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)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES

April 30, 2019

INTRODUCTION

I. THE FRAMEWORK FOR ASSESSING THE U.S. PROPOSED COUNTERMEASURES

1. Pursuant to Article 7.10 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), the Arbitrator's task is to "determine whether countermeasures {proposed by the United States} are commensurate with the degree and nature of the adverse effects determined to exist." The dictionary definition of degree is "the amount, level, or extent to which something happens or is present" and of nature is "the basic or inherent features of something, especially when seen as characteristic of it."[1] In the only arbitration to date regarding actionable subsidies, *US – Upland Cotton (22.6 II)*, the arbitrator considered that the ordinary meaning of these terms in Article 7.10 was consistent with these definitions.[2] Determining the degree and nature of adverse effects invites a case-specific inquiry that seeks to understand the causal findings and rationale in the underlying proceedings.[3]

2. The arbitrator in *US – Upland Cotton (22.6 II)* further found that "'commensurate' essentially connotes 'correspondence' between two elements,"[4] but that "'commensurate' does not suggest that exact or precise equality is required between the two elements to be compared, i.e., in this case, the proposed countermeasures and the 'degree and nature of the adverse effects determined to exist'."[5] Thus, the arbitrator continued, "'commensurate' connotes a less precise

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[1] Oxford English Dictionary online (US version), https://en.oxforddictionaries.com/definition/us/degree (accessed November 8, 2018); Oxford English Dictionary online (US version), https://en.oxforddictionaries.com/definition/us/nature (accessed November 8, 2018).

[2] *See United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the* SCM Agreement, WT/DS267/ARB/2 and Corr.1, paras. 4.20, 4.40-4.48 (31 August 2009) ("*US – Upland Cotton (22.6 II)*").

[3] *See US – Upland Cotton (22.6 II)*, paras. 4.88-4.89. *See also ibid.*, para. 4.43.

[4] *US – Upland Cotton (22.6 II)*, para. 4.37.

[5] *US – Upland Cotton (22.6 II)*, para. 4.39.

degree of equivalence than exact numerical correspondence'."[6] In addition, "the expression 'adverse effects' determined to exist' refers us to the specific 'adverse effects' within the meaning of Articles 5 and 6 of the *SCM Agreement* that form the basis of the underlying findings in the case at hand."[7]

3. The arbitrator in *US – Upland Cotton (22.6 II)* also observed that "it is normally not the task of arbitrators under Article 22.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") to review whether compliance has been achieved or not, as arbitral proceedings under this provision assume that there has been no compliance, and this will normally have been determined through compliance proceedings under Article 21.5 of the DSU."[8] Of course, in this dispute, the EU's failure to comply has in fact been determined through a compliance proceeding in which the findings were adopted by the DSB.[9] Indeed, the parties agreed to a sequencing agreement in which the arbitration would be suspended while the EU's initial claims of compliance would be adjudicated first, and then the arbitration regarding the extent of the countermeasures would continue if the EU was found to have failed to comply, as it was.[10]

4. The arbitrator in *US – COOL (22.6)* discussed the objecting party's burden in an arbitration. Specifically, the arbitrator stated:

> In the absence of a demonstration that the proposing party's methodology is incorrect, the mere submission of an alternative methodology would not meet the objecting party's burden of proof. This is because the alternative methodology does not, in itself, assist the Arbitrator in determining whether the result from the first methodology is (or is not) equivalent to the level of nullification or impairment. In such a situation, it would follow from the rules on burden of proof that the objecting party has not proved that the act at issue is WTO-inconsistent.[11]

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[6] *US – Upland Cotton (22.6 II)*, para. 4.39.

[7] *US – Upland Cotton (22.6 II)*, para. 4.50.

[8] *US – Upland Cotton (22.6 II)*, para. 3.17.

[9] *See* Compliance Appellate Report, paras. 6.43-6.44.

[10] Sequencing Agreement, para. 6

[11] *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 22.6 of the DSU the United States*, WT/DS384/ARB and Add.1 / WT/DS386/ARB and Add.1, para. 4.12 (7 December 2015) ("*US – COOL (22.6)*").

II. THE LEVEL OF COUNTERMEASURES REFLECTED IN THE U.S. METHODOLOGY PAPER COMPORTS WITH THE REQUEST FOR COUNTERMEASURES UNDER ARTICLE 22.2 OF THE DSU.

5. In accordance with its request for authorization, the United States requested countermeasures "commensurate on an annual basis with the degree and nature of the adverse effects determined to exist."[12] At the time the Arbitrator resumed its work on July 17, 2018,[13] the "adverse effects determined to exist" were those found in the compliance panel and appellate reports adopted by the DSB on May 28, 2018. In its methodology paper, the United States used a series of calculations to determine the value of the adverse effects during the period covered by the adopted findings, and expressed that as $11.2 billion per year as of 2018. The process and output follow exactly the approach outlined in the request for countermeasures.

6. The EU argues that the U.S. "estimate{}"[14] in its 2011 request for authorization of $7-10 billion "{b}ased on currently available data in a recent period,"[15] acts as a ceiling on the amount of any countermeasures the United States may properly request now that the Arbitrator has resumed its work in 2018. The EU goes on to argue that the Article 22.2 request has a "jurisdictional nature." It then contends, quoting the *EC – Bananas (22.6 – Ecuador)* arbitrator, that this means that the $7-10 billion figure (or the formula used to derive that figure) "*defines* the amount of requested suspension for purposes of this arbitration proceeding'."[16] The EU notes that the *Bananas* arbitrator rejected Ecuador's effort to add "additional amounts" to the figure set out in its request for countermeasures as not "'compatible with the minimum specificity requirements for such a request'."[17] The EU's argument is meritless.

7. The U.S. request identified the level of countermeasures in functional terms, as the annual level of adverse effects "determined to exist," caused to the interests of the United States by the EU's failure to comply with the DSB's recommendations and rulings. Therefore, under the EU's reasoning, it is this functional description that "*defines* the amount of requested suspension for purposes of this arbitration proceeding." While the U.S. request values "this figure" as $7-10 billion, the result is explicitly stated as illustrative and temporary, framed as an "estimate{}" based on "currently available data in a recent period."[18] This point is further

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[12] WT/DS316/18, p. 2 (12 Dec. 2011).

[13] WT/DS316/38 (19 July 2018).

[14] WT/DS316/18, p. 2 (12 Dec. 2011).

[15] WT/DS316/18, p. 2 (12 Dec. 2011).

[16] EU Written Submission, para. 86 (*quoting EC – Bananas (22.6 – Ecuador)*, para. 24 (emphasis added by EU)).

[17] EU Written Submission, para. 86 (*quoting EC – Bananas (22.6 – Ecuador)*, para. 24).

[18] WT/DS316/18, p. 1 (12 Dec. 2011) (footnote omitted).

underscored by the indication that the United States would update the figure annually using the most recent publicly available data.

8. Moreover, the parties requested suspension of this proceeding pending adoption by the DSB of a finding that the EU failed to comply with the recommendations and rulings of the DSB.[19] In doing so, they evinced the clear intention that the results of that report would inform the work of the Arbitrator.[20] This includes updating the countermeasures amount in 2018 following the nearly seven-year compliance period, which does not pose concerns regarding the EU's due process.[21]

III. THE UNITED STATES FOLLOWED THE CORRECT APPROACH IN DEVELOPING COUNTERMEASURES THAT ARE COMMENSURATE WITH THE ADVERSE EFFECTS DETERMINED TO EXIST.

9. The U.S. countermeasures, as outlined in the U.S. methodology paper and subsequent submissions, are faithful to the requirements of DSU Articles 22.6 and 22.7 and SCM Articles 7.9 and 7.10, as well as the guidance provided by the decisions of past arbitrators.

10. The United States based the methodology on the text of those provisions and the DSB-adopted findings from the compliance proceeding in this dispute. The United States valued the LCA in the specific orders underlying the significant lost sales findings and the LCA in the specific deliveries underlying the impedance findings, which reflect the instances of adverse effects caused by the A380 LA/MSF and A350 XWB LA/MSF in the December 2011 – 2013 period reviewed by the compliance panel. The U.S. calculation relies on the actual transactions underlying the findings for two reasons. First, this approach is consonant with the text of the agreement, which states SCM Agreement Article 7.9 that countermeasures must be commensurate with "the degree and nature of the adverse effects determined to exist." And second, because these are adopted findings, they do not require speculation as to their nature and extent.

11. The SCM Agreement disciplines actionable subsidies when they cause adverse effects to the interests of another Member. When significant sales are lost, or imports and exports (into the EU and third country markets, respectively) are impeded, the United States suffers adverse effects in the form of serious prejudice. It is the determination that particular subsidies cause

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[19] Sequencing Agreement, para. 6.

[20] It is worth noting that in the *EC – Bananas (22.6 – Ecuador)* arbitration, Ecuador proposed to add to the amount of nullification and impairment based on previously existing findings and information. *EC – Bananas (22.6 – Ecuador)*, para. 23. Unlike this proceeding, there had been no compliance proceeding, and no finding that in addition to maintaining existing WTO-inconsistent measures, the responding party had adopted new WTO-inconsistent measures.

[21] *Cf.* EU Written Submission, para. 85.

adverse effects that provides the basis for countermeasures.[22] Therefore, the United States methodology values the instances of adverse effects as of the time they occur. By valuing a lost sale at the time the sale was lost, and valuing impedance at the time the imports and exports (through deliveries) were impeded, the U.S. calculation appropriately reflects the adverse effects determined to exist.

12. The United States methodology then re-states in 2013 dollars the value of instances of adverse effects in 2011 and 2012 to ensure comparability, and derives an annual average value. Finally, to make sure that the countermeasures remain commensurate with the adverse effects determined to exist, the United States proposes a formula that accounts for inflation between 2013 and a given year in which countermeasures are applied.

13. The U.S. methodology reflects the proper understanding of the degree and nature of the adverse effects determined to exist. During the original reference period, the United States established that "the effect of the subsidy is" certain forms of serious prejudice contained in SCM Article 6.3(a)-(c). The United States proved as much by relying on specific instances of these phenomena. During the first compliance proceeding, the United States again proved, based on other specific instances after the end of the implementation period, that LA/MSF continues to cause adverse effects. As a result, the DSB adopted findings that the effects of non-withdrawn LA/MSF is significant lost sales of U.S. twin-aisle LCA and significant lost sales and impedance of U.S. very large aircraft (VLA).[23]

14. As the DSB found, LA/MSF causes "product effects;" that is, it enables Airbus to launch and bring to market new LCA models.[24] When Airbus makes a sale through an order, or gains market share through a delivery, of an LCA model that, absent the subsidies, would not be available for sale or delivery, a causal link is established between the LA/MSF responsible for the market presence of that Airbus model, and the lost sale or impedance suffered by the U.S. LCA industry.[25] Thus, the market presence of an LCA model attributable to the subsidies leads to sales and deliveries year after year, to a variety of customers that would not otherwise occur, making these subsidies "profound and long-lasting."[26] LA/MSF subsidies to one aircraft program also have been found to enable Airbus to build on the competitive advantages from LA/MSF subsidies,[27] and further, to provide Airbus with technologies, experience, and financial

[22] *See* SCM Agreement, Art. 7.9.

[23] WT/DS316/35 (29 May 2018).

[24] Compliance Appellate Report, para. 5.587.

[25] *See, e.g.*, Compliance Appellate Report, paras. 5.725-5.726, 5,740.

[26] Compliance Panel Report, para. 6.1528.

[27] *See* Compliance Appellate Report, para. 5.644.

benefits that make it easier to bring to market subsequent new LCA models, which the compliance appellate report recognized as "indirect effects."[28]

15. In both the original and the compliance proceedings, the adverse effects findings relied on the counterfactual proposition that the Airbus LCA model that won a particular sale or accounted for market share would not have even been available in the market, and neither would any other non-U.S. competing model.[29] Given these adopted findings, the existing LA/MSF subsidies' effects of causing significant lost sales and impedance is not limited to the specific transactions that panels and the Appellate Body have cited as evidence. That effect is ongoing. It is manifest in repeated instances of lost sales and impedance, which will continue to arise as long as LA/MSF subsidies continue to have "product effects."

16. Therefore, to ensure that countermeasures are commensurate with the degree and nature of the adverse effects determined to exist, the United States proposes annual countermeasures that reflect the adopted findings in that regard, including the findings that LA/MSF subsidies continue – in the present tense – to cause adverse effects after the end of the implementation period.[30] Thus, just as Boeing LCA compete with A380 and A350 XWB aircraft that are in the market when and as they are because of the LA/MSF subsidies, the United States proposes to apply countermeasures annually until the DSB finds that the EU has come into compliance or the parties reach a positive solution to the dispute.[31] This is also consistent with the prospective nature of WTO dispute settlement.

17. By ignoring the nature of the adverse effects determined to exist, especially the causal link between the A380 LA/MSF and A350 LA/MSF subsidies and the adverse effects they were found to continue to cause, the EU erroneously treats as the full extent of the adverse effects the five transactions during the December 2011 – 2013 period identified in the compliance proceeding, and deliveries during that same period to the six country markets that served as the basis for impedance findings.

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[28] *See* Compliance Appellate Report, paras. 5.637-5.639.

[29] *See* Original Appellate Report, para. 1264; Compliance Appellate Report, paras. 5.725-5.726, 5,740.

[30] *See* Compliance Appellate Report, paras. 5.413, 5.605, 5.609, 5.640, 5.646-5.647, 5.694, 5.768, 6.37(a), 6.43(a).

[31] *See* DSU, Art. 22.8. The United States notes that the EU attacks a straw man by quoting a phrase in the U.S. methodology paper out of context. The United States never suggested, as the EU implies, that its basis for applying countermeasures going forward is that doing so is common and administrable. *See* EU Written Submission, para. 92. Rather, the U.S. point was that it was using a one-year period, rather than, for example, a 25-month period, because considering imports on an annual basis is both common and easily administrable. The United States could have sought a 25-month countermeasure figure that would apply in each 25-month period. But that would be unusual and more difficult to administer.

IV. ONGOING COUNTERMEASURES, AS ALMOST ALL PAST ARBITRATORS HAVE AWARDED, ARE APPROPRIATE IN THIS PROCEEDING.

18. The continuing adverse effects of LA/MSF subsidies were the explicit focus of the successful U.S. claim in the first compliance proceeding that "the challenged subsidies *continue to cause* the same types of 'adverse effects' today."[32] At the heart of both the U.S. claim and the compliance findings of continued, or ongoing, adverse effects are the "product effects" of LA/MSF and their operation in the LCA industry where the subsidy-enabled market presence of Airbus LCA has an obvious and direct adverse impact on Boeing LCA.

19. Consistent with the original findings of adverse effects, the compliance findings of adverse effects are based on the "direct" and "indirect" product effects that existing LA/MSF has in enabling Airbus to offer and deliver LCA where it would otherwise be unable to do so. LA/MSF thus allows Airbus to take sales, deliveries, and market share that it would not otherwise obtain, resulting in continued adverse effects to the United States for as long as those product effects operate.

20. Relying in large part on the compliance panel's findings, the appellate report concluded that existing subsidies did indeed continue to cause adverse effects into the post-implementation period, and it did so in terms that leave no doubt as to the ongoing nature of LA/MSF's adverse effects:

- "{O}ur discussion of the Panel's findings reveals that the LA/MSF subsidies existing in the post-implementation period – i.e. the A380 and A350XWB LA/MSF subsidies – enabled Airbus to proceed with the timely launch and development of the A350XWB, and to bring to market and to continue developing the A380. Both these events, as the above analysis shows, *were crucial to renew and sustain Airbus' competitiveness in the post-implementation period*."[33]

- "{T}he Panel's findings support the conclusion that the sales of the A350XWB identified in Table 19 of the Panel Report represent 'significant lost sales' to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement, and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. This conclusion 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' timely launch of the A350XWB*, and

[32] Compliance Panel Report, para. 6.1112 (emphasis original).

[33] Compliance Appellate Report, para. 5.647 (emphasis added).

the existence of sufficient substitutability between Boeing's and Airbus' twin-aisle product offerings."[34]

- "{T}he orders identified in Table 19 of the Panel Report in the twin-aisle LCA market represent 'significant lost sales' to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period *are* a genuine and substantial cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement."[35]

- "{T}the Panel's findings support the conclusion that the sales of the A380 identified in Table 19 of the Panel Report represent 'significant lost sales' to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement, and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. This conclusion 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."[36]

- "{T}he orders identified in Table 19 of the Panel Report in the VLA market represent 'significant lost sales' to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period ***continue to be*** a genuine and substantial cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement."[37]

21. In sum, the DSB adopted findings both that existing LA/MSF subsidies have adverse effects of an ongoing, or continuing, nature, and that the subsidies were continuing to cause – in the present tense – such adverse effects throughout the post-implementation period. Thus, there is no merit to the EU's objections to annual countermeasures, or its attempts to again limit the adverse effects caused by LA/MSF to the specific instances identified in the reference period. The DSU provides for countermeasures until the EU is found to have complied in an appropriate forum and the DSB adopts the findings, or a positive solution is reached.

V. EU OBJECTIONS TO THE U.S. METHODOLOGY ARE ERRONEOUS

A. The Proper Counterfactual

[34] Compliance Appellate Report, para. 6.31 (emphasis added).

[35] Compliance Appellate Report, para. 6.31(a) (emphasis added).

[36] Compliance Appellate Report, para. 6.37 (emphasis added).

[37] Compliance Appellate Report, para. 6.37(a) (emphasis added).

22. However, the EU has alleged no anomaly with the compliance reference period – December 2011 – 2013 – in terms of LCA prices or other inputs into the U.S. methodology that were not germane to the adopted compliance findings. Thus, the EU has failed to prove than any such data utilized by the U.S. methodology are "unrepresentative." The EU's arguments in this respect therefore fail.

23. The fact is that the adverse effects flow from the product effects caused by the LA/MSF subsidies. Those product effects continue to result in significant lost sales and impedance. The subsidies are in no way specific to certain sales or deliveries. Thus, because the DSB adopted findings that, following the end of the RPT, the causal chain remained intact, there is no basis to treat the instances of adverse effects that manifested in the December 2011 – 2013 period as the full extent of the adverse effects. Rather, as the compliance panel observed, the adverse effects of LA/MSF are "profound and long-lasting."[38]

24. The EU alleges that the United States mischaracterizes the causal pathway "to turn adverse effects findings based on a temporally-limited acceleration effect into findings of adverse effects that apply in perpetuity."[39] According to the EU, "the first compliance panel found, and the Appellate Body upheld, that the subsidised element of A380 MSF loans and A350XWB MSF loans accelerated the launch of the A380 and the A350XWB."[40]

25. But the EU is flatly wrong. As we already discussed, the compliance panel in *US – Large Civil Aircraft* specifically contrasted the acceleration effects in that dispute with the product creation effects found by the original and compliance panels in this dispute.[41] Indeed, the EU itself has stated in this proceeding:

> 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 eventual basis for findings of other forms of volume effects*** (and specifically, impedance).[42]

Thus, although it repeatedly fights the conclusion, at least once in this proceeding the EU has specifically and concisely acknowledged that both the significant lost sales findings and the

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[38] Compliance Panel Report, para. 6.1528.

[39] EU RAQ 56, para. 48.

[40] EU RAQ 56, para. 48.

[41] *See United States – Large Civil Aircraft (21.5) (Panel)*, para. 9.127, note 2849.

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

impedance findings were based on the unavailability of the Airbus LCA in the absence of LA/MSF. This adopted multilateral finding – including the causal pathway by which the presence of Airbus LCA continually causes Boeing to lose sales and deliveries it would otherwise obtain – remains in effect and cannot be disturbed. Accordingly, contrary to the EU's assertions, the U.S. methodology results in annual countermeasures commensurate with the degree and nature of the adverse effects determined to exist.

B. Counterfactual Airplane Prices

26. The EU has also faulted the United States for the prices it used for calculating significant lost sales and impedance values. With respect to lost sales, the EU objects to the United States' use of somewhat contemporaneous orders (for all but one of the customers) by the same customer of the relevant Boeing model. The EU's allegations fail to prove that the U.S. approach would render the countermeasures not commensurate.

27. The EU's criticisms typically take the form of pointing out some way in which these comparator orders are not identical to the counterfactual order. For example, in some instances, the number of aircraft ordered is not exactly the same. But the EU's burden requires more than demonstrating that the proxies the United States chose are imperfect. Of course, they are. They are proxies. There is no actual information available; it's a ***counterfactual*** order. The proxies the United States chose are eminently reasonable, and therefore, do not result in countermeasures that are not commensurate.

28. 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.[43] To do so would amount to a collateral attack on the findings in the reports adopted by the DSB.

29. In addition, such an approach would presume erroneously that, if a customer actually converted an original order for a given Airbus model (*e.g.*, the A350 XWB-1000) to another Airbus model (*e.g.*, the A350 XWB-900), then the same customer in the counterfactual situation would necessarily have converted the originally ordered Boeing model (*e.g.*, the 777-300ER) to another Boeing model (*e.g.*, the 787-10). Conversion activity can result from various factors, including factors specific to Airbus models and Airbus's customer relationships, such that it cannot be assumed that actual Airbus conversions would translate to counterfactual Boeing conversions.

30. The specifications of the aircraft that each customer actually ordered from Boeing provide the best proxy for the specifications of aircraft they likely would have ordered in the counterfactual. The price that they paid accordingly provides the best measure of the value of the aircraft that would have been ordered in the counterfactual. In addition, there are not reliable

[43] *See* 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.

methods to adjust LCA pricing for differences in the countless physical characteristics and other specifications between Airbus and Boeing aircraft.

31. The United States also notes that these prices are just proxies for counterfactual sales. Even if the requisite information was available and there was a reliable methodology to make price adjustments, there is no indication that any differences in physical characteristics or other specifications between the Airbus aircraft ordered and the counterfactual Boeing model would necessitate price adjustments so large as to affect the conclusion whether proposed countermeasures are "commensurate." Accordingly, there is no basis to undertake an immensely complicated, unreliable, and improper exercise of adjusting the submitted prices, if that indeed is what the EU is advocating.

32. The EU argues that the Arbitrator should attempt to exclude non-U.S. inputs from the valuation of Boeing aircraft in the calculation of countermeasures. The EU goes so far as to ask that all "engine costs" should be excluded from the calculations because one Boeing model, the 787, offers customers a choice between Rolls Royce engines and General Electric engines.[44] As demonstrated previously, the EU's argument is untenable, and would inherently result in countermeasures that are *not* "commensurate" because the goods experiencing serious prejudice are U.S. LCA, not the U.S. parts thereof.[45] The EU's argument is also incoherent: for LCA incorporating millions of parts from several tiers of suppliers, it would exclude complex assemblies, such as engines, based on the country in which they were assembled, without regard to any U.S.-origin parts in such assemblies.[46]

33. In sum, the EU's criticisms of the U.S. lost sales evidence are meritless. They include a mixture of inaccurate guesswork, legal error, and demands for documentation that is now on the record. These arguments are emblematic of the EU's failure to demonstrate that the U.S. calculations are not "commensurate with the degree and nature of the adverse effects determined to exist."

C. Alleged Dissipation of Adverse Effects

34. The counterfactual launch of the A380 and A350 XWB is a necessary, but not necessarily sufficient, condition for the dissipation of adverse effects based on sales and deliveries of the A380 and A350 XWB. That is, as long as the A380 and A350 XWB would not be available for offer in the counterfactual situation absent existing LA/MSF – and therefore not available for delivery – the sales and deliveries they take during that period from competing Boeing LCA continue to represent adverse effects caused by the subsidies.

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[44] *See* EU RAQ 52, para. 3 (seventh bullet).

[45] *See* U.S. Written Submission, paras. 266-269.

[46] *See* U.S. Written Submission, para. 269.

35. However, the point at which the A380 and A350XWB would launch in the counterfactual is not necessarily the point at which adverse effects would cease. There are several reasons why adverse effects would not cease at the moment of a counterfactual launch in this dispute, including those discussed below.

36. First, A380 LA/MSF would still contribute to the adverse effects caused in the twin-aisle market. Both A380 LA/MSF and A350 XWB LA/MSF – assessed through aggregation as a single subsidy – were found to cause significant lost sales in the twin-aisle market. Therefore, both A380 LA/MSF and A350 XWB LA/MSF would remain out of compliance unless the EU somehow could have demonstrated, in addition to a counterfactual A380 launch, that Airbus also would have been able to offer and deliver the A350 XWB in the absence of the aggregated LA/MSF subsidies.

37. Second, there would still be adverse effects in the form of impedance in the VLA market. The findings of impedance in the VLA market were based on ***deliveries***. Delivery of an aircraft necessarily lags by several years behind the launch of an aircraft. The real-world A380 was launched in 2000, but first delivery did not occur until 2007.[47] Therefore, even if the counterfactual launch of the A380 marked the moment at which a customer could *order* A380s, at least another seven years would have to pass before Airbus could make deliveries of the A380. Accordingly, counterfactual launch will not coincide with an end to impedance resulting from LA/MSF-enabled A380 deliveries.

38. Third, there may even still be significant lost sales involving the A380 in the global VLA product market after the counterfactual A380 launch. A later launch can have several important effects on a sales campaign. For example, market perceptions regarding the value proposition an LCA model offers can be strengthened by a model's demonstrated success in service. A manufacturer cannot benefit in early sales campaigns from such demonstrated success. In addition, the timing of a launch may affect the delivery slots a manufacturer is able to offer in a particular campaign. Whether or not the subsidies would continue to cause significant lost sales in the global VLA market after the counterfactual A380 launch would be a fact-specific inquiry assessed on the basis of the relevant campaign-specific evidence. If these or other factors made it so that Airbus's offer in a particular campaign would have been less attractive in the counterfactual, and as a result Boeing would have won the sale, then the subsidies would still be the cause of a lost sale even though in the counterfactual the A380 would have launched.

39. As the United States has demonstrated, these are not proper considerations in the context of this arbitration. However, even in the context of a compliance proceeding, compliance would require that any existing subsidies no longer cause adverse effects. In particular, with respect to the VLA market, the EU would have failed to achieve compliance if, absent existing LA/MSF, Boeing would have made additional significant sales. To be sure, establishing compliance by

[47] *See* Compliance Panel Report, paras. 6.1220, 6.1383 (citing to a 2011 Airbus presentation entitled "A380 Update: Four Years in Service").

severing the causal link would have meant showing that the A380 would have been launched in the absence of LA/MSF. But demonstrating a counterfactual launch alone would be insufficient if it were still the case that, for any of the reasons listed above or based on any other considerations, Boeing still would have made sales after the end of the RPT to customers that instead ordered the A380.

40. For these reasons, even if a counterfactual launch date had been established, it is not certain that any of the forms of adverse effects in any of the relevant product markets would have ceased at the time of that launch. Of course, the EU established no such thing. The compliance proceeding found that the subsidies cause significant lost sales and impedance in the VLA product market, and significant lost sales in the twin-aisle product market.

41. There are other ways in which the adverse effects caused by A380 LA/MSF and A350 XWB LA/MSF could dissipate. In particular, if generations of LCA passed and the technological knowledge, experience, and financial gains from the subsidies no longer bore a significant relationship with the LCA models being sold at that time, the effects could be found to have dissipated. Specifically, the compliance panel explained:

> Nevertheless, it is possible to envisage a number of different scenarios pursuant to which the "product-creating" effects of the pre-A350XWB LA/MSF subsidies might well come to an end. One such possibility could be through the launch of new *unsubsidized* models of Airbus LCA. The introduction of a new *unsubsidized* model of Airbus LCA would ensure that its market presence could not be attributable to the *direct effects* of LA/MSF. Yet because of the particular features of LCA production, it is highly unlikely that a new unsubsidized model of Airbus LCA could be launched today in the absence of the "learning", scope and financial effects associated with the LA/MSF subsidies provided for certain (but not necessarily all) previous models of LCA. Indeed, as already noted, it is undisputed that "learning" effects are fundamental to the very existence of any competitive LCA producer. However, were a *second* unsubsidized LCA model to be developed, it is possible that the *indirect effects* of the LA/MSF subsidies provided for the purpose of developing previous models of LCA would play a relatively minor role in its launch and bringing to market compared with the *first* unsubsidized new model of Airbus LCA. The impact of the same *indirect effects* on a *third* unsubsidized new model of Airbus LCA would be even smaller as its development would most likely be based on mainly the "learning", scope and financial effects generated from the *first* and *second unsubsidized* models of Airbus LCA.[48]

42. Finally, the United States recalls that these findings were adopted by the DSB and cannot be re-evaluated in this arbitration. Article 7.10 of the SCM Agreement requires the Arbitrator to

[48] Compliance Panel Report, para. 6.1529 (emphasis original).

determine whether the proposed countermeasures are commensurate with the degree and nature of the adverse effects determined to exist. It would therefore be improper to replace the degree and nature of the adverse effects determined to exist with new adverse effects findings. The EU is welcome to argue (again) that the adverse effects have dissipated. The United States is confident any such effort will fail (again). However, this is not the forum for those arguments.

CONCLUSION

43. Effective countermeasures are the last remaining hope to force the EU to reckon with the pernicious effects its LA/MSF subsidies cause, and hopefully achieve a solution to this longstanding failure to comply with its WTO obligations. For the United States, as with the DSU, these countermeasures are not the preferred option. But after 14 years of litigation, and ten years since the original panel findings against the EU, without a single, meaningful step by the EU to reform LA/MSF – and, in fact, a period in which the EU reinforced its WTO-inconsistent behavior by providing the latest and largest tranche of subsidized LA/MSF to date (and with no guarantee that it will not once again do the same) – this option is all that remains.

44. The EU's efforts to greatly expand the limited scope of this proceeding to evade the consequences of its WTO-inconsistent behavior for longer still, represent an attack on the very utility of dispute settlement at the WTO. Despite that the EU has provided these WTO-inconsistent LA/MSF subsidies to every single Airbus LCA program, and that the EU has taken zero meaningful steps to address these subsidies or the effects they cause, the EU seeks to avoid countermeasures commensurate with the degree and nature of the adverse effects determined by the WTO to exist. The EU tries to guarantee itself the right to continue its course of unabated, WTO-inconsistent subsidies with limited and ineffectual, if any, consequences. The EU therefore, in effect, seeks to have the Arbitrator declare that the WTO rules and dispute settlement system simply cannot deal effectively with the EU's massive subsidization of Airbus, or with subsidies of this nature in general.

45. But the EU is wrong. The DSB adopted reports twice, making clear that the EU's LA/MSF subsidies breach the EU's WTO obligations by causing massive adverse effects to the United States. The SCM Agreement and the DSU explicitly provide for the United States now to obtain authorization to impose countermeasures commensurate with the degree and nature of those adverse effects. To deny the United States that right would be to cement in perpetuity the imbalance imposed by the EU's subsidies. It is long past the appropriate time for the EU to argue about whether, or the extent to which, its subsidies cause adverse effects.

46. We must distinguish between so-called technical errors with the U.S. methodology alleged by the EU, and the EU's broader attempt to draw out and expand this proceeding far beyond its intended purpose. The EU may not like the potential consequences of the requested countermeasures. But they are unfortunately necessary to induce the EU to finally confront the economic pain its subsidies have caused for at least two decades – a burden the United States alone has shouldered for the duration of this long dispute. It is our hope that, consistent with the DSU and the parties' joint sequencing agreement, the "technical" disagreements can be

adjudicated relatively quickly, so that the balance of concessions can be restored and the EU is given appropriate additional incentive to pursue in earnest a lasting solution.