information.* In several instances, it apparently included information unrelated to the order it was purportedly provided to support. For example, certain of the order-specific delivery schedules provided by the EU do not appear to relate to the order covered by the

³⁴⁸ See, e.g., EU Written Submission, paras. 247-254; EU RAQ 135, paras. 160-165.

³⁴⁹ The order documentation for Airbus's orders with **[BCI]** and with **[BCI]** includes **[[HSBI]]**.

³⁵⁰ Further, there is no indication in the order documentation provided by the EU as to which **[BCI]** escalation factors were applied to establish the net price paid for delivered aircraft. In fact, there is no explanation at all regarding how the delivered price listed on the **[BCI]** included in the order documentation in Exhibits EU-125-HSBI to EU-137-HSBI was determined.

³⁵¹ The order documentation for the **[BCI]** included the final delivery price for only one aircraft even though **[BCI]**. EU RAQ 147, para. 287, Table 6.

³⁵² For example, the order documentation for the **[BCI]** indicates that the order included only **[[HSBI]]** aircraft. However, according to publicly available information, this order included the sale of **[BCI]** aircraft. There is no documentation indicating why the number of delivered aircraft does not correspond to the order size.

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exhibit.³⁵³ Additionally, in certain cases, the EU provided delivery prices (included on [BCI]) for entirely different models of aircraft in response to the Arbitrator’s request.³⁵⁴

260. Aircraft sales contracts are extremely complex, as should be evident from the documentation submitted by the United States.³⁵⁵ However, the documentation submitted by the EU (deficient as it is) and by the United States shows that it is not necessary for purposes of this proceeding to exhaustively catalog every aspect of the sales contract for each order. For example, although the service related provisions requested by the Arbitrator [BCI]. Thus, an exhaustive analysis of those and other contractual terms is not necessary for the Arbitrator to fulfill its mandate. The EU’s failure to provide complete documentation – despite having far fewer transactions to cover than did the United States – suggests strongly that it considered the information to be irrelevant, and any adjustments it notionally advocated unreliable and unworkable.

Question 151 (EU)

With reference to paragraph 173 of the United States' written submission, could the European Union please provide estimates of the demand elasticity for large civil aircraft using available estimates, including, if available, estimates distinguishing between VLA and twin-aisle aircraft?

261. The EU response to this question errs in its framing of the issue, its understanding of findings in the previous proceedings, its analysis of qualitative evidence as to demand for VLA, and the conclusions it seeks to draw from an economic paper discussing elasticities of demand in the 1968 – 1998 period. The United States addresses each in turn.

262. The EU starts by arguing that the United States bears the burden of proof as to the counterfactual level of demand for VLA.³⁵⁶ However, as the United States explained in its comments on the EU response to Question 106, this framing of the question ignores that it is the EU who bears the burden “to show that the proposed level of suspension is inconsistent with the DSU.”³⁵⁷ The EU would bear the burden of proof regarding its assertion that counterfactual

³⁵³ The delivery schedules provided for [BCI] order appears to be for another order, as it includes [[HSBI]]. For the [BCI], the delivery schedule information includes information related to only [[HSBI]] aircraft. However, the documentation also included final [BCI] for [[HSBI]] aircraft. It is unclear how – or whether – the delivery schedule in the order connects to the [BCI] provided.

³⁵⁴ The documentation for Airbus’s [BCI] and for Airbus’s [BCI] included [BCI] listing delivery prices for models of aircraft not covered by the [BCI] included therein.

³⁵⁵ See, e.g., U.S. RAQ 135.

³⁵⁶ See EU RAQ 151, para. 323.

³⁵⁷ US – COOL (22.6), para. 4.13.

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demand for VLA would be lower than actual demand, if this were a live issue. And the EU has not met that burden.

263. But it is not a live issue. As discussed elsewhere, the basis for the U.S. approach to valuing impedance (and significant lost sales) – including the number of counterfactual Boeing orders and deliveries to be valued – was the adopted compliance findings of impedance and significant lost sales. Thus, it would be improper for the Arbitrator to accept the EU’s proposal of re-litigating the issues of counterfactual demand, orders, and deliveries.³⁵⁸ The United States has also relied on the large body of findings in the previous proceedings as to conditions of competition in the markets for large civil aircraft.

264. It is in that context that the United States recalled that the panels in this dispute and *US – Large Civil Aircraft (21.5)* noted the view that demand for LCA is inelastic,³⁵⁹ a point the EU does not directly dispute.³⁶⁰ This fact by itself suggests that in the absence of an aircraft model in a particular product market, demand for products in that product market would not change. In contrast, the EU is asking the Arbitrator to ignore the adopted findings and “simply assume” that the counterfactual situation is a blank slate that must be re-litigated again.

265. Not only would this be improper, it would be fruitless. The compliance panel “emphasized that ‘the task of performing a reliable econometric analysis of the demand for LCA products would face a number of significant methodological and data challenges’.”³⁶¹ As a result, the compliance panel based its product market delineation on a qualitative, rather than quantitative, analysis of demand-side substitutability, which was upheld on appeal.³⁶²

266. The EU then asserts that although demand for large civil aircraft is inelastic, demand for aircraft in a particular product market (such as VLA) may be more elastic.³⁶³ Of course, as the party making that assertion, the EU bears the burden of proof. It first argues that the panel’s finding of inelastic demand relates only to price stimuli, whereas non-price stimuli such as the introduction of a new product or the unavailability of an existing product would also affect demand. This is simply incorrect.

³⁵⁸ See, e.g., U.S. Written Submission, paras. 166-173; U.S. Comments on EU RAQ 113, 146, *supra*.

³⁵⁹ See U.S. Written Submission, para. 173 (citing *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.17; Original Panel Report, note 5180).

³⁶⁰ See EU RAQ 151, para. 327.

³⁶¹ Compliance Appellate Report, para. 5.462 (quoting Compliance Panel Report, para. 6.1205).

³⁶² See Compliance Appellate Report, paras. 5.488, 5.501-5.502.

³⁶³ EU RAQ 151, para. 327.

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267. Differing supply conditions may shift the supply curve and result in a different supply-demand equilibrium point, but they do not affect the demand curve or demand elasticity. The EU's point about temporary supply disruptions is also inapposite to the counterfactual, as the compliance panel and appellate reports found that Airbus would not have been able to offer the A350 XWB and A380 during the December 2011 – 2013 period.³⁶⁴ The compliance panel did not find that this unavailability was “temporary;” in fact, that counterfactual unavailability dated back to the actual launch and offering of those aircraft in 2000 and 2006.

268. The EU also argues that the availability of other twin-aisle aircraft (such as the A350 XWB) or used aircraft would increase the elasticity of demand for VLA.³⁶⁵ The EU has presented no evidence indicating that used aircraft are available in sufficient quantity to affect the demand elasticity for VLA. Past panel and appellate reports have found that substitutability across aircraft product markets is limited. In any event, as the United States has observed in its comments on the EU's response to Question 113, the possibility of VLA customers buying twin-aisle aircraft (if a permissible premise given the product market delineation in the adopted findings) suggests impedance would merely shift to sales of Boeing's 777, rather than eliminate, adverse effects.³⁶⁶

269. The EU also fails in its effort to draw support for its assertion of highly elastic VLA demand from a paper by Irwin and Pavcnik published in 2004. That paper modeled a world consisting of sales by Airbus, Boeing, McDonnell Douglas, and Lockheed Martin³⁶⁷ over the 1969 – 1998 period to estimate elasticities in two markets: wide-body and narrow body.³⁶⁸ It further divided wide-body into “two distinct market segments” – medium-range (767, A300, and A310) vs. long-range (A380, 747, 777, MD11, A330, A340).³⁶⁹ The authors modeled entry of the A380 into the wide body market, but emphasized that they considered only existing aircraft,³⁷⁰ which would necessarily exclude the A350 XWB, 787, and 747-8I. References to the 747 can only have applied to the 747-400.

³⁶⁴ Compliance Appellate Report, paras. 5.709 (“in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A350XWB at the time it did and with the features that the A350XWB contained”) and 5.740 (“in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did.”).

³⁶⁵ See EU RAQ 151, para. 328.

³⁶⁶ See *infra* U.S. Comments on EU RAQ 113. See also Compliance Appellate Report, para. 5.735; Compliance Panel Report, para. 6.1816.

³⁶⁷ Irwin and Pavcnik, p. 228 (Exhibit EU-138).

³⁶⁸ Irwin and Pavcnik, pp. 227-228 (Exhibit EU-138).

³⁶⁹ Irwin and Pavcnik, pp. 227 and 242 (Exhibit EU-138).

³⁷⁰ Irwin and Pavcnik, p. 240 (Exhibit EU-138).

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270. These facts – most of them omitted from the EU’s discussion – point to several flaws with the EU’s efforts to apply Irwin and Pavcnik’s elasticities to the current VLA market. Most importantly, their conclusions applied primarily at the aggregated level, in which the 747-400 was grouped with other twin-aisle aircraft. They accordingly do not allow *any* conclusions about the VLA product market as defined in the compliance proceeding as opposed to the twin-aisle market.

271. It is also problematic that their analysis covers a period that ended 13 years before the period covered by the compliance reports.³⁷¹ There is no dispute that the nature of demand for large civil aircraft changed after that period, as airlines sought to accommodate massive increases in passenger demand for air travel. The EU has provided no basis to conclude that the 1968 – 1998 data on which Irwin and Pavcnik relied accurately describe conditions of competition in the December 2011 – 2013 period. And, finally, while the paper followed the industrial organization literature at the time, the authors lacked detailed non-price data on models and other quality factors that directly impact the prices of the aircraft in question.³⁷² Thus, even if it were appropriate to revisit the adopted findings related to counterfactual demand, the Irwin and Pavcnik elasticities are of no usefulness in understanding VLA demand in the December 2011 – 2013 period.

272. In any event, the EU’s arguments do nothing to advance its assertion that the level of countermeasures is too high. Even if the elasticities of demand for VLA were higher than the inelastic demand for large civil aircraft as a whole, that would not affect the valuation of adverse effects. The EU forgets that elasticities of demand address purchasers’ responsiveness to changes in price, and would only affect the calculation if prices changed. The U.S. counterfactual does not assume any changes to prices. In fact, none of the reports in this dispute found that LA/MSF affects Boeing’s prices.³⁷³ Thus, there is no basis to conclude that the elasticity of demand for VLA would affect the valuation of the adverse effects found to exist.³⁷⁴

³⁷¹ In particular, the EU highlights the elasticity of -11.2 for the 747-400 in 1998. EU RAQ 151, para. 331. However, it disregards the authors’ explanation that this was a result of “the growing stock of used aircraft that is potentially in the market.” Irwin and Pavcnik, p. 230 (Exhibit EU-138). While that may have been a factor in 1998 for demand elasticity for the 747-400, which had been in commercial service for nine years, it is clearly not applicable to the 747-8I in the December 2011 – 2013 period, during which the 747-8I first entered service.

³⁷² Irwin and Pavcnik, p. 228 (Exhibit EU-138).

³⁷³ Indeed, the original panel and appellate reports affirmatively found that it “cannot conclude that the United States has demonstrated, in this context, that the effect of the subsidies is the significant price suppression and price depression we observed over the period 2001-2006.” Original Panel Report, para. 7.1996.

³⁷⁴ The United States notes that even assuming *arguendo* that Boeing raised prices in response to a 787-8I monopoly in the VLA product market and the equilibrium price increased accordingly, as the EU hypothesizes, that would not support a finding that the level of countermeasures was too high. The EU would have to demonstrate

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Question 152 (EU)

With reference to, inter alia, the parties' oral responses to question No. 110 and footnotes 176 and 177 of the European Union's written submission, could the European Union please explain whether a conversion risk factor is typically built into a LCA sales contract and if so how it is quantified?

273. The United States has no objection to the EU's statement that it "understands that conversion risk factors are not typically built into LCA sales contracts."³⁷⁵

274. The EU goes further to observe that some LCA purchase agreements contain conversion clauses providing pricing for the aircraft model that would be ordered if a conversion right were exercised.³⁷⁶ The United States does not dispute this. However, this should not matter for the Arbitrator's work. It would not be appropriate for the Arbitrator to attempt to mirror actual Airbus conversion activity in the countermeasures calculation.³⁷⁷

275. Moreover, even assuming *arguendo* that conversion to different Airbus models after the compliance reference period were considered, the United States has proposed the best alternative comparator orders and supplied relevant source documentation to derive pricing for those orders. Therefore, no need to incorporate any quantification of conversion clauses into the countermeasures calculation could arise.³⁷⁸

276. The EU closes its response to this question with a *non sequitur*, referencing its unfounded arguments in favor of adjusting the countermeasures calculation for non-U.S. inputs.³⁷⁹ Its inclusion appears to be a clerical error. If not, the United States reiterates that such adjustments should be rejected for the reasons explained by the United States,³⁸⁰ and there is nothing about conversions or conversion clauses that would rehabilitate the EU's arguments in that regard.

further that the revenue loss associated with decreased sales exceeded the revenue gained by increased prices. The EU has not even attempted to do this.

³⁷⁵ EU RAQ 152, para. 338.

³⁷⁶ EU RAQ 152, para. 339.

³⁷⁷ See e.g., U.S. RAQ 58, paras. 14-16; U.S. RAQ 117, paras. 60-61; U.S. RAQ 110; U.S. Comments on EU RAQ 110, *supra*.

³⁷⁸ See U.S. RAQ 117, paras. 62-65.

³⁷⁹ See EU RAQ 152, para. 340.

³⁸⁰ See e.g., U.S. Comments on EU RAQ 95; U.S. RAQ 120, para. 85; U.S. Written Submission, paras. 266-269.