

*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 FOURTH SET OF QUESTIONS FROM THE ARBITRATOR**

April 12, 2019

TABLE OF CONTENTS

2 FOR THE EUROPEAN UNION.....	1
Question 158.....	1
Question 159.....	5
Question 160.....	6
Question 161.....	6
Question 162.....	10
Question 163.....	10
Question 164.....	10
Question 165.....	11
Question 166.....	13

2 FOR THE EUROPEAN UNION

Question 158

With reference to Exhibits USA-16 (HSBI), USA-47 (HSBI) through USA-52 (HSBI) and the United States' response to question No. 86, could the European Union please comment on the appropriateness of using the data in these exhibits to calculate the counterfactual prices of Boeing 747-8I deliveries in the Reference Period in the six relevant geographic markets?

1. Question 158 is the final stage in the debate between the parties as to the proper method for valuing the DSB-adopted compliance proceeding findings of impedance in six markets:
 - Paragraphs 82-84 of the U.S. Methodology Paper explained that the estimated value of countermeasures for impedance reflected the average delivery prices for 747-8Is during the December 2011 – 2013 period.
 - The EU¹ objected to this approach in its written submission, arguing instead for use of comparator orders – “airline customers in the same six specific country markets at issue *that have purchased 747-8Is* at or around the 2011-2013 period at issue, or to which Boeing made *concrete offers to sell 747-8Is*.”²
 - Paragraph 244 of the U.S. written submission summarized and addressed the comparator approach urged by the EU. It then agreed to removal of non-airline customers from the average, leaving only deliveries to Lufthansa in the December 2011 – 2013 period.
 - Question 86 (referenced in this question) cited paragraph 244, and asked the United States to provide information necessary to apply to impedance the same methodology used to value lost sales – “i.e. using ‘comparator orders.’” The United States proposed a number of comparators in response. The United States also provided extensive documentation that would allow the Arbitrator to implement a comparator approach to valuing impedance.³

¹ As has been the case throughout this proceeding, for the sake of convenience, the United States refers to the European Union and its member States Spain, France, Germany, and the United Kingdom, collectively as “the EU.”

² EU Written Submission, para. 312 (emphasis original).

³ See 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)) and 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)) (providing impedance calculations using the same methodology as used to value lost sales and relying on two sets of comparators as described in Questions 153 and 154(d)). See also Net Price Calculations for Questions 153 and 153(d) Alternative Impedance Valuations (Exhibit USA-106(HSBI)) (citing [BCI]).

Question 158 asked the EU to comment on the “appropriateness” of using data for the sales proposed by the United States to calculate prices in the impedance markets – a methodology that the EU initially insisted was the only appropriate way to value impedance.

2. The EU’s joint response to Questions 158 and 160⁴ exposes the results-driven nature of the EU’s approach to the countermeasures calculation.

3. The EU begins by embracing the average delivery price to Lufthansa in December 2011 – 2013, the approach that it so heavily criticized:

The European Union agrees with the United States that the 2006 Lufthansa order of 20 747-8Is constitutes a representative, reliable, and robust basis to construe counterfactual 2012 and 2013 747-8I delivery prices for the purpose of quantifying impedance. Without further computation, the Arbitration Panel can secure the relevant 2012 and 2013 delivery prices from Exhibit USA-26 (HSBI), and integrate them into its quantification exercise.

The EU does not seek to explain this change in its views. Indeed, it is impossible to square this response with the EU’s arguments regarding valuation of lost sales, which insist on using transactions of a similar size and in the same market or at least the same region. Needless to say, the Lufthansa transaction does not meet the regional criterion for five of the six markets in question. (However, as [BCI].)

4. The EU also distorts the U.S. position, which is that the Lufthansa prices are relevant only to the extent of valuing the global average delivery price as a proxy for prices in the markets subject to the impedance findings. But where the issue is choosing a comparator – as is the premise of Questions 158 and 160 – the United States has never advocated using the 2006 Lufthansa order for markets outside the EU.⁵

5. In the guise of agreeing with the United States, the EU now argues that the 2006 Lufthansa order should be used as the comparator for counterfactual U.S. VLA deliveries to Air France, British Airways, Emirates, Qantas, and Singapore Airlines.⁶ It abandons – again without

⁴ Question 160 requests identification of a comparator for the counterfactual VLA deliveries to China Southern Airlines.

⁵ See U.S. RAQs 153, 154(d).

⁶ EU RAQ 158, para. 9, Table 1.

explanation – previous arguments that Korean Air 747-8I deliveries were the appropriate comparators for valuing counterfactual 747-8I deliveries to Qantas and Singapore Airlines.⁷

6. In any event, the new EU position still contains a fair amount of overlap with the U.S. position on the appropriate comparators. The EU also confirms that choosing a customer in the same or similar region is an important consideration, presumably if the same customer is not available.⁸ To recall, the United States provided two different alternatives for valuing impedance based on comparators. In the first, provided in response to Question 153, the United States included [BCI]. In the second, provided in response to Question 154(d), the United States relied [BCI].

7. In the table below, the United States summarizes the differences in comparators across the two U.S. alternative impedance calculations and the EU approach described in its response to this question. Where the EU approach overlaps with the U.S. approach in response to Question 154(d), the comparator is indicated in bold typeface.

⁷ See EU Written Submission, paras. 319-320; EU RAQ 158, para. 9, Table 1.

⁸ EU RAQ 158, para. 5.

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*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 (DS316)*

U.S. Comments on the EU Responses to the
Fourth Set of Questions from the Arbitrator
April 12, 2019 – Page 4

Period of A380 Deliveries	Boeing 747-8I Comparator Used in the Approach Described in the U.S. Response to Question 153	Boeing 747-8I Comparator Used in the Approach Described in the U.S. Response to Question 154(d)	EU Approach Described in Response to Question 158 (overlap with U.S. Q154(d) approach indicated in bold)	Comparator for A380 Deliveries to:
Dec. 2011	[Qantas 2006 Proposal]	Korean Air 2009 Order	Lufthansa 2012 delivery price	Qantas (1)
Dec. 2011	Air China 2012 Order	Air China 2012 Order	Air China 2014 delivery price	China Southern (1)
Dec. 2011	[Emirates 2014 Planned Proposal]	Korean Air 2009 Order	Lufthansa 2012 delivery price	Emirates (2)
2012	Lufthansa 2006 Order	Lufthansa 2006 Order	Lufthansa 2012 delivery price	Lufthansa (2), Air France (2)
2012	Air China 2012 Order	Air China 2012 Order	Air China 2014 delivery price	China Southern (2)
2012	Korean Air 2009 Order	Korean Air 2009 Order	Korean Air 2015 delivery price	Korean Air (1)
2012	[Singapore Airlines 2011 Planned Proposal]	Korean Air 2009 Order	Lufthansa 2012 delivery price	Singapore Airlines (5)
2012	[Emirates 2014 Planned Proposal]	Korean Air 2009 Order	Lufthansa 2012 delivery price	Emirates (11)
2013	Lufthansa 2006 Order	Lufthansa 2006 Order	Lufthansa 2013 delivery price	Air France (1)
2013	[British Airways 2012 Proposal]	Lufthansa 2006 Order	Lufthansa 2013 delivery price	British Airways (3)
2013	Air China 2012 Order	Air China 2012 Order	Air China 2014 delivery price	China Southern (1)
2013	Korean Air 2009 Order	Korean Air 2009 Order	Korean Air 2015 delivery price	Korean Air (2)
2013	[Emirates 2014 Planned Proposal]	Korean Air 2009 Order	Lufthansa 2013 delivery price	Emirates (13)

8. The table shows that there is considerable overlap in the comparator customers used by the EU in its response to this question and by the United States in its response to Question 154(d). The exceptions are the comparators to value deliveries to Emirates, Qantas, and Singapore Airlines.⁹ As explained in the U.S. response to Question 154(d), the Korean Air 2009 order is the appropriate comparator for deliveries to Emirates, Qantas, and Singapore Airlines. The United States selected this and other comparators according to a principled, coherent approach.¹⁰ Indeed, the EU itself previously concurred with respect to the use of Korean Air prices for Qantas and Singapore Airlines.¹¹ Given the EU’s past position, it cannot dispute that Korean Air is a sufficiently similar customer to these other airlines in the Asian and Oceanic

⁹ This discussion focuses on comparing the U.S. “Question 154(d)” alternative approach, rather than the U.S. “Question 153” alternative approach, to the EU “Question 158” alternative approach because there is less disagreement between the U.S. Question 154(d) and EU Question 158 alternative approaches. This does not represent a concession by the United States that the Question 153 approach is invalid. Rather, the United States considers that both the Question 153 and 154(d) approaches are valid, and that focusing on the latter would assist the Arbitrator in its work by narrowing the differences between the parties.

¹⁰ See U.S. RAQ 154, paras. 20-21.

¹¹ See EU Written Submission, paras. 319-320. See also EU RAQ 158, para. 9, Table 1.

regions, such that use of a Korean Air order as a comparator would render the countermeasures not commensurate.

9. Accordingly, if the Arbitrator adopts a comparator approach to valuing impedance, the comparators proposed by the United States remain the appropriate ones on which to base the countermeasures calculation.

10. The EU also proposes a different approach to calculating the relevant delivery prices. The EU proposes that the Arbitrator use the “delivery price, as per contract,” and then de-escalate (or “discount” in the EU’s parlance) that delivery price where necessary to value a counterfactual delivery in the December 2011 – 2013 period.¹² By “delivery price, as per contract,” the EU apparently refers to the price reflected upon actual delivery (generally reflected in an invoice),¹³ which would include any amendments to the contract after the time of order, including those after the compliance reference period. By contrast, the U.S. approach starts with base year order prices (per the original documentation) and then escalates those prices to the period of counterfactual 747-8I delivery using contractual escalation factors.¹⁴

11. The EU bears the burden of demonstrating that the U.S. approach would result in countermeasures that are not commensurate. It is insufficient for the EU to propose a different approach, even if its approach were also an acceptable one. Moreover, the U.S. approach is superior.

12. First, the U.S. approach reflects the terms the customer agreed to at the time of order. Second, the United States has already provided both the documentation and the complete calculations for the U.S. Question 154(d) approach, whereas the EU has only described its proposed de-escalation calculations in general, illustrative terms that have elicited questions from the Arbitrator, such as Question 159.¹⁵

Question 159

With reference to paragraph 320 (second bullet point) of the European Union's written submission, could the European Union please explain why it proposes to use the 2015 delivery price to calculate the 2011 counterfactual delivery price and the 2016 delivery price to calculate the 2012 counterfactual delivery price?

¹² See EU RAQ 158, para. EU RAQ 158, para. 9, Table 1.

¹³ As the United States explained previously, the delivery price [BCI]. See U.S. RAQ 124, paras. 112-113; U.S. RAQ 135, paras. 156, 158.

¹⁴ See U.S. RAQs 153, 154.

¹⁵ See EU RAQ 158, para. 9, Table 1 (citing EU RAQ 83, paras. 297-299). See also EU RAQ 159.

13. This question asked the EU to clarify how, in valuing impedance, it proposes to calculate counterfactual delivery prices to Qantas and Singapore Airlines in 2011 and 2012, respectively. In paragraph 320 (second bullet point) of its written submission, the EU proposed using 2015 and 2016 per-aircraft delivery prices from “the Korean Air {747}-8I deal” to value counterfactual 747-8I deliveries to Qantas (in 2011) and Singapore Airlines (in 2012), pursuant to A380 orders placed in 2006.¹⁶ The EU selected the Korean Air “deal” because it “is the most comparable within the set of available sales in terms of order size, size of deliveries, geography, and timing of delivery.”¹⁷

14. The United States notes that Korean Air placed 747-8I orders on two separate occasions: (i) a 2009 order for five 747-8Is (which resulted in [BCI]), and (ii) a 2013 order for five 747-8Is (which resulted in [BCI]).¹⁸ The United States also recalls that it has submitted alternative impedance calculations that use the 2009 Korean Air 747-8I order to value counterfactual 747-8I deliveries to A380 customers in some of the six VLA country markets at issue in the underlying impedance findings. And as further discussed in the U.S. comments on the EU’s response to Question 158, those calculations are fully documented and complete and, therefore, provide the best basis should the Arbitrator adopt a comparator approach to valuing impedance.

Question 160

With reference to paragraph 317 of the European Union's written submission, could the European Union please explain which comparator order it would propose to use for the purpose of identifying prices for the counterfactual VLA deliveries to China Southern Airlines?

15. The EU’s response to this question refers the Arbitrator to its response to Question 158.¹⁹ The United States likewise refers the Arbitrator to its comments on the EU’s response to Question 158.

Question 161

With reference to, *inter alia*, footnote 177 of the European Union's written submission, could the European Union please clarify what comparator orders it proposes to use for converted aircraft if the Arbitrator were to take into account the fact that some lost sales orders have completely or partially been converted into another aircraft model, and in particular:

¹⁶ EU Written Submission, para. 320 (second bullet).

¹⁷ EU Written Submission, para. 320 (second bullet).

¹⁸ See Korean Air 2009 747-8I Order Documentation at p. 86 (Exhibit USA-89(HSBI)); Korean Air 2013 747-8I Order Documentation at p. 81 (Exhibit USA-76(HSBI)).

¹⁹ EU RAQ 160, para. 13.

- a. **for the 2012 Cathay Pacific order of ten A350XWB-1000 aircraft, two A350XWB-1000 aircraft were converted into A350XWB-900 aircraft in September 2017; and**
- b. **for the 2013 United Airlines order of ten A350XWB-1000 aircraft, the entirety of the order was converted into A350XWB-900 aircraft in September 2017?**

16. The United States is providing joint comments on the EU's responses to Questions 161, 162, and 163. Those questions concern the EU's proposed comparators in the event that the Arbitrator were to take into account complete or partial conversions corresponding to the Airbus orders placed in the 2012 Cathay Pacific and 2013 United Airlines lost sales.

17. In previous submissions, the United States has demonstrated that it would be legal error under Article 7.10 of the SCM Agreement to value the instances of significant lost sales from the compliance proceeding as if they involved orders for Airbus models other than those identified in the compliance appellate report, or as if there were fewer orders that represent significant lost sales than found in that report.²⁰ To do so would amount to a collateral attack on the adopted findings of adverse effects.²¹

18. The United States has also identified the conceptual and factual flaws in the EU's conversion-related and deferral-related arguments.²² Most importantly, the EU wrongly presumes that, if an Airbus order were converted or delayed in the real world, then the counterfactual Boeing order would likewise have been converted or delayed.²³ In repeating this argument with respect to the 2013 United Airlines and 2012 Cathay Pacific lost sales, the EU once again highlights the flaws in its rationale for basing comparators on conversion activity.

19. First, the EU asserts that United Airlines converted its original A350 XWB-1000 orders to A350 XWB-900 orders in September 2017 because of "evolving fleet requirements," which changed in response to "{1}ow fuel prices and the imminent delivery of heavily discounted Boeing 777-300ERs {that} allowed United Airlines to retire its 747-400s earlier than anticipated."²⁴ The United States does not agree with the EU's characterization of those 777-300ERs as "heavily discounted."

²⁰ See U.S. Comments on EU RAQ 98, para. 72; 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.

²¹ See U.S. Comments on EU RAQ 98, para. 72.

²² See U.S. Comments on EU RAQ 98, paras. 76-79; U.S. RAQ 117, para. 61; U.S. RAQ 110, para. 35; U.S. Written Submission, paras. 185-194.

²³ See EU RAQ 161, paras. 16-22.

²⁴ EU RAQ 162, para. 26.

20. In any event, the EU ignores that United Airlines ordered those 777-300ERs in 2015 and that, in the counterfactual, United Airlines would have ordered 777-300ERs in 2013 (*i.e.*, at the time of the lost sale, and before the airline’s initial 777-300ER orders in 2015). Given these circumstances, the only reasonable inference that could be drawn is that, to the extent the “imminent delivery” of 777-300ERs would have caused United Airlines to consider order conversions, it would be the imminent delivery of counterfactual 777-300ERs ordered at the time of the lost sale in 2013. Accordingly, there is no basis to assume that a counterfactual 777-300ER order in 2013 would have been converted to a smaller Boeing model in 2017.

21. Second, regarding the “2012 Cathay Pacific lost sale of 10 A350XWB-1000s,”²⁵ the EU concedes that it would be appropriate to use a 777-300ER price to value the eight A350 XWB-1000 orders that were not converted to A350 XWB-900s.²⁶ As for deriving a counterfactual 777-300ER price for those orders, the EU objects to the U.S. proposal of using the 2013 Cathay Pacific order for three 777-300ERs and instead proposes either [BCI] or the March 2011 Cathay Pacific order for ten 777-300ERs.²⁷

22. The United States has already demonstrated that the EU has failed to show that the 2013 Cathay Pacific 777-300ER order is an invalid comparator. In fact, [BCI]²⁸ [BCI].²⁹

23. For the two Cathay Pacific orders that were converted to A350 XWB-900s, the EU wrongly assumes that two counterfactual Boeing 777-300ER orders would likewise have been converted. According to the EU, Cathay Pacific allegedly undertook these conversions to the smaller A350 XWB-900 as a cost-savings exercise [BCI].³⁰ There is no basis to assume that, in the counterfactual, Cathay Pacific would have anticipated similar cost savings with respect to the 777-300ER, particularly since the airline would have already had a large, installed fleet of 777-300ERs – which would have made it relatively easy for the airline to take additional 777-300ERs – and no other Boeing models smaller than a 777. Therefore, a “down-conversion” to a 787-10, for example, would have required Cathay Pacific to introduce an entirely new Boeing model into its fleet. Moreover, given that the actual conversion allegedly arose [BCI], there is no basis to assume that a similar circumstance would have arisen in the counterfactual.

²⁵ EU RAQ 162, para. 29.

²⁶ EU RAQ 161, paras. 19-21.

²⁷ EU RAQ 161, paras. 17-20.

²⁸ [BCI].

²⁹ See U.S. Comments on EU RAQ 105, para. 140; U.S. Comments on EU RAQ 97, para. 63 (demonstrating that the [BCI]). See also [BCI].

³⁰ EU RAQ 162, paras. 29-30.

24. The EU also suggests that, if certain Boeing contractual provisions provide for conversions, the appropriate “down-conversion” might be from 777-300ERs to the 777-8,³¹ a long-range variant of the 777X program launched in 2013. The 777-8 has standard 2-class seating of 350-375 passengers and a maximum range of 8,690 nautical miles.³² According to the compliance panel report, the 777-300ER has standard seating for 360 or 386 passengers (according to Airbus and Boeing, respectively) and a maximum range of 7,650 or 7,825 nautical miles.³³ It is difficult to see how switching from a 777-300ER to the 777-8, a longer-range variant with comparable seating capacity, would constitute a “down-conversion,” and still more difficult to see how such a switch would be consistent with Cathay Pacific’s reasons for converting two A350 XWB-1000s to A350 XWB-900s.

25. This all underscores the erroneous and speculative nature of the EU’s arguments. Cathay Pacific ordered A350 XWB-1000s in the 2012 Cathay Pacific lost sale, and the EU submitted the originally contracted delivery schedule for that sale. The parties agree that the 777-300ER is an appropriate Boeing comparator model for the A350 XWB-1000. Therefore, there is no basis to deviate from the U.S. methodology, which values the 2012 Cathay Pacific lost sale as a counterfactual Boeing order for ten 777-300ERs according to the Airbus contracted delivery schedule agreed to by the airline. Accordingly, there is no basis to speculate about if and how Cathay Pacific might have subsequently deferred and converted part of that order.

26. In addition, the United States notes the EU’s use of an Airbus graphic comparing twin-aisle LCA and VLA in its response to Question 161.³⁴ That graphic reflects the parties’ general agreement as to the appropriate Boeing model to use in valuing a lost sale involving a particular Airbus model – *i.e.*, a 747-8I for an A380 order, a 777-300ER for an A350 XWB-1000 order, and a 787-10 for an A350 XWB-900 order.³⁵ The United States has adhered to these “closest” model pairings in valuing each of the five lost sales at issue,³⁶ while simultaneously adhering to the obviously important criterion – recognized by the EU³⁷ – of using “same customer” comparators for [BCI] of the five lost sales that arose close in time to the lost sale. Thus, the

³¹ EU RAQ 161, para. 22.

³² Technical specs of 777X, Boeing website (Exhibit USA-114).

³³ Compliance Panel Report, para. 6.1295, Table 17.

³⁴ See EU RAQ 161, para. 16, Figure 1.

³⁵ See EU RAQ 161, paras. 16-20; U.S. Comments on EU RAQ 106, para. 151. The EU has recognized the obvious importance of selecting Boeing comparators based in part on the “comparator LCA type” or “closest competing Boeing model.” 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)). See also U.S. Comments on EU RAQ 97, paras. 44-47.

³⁶ See U.S. Methodology Paper, paras. 33, 56, 61, 67, 72, 77.

³⁷ See EU RAQ 166, para. 52; EU RAQ 106, para. 154.

U.S. lost sales valuations are fundamentally sound, and there is no basis to find that resulting countermeasures would not be commensurate with the adverse effects determined to exist.

Question 162

With reference to, *inter alia*, footnote 177 of the European Union's written submission, regarding the conversions of the Cathay Pacific and United Airlines lost sales (in addition to any other conversions concerning the orders involved in the five lost sales), could the European Union please clarify the circumstances under which these conversions occurred? In particular, did the customers request these conversions or were the conversions initiated by Airbus? If the customers requested them, did they do so pursuant to a pre-existing conversion right in the relevant sales contracts?

27. The United States refers the Arbitrator to its joint comments on the EU's responses to Questions 161, 162, and 163.

Question 163

With reference to, *inter alia*, footnote 176 of the European Union's written submission, regarding postponed deliveries with respect to the Cathay Pacific and United Airlines lost sales, could the European Union please clarify the circumstances under which these delays occurred? In particular, did the customers request these delays or were the delays initiated by Airbus?

28. The EU's response to this question refers the Arbitrator to its response to Question 162.³⁸ The United States refers the Arbitrator to its joint comments on the EU's responses to Questions 161, 162, and 163.

Question 164

With reference to the European Union's response to question No. 28, could the European Union please explain what alternative option it suggests using if the information of the actual final proposal lost to [BCI] is not available:

- a. for the delivery schedule of [BCI] lost sales; and**
- b. for the price adjustment of the delivery prices of the [BCI] lost sales?**

29. As the EU's response suggests,³⁹ the United States has submitted the requested documentation regarding the [BCI] in response to Question 137, such that there is no need for

³⁸ EU RAQ 163, para. 31.

³⁹ See EU RAQ 164, para. 33.

the “alternative option” referenced in this question. More importantly, there is no basis for any of the calculations discussed in the EU’s responses to Questions 28 and 164.

30. For the ostensible purpose of accounting for differences in order sizes and delivery schedules, the EU in its response to Question 164 has proposed using a “structured comparison” between the [BCI] and the [BCI] to enable downward adjustments to the per-aircraft prices from [BCI].⁴⁰ There is no evidence that would support this approach.

31. The EU bases its downward adjustments on the premise that smaller order sizes and earlier delivery slots invariably result in higher prices. But, as the United States explained in its comment on the EU response to Questions 161-163, [BCI].⁴¹ Moreover, [BCI]. Accordingly, there is no basis to make such adjustments.⁴² [BCI].

32. Finally, the United States observes that the [BCI].⁴³ Even under the EU’s theory, there is no need for an order size adjustment of any kind, let alone an adjustment based on a comparison between [BCI]. Similarly, [BCI].⁴⁴ Simply put, there is no relevant difference between these comparators proposed by the United States and the lost sales. Therefore, there is no reason for any adjustments, much less for the spurious downward-adjustments proposed by the EU.

Question 165

With reference to the European Union's response to question No. 28, could the European Union please explain why any relevant price adjustment would be necessary if the order size of the comparator order is the same as the order size of the actual Airbus lost sale? If the European Union considers that such price adjustments would still be necessary, could the European Union please provide specific examples of how the adjustments could be carried out?

33. Most of the EU’s response does not address the question posed by the Arbitrator concerning order size and instead refers to other criteria it proposes for evaluating potential

⁴⁰ See EU RAQ 164, paras. 34-38; EU RAQ 28, paras.

⁴¹ See U.S. Comments on EU RAQ 105, para. 140; U.S. Comments on EU RAQ 97, para. 63 (demonstrating that the [BCI]). See also [BCI].

⁴² The United States also recalls that its second revised countermeasures calculation uses Airbus’s originally contracted delivery schedules from the lost sales. The EU’s objections to using Airbus’s delivery schedules fail as well, as the United States has demonstrated. See U.S. Written Submission, paras. 186-198. See also U.S. RAQ 80, para. 112.

⁴³ EU RAQ 164, para. 34.

⁴⁴ U.S. Comments on EU RAQ 96, para. 23; U.S. Comments on EU RAQ 106, paras. 151, 154, 155.

comparators.⁴⁵ The United States has already shown that certain of the EU’s criteria support the use of the comparators proposed by the United States for valuing lost sales, and that the remaining criteria are invalid.⁴⁶

34. With respect to the Arbitrator’s question about order size, the United States has already demonstrated that there is no basis to adjust prices for order size.⁴⁷ Nonetheless, the United States welcomes the EU’s confirmation that, “{i}f the size of a ‘comparator order’ is the same as the order size of the counterfactual lost sale, no adjustment for order size is required, and the European Union has not suggested otherwise.”⁴⁸

35. The United States recalls that, for three of the five lost sales at issue, it has proposed comparator Boeing orders of the same order size as the corresponding lost sale.⁴⁹ (The United States also recalls the EU’s admission that these three proposed comparators constitute “competitive campaigns”⁵⁰ and therefore, according to the EU’s reasoning, do not “risk artificially inflating the real level of adverse effects.”⁵¹)

36. Thus, even under the EU’s erroneous reasoning, no order size adjustment is warranted for three of the five comparators proposed by the United States. Moreover, to be clear, there is also no basis for an order size adjustment with respect to the other two comparators proposed by the United States, concerning the 2012 Cathay Pacific and 2013 Emirates lost sales, as the United States has demonstrated.⁵²

⁴⁵ See EU RAQ 165, paras. 40-41, 43-44.

⁴⁶ See U.S. Comments on EU RAQ 96, paras. 19-30; U.S. Comments on EU RAQ 105; U.S. Comments on EU RAQ 106.

⁴⁷ See U.S. Comments on EU RAQ 105; U.S. Comments on EU RAQ 106, para. 155.

⁴⁸ EU RAQ 165, para. 42.

⁴⁹ Those three comparators are: (1) 2013 Singapore Airlines order for 30 787-10s as the comparator for the 2013 Singapore Airlines order for 30 A350 XWB-900s; (2) the 2015 United Airlines order for 10 777-300ERs as the comparator for the 2013 United Airlines order for 10 A350 XWB-1000s; and (3) the 2013 Transaero Airlines order for four 747-8Is as the comparator for the 2012 Transaero order for four A380s. U.S. Comments on EU RAQ 96, para. 23. See also U.S. Comments on EU RAQ 105, para. 138; U.S. Comments on EU RAQ 96, para. 23; Compliance Panel Report, para. 6.1781, Table 19.

⁵⁰ EU RAQ 105, para. 147, Table 1.

⁵¹ See EU RAQ 105, para. 141. See also U.S. Comments on EU RAQ 105, para. 138; U.S. Comments on EU RAQ 96, para. 23.

⁵² See U.S. Comments on EU RAQ 106, para. 155; U.S. Comments on EU RAQ 97, para. 52; U.S. Comments on EU RAQ 96, para. 23; U.S. RAQ 125, paras. 114-117.

Question 166

With reference to paragraph 246 of the European Union's written submission and the European Union's responses to question Nos. 28 and 68, could the European Union please confirm that for the 2013 Emirates lost sale it proposes to multiply the per-aircraft delivery prices of Boeing 747-8I aircraft delivered to Lufthansa in 2013 by the 2013 Airbus order size (i.e. 50) to calculate the value of the Emirates lost sale? If this is the case, could the European Union please indicate whether a similar methodology could be used for the other lost sales campaigns?

37. The EU's response to this question proceeds in two parts. The United States addresses each in turn.

38. In the first part of its response, the EU argues that the 2006 Lufthansa 747-8I order should be used as a comparator for the 2013 Emirates A380 lost sale, with the qualification that a downward adjustment be made to account for the differences in order size. The EU would have the Arbitrator base that adjustment on price and order information from the 2006 Lufthansa order and "the Korean Air order (Exhibit USA-48 (HSBI))."⁵³

39. The 2006 Lufthansa 747-8I order should not be used as a comparator for the 2013 Emirates lost sale because [BCI] is both reliable⁵⁴ and superior to the 2006 Lufthansa order of 20 747-8Is in terms of [BCI] and [BCI].⁵⁵ In addition, although the United States has shown that [BCI].⁵⁶

40. Moreover, if the Arbitrator were to reject the use of the [BCI], the 2013 Korean Air 747-8I order would still be superior to the 2006 Lufthansa order as a comparator to the 2013 Emirates lost sale, particularly since (i) the former occurred in the same year as the lost sale, while the latter was a launch order that occurred approximately seven years prior and therefore reflected market conditions at a markedly different time;⁵⁷ and (ii) the EU implicitly recognizes that Lufthansa and Korean Air are comparable customers.⁵⁸

41. In addition, the EU compounds its errors in seeking adjustments to the 2006 Lufthansa per-aircraft price in a misguided attempt to account for the larger order size of the Emirates lost

⁵³ EU RAQ 166, paras. 46-48.

⁵⁴ U.S. Comments on EU RAQ 97, para. 47; Boeing E-mail regarding Questions 116, 118, 121, 124(c), 125, 128-129, 132 (Exhibit USA-66(HSBI)).

⁵⁵ See U.S. Comments on EU RAQ 96, para. 23; U.S. Comments on EU RAQ 97, paras. 44-57.

⁵⁶ See EU RAQ 166, para. 52.

⁵⁷ See U.S. Comments on EU RAQ 97, paras. 44-57.

⁵⁸ U.S. Comments on EU RAQ 97, para. 67.

sale.⁵⁹ The United States demonstrated these errors in detail in its comments on the EU’s response to Question 97 and will not repeat them here.⁶⁰

42. The second part of the EU’s response addresses whether a similar adjustments can or should be made with respect to other comparator orders to value the lost sales.

43. The EU starts by discussing the selection of a comparator order. It clearly states that the Arbitrator “should preferentially use ‘comparator orders’ by the same airlines, where available” because “‘comparator orders’, by their very nature should be as similar as possible to the counterfactual lost sale.”⁶¹ This only serves to support the U.S. methodology, which uses “same customer” aircraft price information for [BCI] of the five lost sales.

44. The EU then repeats its argument that, after selecting an appropriate comparator, the Arbitrator must perform “necessary adjustments” to account for “structural differences” between the comparator and the lost sale.⁶² However, as demonstrated previously, the U.S. comparators provide the best available controls for potentially relevant differences, and the other allegedly differentiating characteristics raised by the EU do not provide a valid basis to adjust pricing.⁶³

⁵⁹ See EU RAQ 166, paras. 47-50.

⁶⁰ See U.S. Comments on EU RAQ 97, paras. 58-67.

⁶¹ EU RAQ 166, para. 52.

⁶² EU RAQ 166, paras. 53-55.

⁶³ See U.S. Comments on EU RAQs 96, 97, 105, 106, 110. See also *supra*, U.S. Comments on EU RAQs 161, 164, 165.