

*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)

**COMMENTS OF THE UNITED STATES OF AMERICA  
ON THE EUROPEAN UNION'S RESPONSES TO THE FIFTH SET OF QUESTIONS FROM  
THE ARBITRATOR**

June 21, 2019



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**Question 167 (EU)**

**With reference to the European Union's response to question No. 147 and the United States' comments thereon, could the European Union please elaborate on the reasons why Emirates cancelled some but not all of its outstanding A380 aircraft orders? In particular, was Emirates' decision based on a perceived problem with the A380 aircraft, specifically, or did it represent a shift away from VLA by Emirates? Relatedly, could the European Union please respond to the United States' assertion that the European Union has not explained why "in the counterfactual, Emirates would have cancelled some of the 747-8Is that even the EU admits the airline would have ordered"?**

1. The EU's response to Question 167 attempts again to improperly reduce the level of countermeasures by re-determining the degree and nature of adverse effects. The EU argues that the Emirates A380 cancellations reflect a shift in demand from VLA to twin-aisle LCA, that this same shift in demand would have led to the equivalent cancellation of counterfactual 747 deliveries, and that the countermeasures should reflect this alleged reduction in VLA demand, but not the corresponding increase in twin-aisle demand.
2. The Arbitrator's role in this proceeding is to ensure that the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist, not re-determine the degree and nature of the adverse effects. Furthermore, even if the Arbitrator could attempt to capture shifting demand in one market segment, it would be invalid to disregard the corresponding demand shifts in other market segments in which the subsidies were found to cause adverse effects. And, in any event, as a factual matter, the EU fails to establish that counterfactual 747 deliveries would have been cancelled just because the A380 deliveries were.
3. First, the EU's arguments are unfounded as a legal matter. The task before the Arbitrator is to determine whether the EU has demonstrated that the level of countermeasures requested by the United States is not "commensurate with the degree and nature of the adverse effects determined to exist."<sup>1</sup> 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 there were fewer orders that represent significant lost sales than found in that report.<sup>2</sup> To do so would amount to an attack on and attempted reversal (in part) of the adopted findings of adverse effects so that the "degree" of adverse effects is something other than what was already "determined" in the compliance proceeding.<sup>3</sup> Thus, the EU's proposal to treat the Emirates campaign as involving less than the 50 orders that represent significant lost sales – which are the adopted findings<sup>4</sup> – is legally erroneous.
4. Second, the EU's explanation for disregarding instances of A380 lost sales is that the A380 cancellations resulted from Emirates' strategic shift in its fleet planning from VLA to twin-

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<sup>1</sup> See *Agreement on Subsidies and Countervailing Measures*, Art. 7.10 ("SCM Agreement").

<sup>2</sup> 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.

<sup>3</sup> See U.S. Comments on EU RAQ 98, para. 72.

<sup>4</sup> See EU RAQ 167, paras. 23-25.

aisle LCA.<sup>5</sup> However, the EU is not suggesting that adverse effects are actually diminishing. Rather, the EU asserts that Emirates is anticipating steady growth, but that, as it grows, it intends to reposition its model mix.<sup>6</sup> If this assertion is correct, any reduction in Emirates' demand for VLA would correspond to an increase in demand for twin-aisle aircraft.

5. Indeed, simultaneous with the Emirates' A380 order cancellations, Emirates announced new Airbus orders valued at "\$21.4 billion," including for 30 A350 XWB-900s<sup>7</sup> – *i.e.*, another subsidized Airbus model involved in lost sales underlying the adopted findings that EU subsidies cause adverse effects to U.S. interests. According to those findings, absent the subsidies Airbus would have been unable to offer the A380 or the A350 XWB in the post-implementation period. It is transparently self-serving and invalid for the EU to request the Arbitrator to take into account developments that allegedly reduce demand in the VLA market, but ignore the effect of those same developments that increase demand in the twin-aisle market.

6. Third, in any event, the EU has failed to demonstrate that "the same dynamics would have occurred in the *counterfactual* world to the other manufacturer (here, Boeing)."<sup>8</sup> According to the EU, Emirates partially cancelled its outstanding A380 orders because of a "strategic shift in the airline's fleet planning, away from VLA towards twin-aisle aircraft," a shift driven by increased fuel prices, shifting consumer demand, and "ongoing macroeconomic pressures."<sup>9</sup> On that basis, the EU contends that the same factors would have caused counterfactual Emirates to cancel some of its outstanding 747-8I orders. Yet, the facts belie the EU's argument, showing instead how recent developments with the A380 do not necessarily apply to the same extent, or in some cases at all, to the 747-8I.

7. While the A380 and 747-8I both compete in the VLA market, the A380 and 747-8I differ significantly in terms of passenger capacity and maximum takeoff weight (MTOW), which in turn has significant implications for airline economics when fuel prices increase and/or passenger loads decline. The A380 typically offers 88 to 120 seats more than the 747-8I, and an MTOW more than 100 tons greater.<sup>10</sup> In addition, the A380 requires specialized terminal facilities available at a limited number of airports, while a greater number of airports can accommodate

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<sup>5</sup> EU RAQ 167, para. 6.

<sup>6</sup> See EU RAQ 167, para. 19.

<sup>7</sup> *Emirates President "Satisfied" with Performance Amid Numerable Industry Headwinds*, Arabian Travel Market (Apr. 30, 2019) (Exhibit EU-152).

<sup>8</sup> See EU RAQ 167, para. 23.

<sup>9</sup> See EU RAQ 167, para. 15.

<sup>10</sup> Compliance Panel Report, para. 6.1373, Table 18.

the 747-8I without comparable modifications.<sup>11</sup> Accordingly, where an airline perceives prohibitive costs to operating an A380 – for example, because of a mix of high fuel prices that increases trip costs and reduced passenger demand that leaves a significant amount of unfilled seats on the airplane<sup>12</sup> – it does not necessarily follow that the airline would also find it prohibitively costly to operate a 747-8I.<sup>13</sup> And the EU makes no attempt to demonstrate as much with factual analysis and evidence.

8. The fact that differences between the A380 and 747-8I may lead to different conclusions with respect to operating each, is borne out in the recent experience of airlines operating VLA.

- The United States has demonstrated that only one airline, Transaero, has cancelled 747-8I orders (and only four, at that), and that was because the airline went bankrupt, not because of broader problems with the 747-8I (which it never ended up operating) or VLA in general.<sup>14</sup> In contrast, the EU’s own evidence shows that Emirates has cancelled some A380 orders because of its issues with the aircraft, not because of financial problems.
- Moreover, the EU’s evidence shows Lufthansa – which operates both the A380 and 747-8I – is selling back some A380s to Airbus,<sup>15</sup> but the EU is unable to show that Lufthansa is doing likewise with its 747-8Is.

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<sup>11</sup> See Compliance Panel Report, para. 6.1384 (“in an earlier Airbus presentation from 2005, the number of airports expected to be ready for the larger A380 in 2006 and 2010 are identified in terms of the percentage of all worldwide 747 flights that are handled by the same airports”).

<sup>12</sup> See Compliance Panel Report, paras. 6.1375 (“The 747-8I has a lower overall per trip fuel-burn and greater cargo capacity than the A380. However, the A380 has a lower per/passenger operating cost (when flying at maximum capacity) than the 747-8I.”), 6.1378 (“we do not understand the parties to disagree with the proposition that, when seating capacity is determined on the basis of the same rules and assumptions, the A380 offers customers lower per/seat operating costs and greater potential revenues than the 747-8I for missions requiring a seating capacity that approaches the A380’s maximum; and conversely that the 747-8I offers lower per/seat operating costs than the A380 for missions requiring a passenger seating capacity that approaches its maximum.”), 6.1381.

<sup>13</sup> See Compliance Panel Report, para. 6.1384 (“It is important to recall that the A380’s per/seat operating cost and revenue advantage over the 747-8I will decrease the closer the expected seating capacity of a particular mission is to the maximum seating capacity of the 747-8I. The smaller the difference, the greater is the possibility that the A380’s advantage might be overcome by a combination of other factors informing a customer’s purchase decision, including price, fleet commonality and/or delivery date.”).

<sup>14</sup> See U.S. RAQ 171, para. 6.

<sup>15</sup> Andrew Curran, *Emirates to Retire Airbus A380s by Mid 2030s*, Simple Flying (June 3, 2019) (Exhibit EU-147).

- In addition, Qatar Airways reportedly will retire its A380s in 2024, when they will be only 10 years old,<sup>16</sup> but again, the EU is unable to cite a comparable situation with respect to the 747-8I.

Thus, with no discernible correlation between A380 cancellations and early retirements and comparable events for the 747-8I, there is no basis to assume – as the EU does – that a counterfactual Emirates 747-8I order would play out like the real-world Emirates A380 order simply because both aircraft compete in the VLA market and have four engines.

9. The EU also acknowledges that the Rolls Royce engines for the A380s on order to Emirates were afflicted by “technical issues” that were never resolved.<sup>17</sup> The EU fails to mention that the 747-8I’s engines are made by General Electric, not Rolls Royce. In the counterfactual, Boeing would have no such Rolls Royce “technical issues” to try (and fail) to overcome.

10. Moreover, the EU asserts that Emirates’ decision to cancel some A380 orders, but not others, was influenced by pre-delivery payments already made by the airline and the financial consequences of cancelling some deliveries relative to others.<sup>18</sup> However, the EU has not established that the contractual consequences of cancellation with respect to later deliveries – consequences that were apparently palatable in the case of the A380 – would have been the same in a contract with Boeing. In other words, attempting to map Airbus-specific issues, like the contractual consequences of cancelling orders, onto a counterfactual Boeing-Emirates supply relationship would be erroneous, and in any event, is not something the EU attempted to do with actual evidence and argumentation.

11. In sum, the EU’s arguments fail to show that the requested U.S. countermeasures are not commensurate with the degree and nature of the adverse effects determined to exist. Legally, recent developments at Emirates are no basis for reassessing the degree and nature of the adopted adverse effects findings. Even if that were not the case, the EU’s own allegations, if accepted as accurate, would merely establish a shift of some adverse effects from the VLA market to the twin-aisle market, not a reduction in adverse effects. Finally, there is ample evidence to show that the Emirates A380 order cancellations are due to Airbus-specific factors that cannot be assumed to apply to counterfactual Boeing 747-8I orders.

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<sup>16</sup> Andrew Curran, *Emirates to Retire Airbus A380s by Mid 2030s*, Simple Flying (June 3, 2019) (Exhibit EU-147).

<sup>17</sup> See EU RAQ 167, para. 9.

<sup>18</sup> See EU RAQ 167, para. 18.

**Question 168 (EU)**

**With reference to Exhibit EU-106 (HSBI), could the European Union please provide the actual delivery schedule of the 2013 Emirates order for 50 A380 aircraft as of May 2019 with the same type of information provided in Exhibit EU-106 (HSBI)?**

12. The EU's response to this question confirms again that A380 deliveries from the 2013 Emirates lost sale will continue to occur through at least [BCI].<sup>19</sup>

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<sup>19</sup> See EU RAQ 168, para. 26.