

***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)

WRITTEN SUBMISSION OF THE UNITED STATES

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Compliance Appellate Report	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS316/AB/RW and Add.1, adopted 28 May 2018
Compliance Panel Report	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS316/RW and Add.1, adopted 28 May 2018, as modified by Appellate Body Report WT/DS316/AB/RW
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<i>EC – Bananas III (Ecuador) (22.6)</i>	Decision by the Arbitrator, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS27/ARB/ECU, 24 March 2000
<i>EC – Large Civil Aircraft (AB)</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R
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<i>US – Continued Suspension (AB)</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008
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<i>US – Softwood Lumber IV (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004
<i>US – Tuna II (22.6)</i>	Decision by the Arbitrator, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 22.6 of the DSU by the United States</i> , WT/DS381/ARB, 25 April 2017
<i>US – Upland Cotton (22.6 I)</i>	Decision by the Arbitrator, <i>United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS267/ARB/1, 31 August 2009
<i>US – Upland Cotton (22.6 II)</i>	Decision by the Arbitrator, <i>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</i> , WT/DS267/ARB/2 and Corr.1, 31 August 2009

INTRODUCTION

1. Since the inception of this dispute 14 years ago, the European Union and its member States France, Germany, Spain, and the United Kingdom (referred to collectively for ease of reference as “the EU”), have caused adverse effects to U.S. interests through massive, subsidized financing in the form of LA/MSF¹ to Airbus, despite unambiguous evidence that these measures are WTO-inconsistent. Since December 2011, the EU has ignored the findings against it and attempted to avoid any repercussions for its WTO-inconsistent conduct. The EU’s written submission in this arbitration is more of the same, consisting mainly of attempts to ignore the many findings against LA/MSF or otherwise avoid accountability for the immense adverse effects that it causes to the interests of the United States.

2. The EU has provided subsidized financing unabated to every single Airbus family of large civil aircraft (“LCA”).² According to the findings adopted in the original proceeding, and subsequently in the first compliance proceeding, the EU’s ongoing subsidization of Airbus has been causing adverse effects since at least 2000.³

3. Previously, the EU claimed it had achieved compliance in late 2011 by taking no steps of any substance at all, but the United States disagreed with that claim. In January 2012, the EU and the United States entered into a sequencing agreement, which resulted in a nearly seven-year suspension of this arbitration, so that the EU’s claims of compliance could be evaluated. The sequencing agreement provided that if the EU were found to have failed to achieve compliance with the DSB’s recommendations and rulings, then the arbitration could proceed on the basis of those findings of inconsistency.

4. The DSB adopted findings that all of the EU’s so-called compliance steps amounted to no action at all with respect to LA/MSF subsidies.⁴ To make matters worse, the EU granted massive, new subsidized financing through LA/MSF to Airbus’s latest LCA family, the A350 XWB, causing further adverse effects to the U.S. LCA industry. The appellate report considered that the passage of time had rendered subsidies to Airbus LCA families prior to the A380 unactionable under Article 7.8 of the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”), despite the ongoing commercialization of prior aircraft families. It nonetheless recognized that LA/MSF for the A380 and A350 XWB – the most massive and most recent subsidized financing packages – continued to cause adverse effects after the end of the implementation period in 2011.

¹ “LA/MSF” stands for “Launch Aid/Member State Financing,” and is the term developed in the original proceeding to bridge the gap between the terms the United States and the EU had used for the main EU subsidies at issue here.

² See Original Appellate Report, para. 1414(e)(iv) (confirming LA/MSF subsidies to the A300, A310, A320, A330/A340, A330-200, A340-500/600, and A380); Compliance Appellate Report, para. 6.10 (confirming LA/MSF subsidies to the A350 XWB).

³ See Original Panel Report, paras. 7.1828, 7.1845, 8.2(d); Original Appellate Report, para. 1414(l),(m),(o),(p); Compliance Appellate Report, paras. 6.31, 6.37, 6.42-6.43.

⁴ See WT/DS316/35 (29 May 2018); Compliance Panel Report, para. 6.42.

5. The United States has long sought to resolve this matter on the basis of WTO rules. To that end, the United States is seeking a level of countermeasures that is “commensurate with the degree and nature of the adverse effects determined to exist” within the meaning of Article 7.9 of the SCM Agreement. As reflected in the U.S. Methodology Paper, the requested level of countermeasures adheres closely to the DSB-adopted adverse effects findings. The U.S. calculation accounts for the ongoing “product effects” of LA/MSF to the A380 and A350 XWB that are manifest in both lost sales that occur at the time of order *and* the distinct, additional harm of impedance that occurs when U.S. LCA deliveries are prevented from entering EU and third country markets. It also avoids unnecessary speculation, making it the most reliable indication available of the adverse effects that existing LA/MSF subsidies cause. The U.S. calculation presented the EU with yet another opportunity to engage seriously with the full measure of adverse effects that its WTO-inconsistent conduct causes. Regrettably, the EU persists in its old approach of seeking to avoid any accountability whatsoever.

6. Having argued unsuccessfully in the original proceeding and the first compliance proceeding that it was in full compliance with its WTO obligations, the EU – now for the third time – argues that its LA/MSF complies fully with WTO rules. And, despite that the whole point of the sequencing agreement was to allow the Arbitrator to take account of the first compliance proceeding’s conclusions as to compliance, the EU requests that the Arbitrator suspend this arbitration yet again, this time without the agreement of the United States. The EU’s approach is unfair given U.S. patience in seeking DSB authorization and would convert the WTO dispute settlement system into a means to avoid resolving disputes, rather than serving its “aim ... to secure a positive solution to the dispute.”⁵

7. If the EU is found by the second compliance panel for a third time to be in continued breach of its obligations, the EU’s logic would justify a fourth EU claim of compliance and a further delay in this arbitration. The EU’s arguments show no concern for the fact that the United States has suffered enormous adverse effects for at least 18 years now, and would continue to do so, with no opportunity for relief, as long as the EU continues to claim that, this time, its assertion of compliance is different.

8. The EU also seeks to evade accountability by ignoring the adopted findings regarding LA/MSF. In both the original and compliance proceedings, the DSB found that LA/MSF has caused adverse effects through its “product effects” – that is, by enabling the existence of products in the market that otherwise would not be present. Through this mechanism, LA/MSF has been found to cause adverse effects throughout the multi-year periods evaluated in both proceedings.⁶ Like the original findings, the compliance findings are clear – the U.S. LCA

⁵ DSU, Art. 3.7.

⁶ See Original Panel Report, paras. 7.1828, 7.1845, 8.2(d) ; Original Appellate Report, para. 1414(l),(m),(o),(p); Compliance Appellate Report, paras. 6.31, 6.37, 6.42-6.43

industry continues to suffer as Airbus continues to sell and deliver LCA that, absent the subsidies, would not be available for sale or delivery.

9. Yet, rather than recognize the import of these consistent findings, the EU's written submission adopts the pretense that the only adverse effects potentially occurring now and in the future are limited to aircraft ordered during the December 2011 – 2013 period that have not yet been delivered. In doing so it implicitly assumes a finding that has never been made – that LA/MSF will have no new effects on the United States after 2013. To the contrary, the adopted finding is 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.”⁷

10. Even in the realm of adverse effects based on the limited period that it considers relevant, the EU seeks to avoid accountability. Seizing on the fact that there is a lag between the order and delivery of an LCA, the EU argues that adverse effects in the form of significant lost sales must be valued according to deliveries rather than orders, and so any ordered aircraft that have already been delivered must be excluded from the calculation. This ignores the adopted findings that it is through the loss of the *order* that a lost sale arises in this industry. The value of the aircraft ordered is the tool used to *quantify* the extent of that adverse effect. The fact that some of the aircraft have already been delivered does nothing to reduce the value of the initial lost sale. Indeed, the findings that the subsidies *continue* to cause adverse effects after the implementation period signals that their effect is to continue to cause lost sales.

11. The EU's theory regarding deliveries suggests an attempt to shirk accountability to an even greater degree with respect to the impedance findings against it. Because impedance findings were based on deliveries during the December 2011 – 2013 period, there obviously are no outstanding deliveries. Therefore, according to the EU's theory, the impedance findings would seemingly warrant no countermeasures (and the EU has not discussed any).

12. The EU's attempts to avoid accountability do not end with these broader methodological arguments. They extend to the smallest details of the counterfactual scenarios. To take one glaring example, the EU argues that the Arbitrator should reduce the value of lost sales and impedance of VLA because in the counterfactual Boeing would face capacity constraints that would prevent it from supplying demand served in the real world by Airbus aircraft that would not be available absent LA/MSF subsidies.⁸ This asks the Arbitrator in essence to reverse the adopted findings that Boeing lost the orders in question and was impeded in the EU and third-

⁷ Compliance Appellate Report, paras. 6.31(a), 6.37(a) (emphasis added). With respect to impedance, the compliance appellate report similarly found that “the ‘*product effects*’ of the LA/MSF subsidies existing in the post-implementation period *are* a genuine and substantial cause of impedance of US LCA in the VLA markets in the markets in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates.” *Ibid.*, para. 5.742 (emphasis added).

⁸ See EU Written Submission, paras. 223-224, 300-305.

country markets. These were the findings, and the EU cannot properly disregard them in this way.

13. The EU’s approach in this arbitration also fails to honor the sequencing agreement it signed. It is difficult indeed to see how its arguments comport with its commitment to “cooperate to enable the arbitrator under Article 22.6 of the DSU to circulate its decision within 60 days of the date on which the suspension of its proceedings ends. . . .”⁹ Furthermore, the EU’s approach would eviscerate the very concept of using countermeasures to induce compliance with the DSB’s recommendations under Part III of the SCM Agreement.

14. As the United States explains in Section II below, the DSU, the SCM Agreement, and the sequencing agreement signed by the parties all support a swift arbitration focused on the extent of the countermeasures commensurate with the degree and nature of the adverse effects determined to exist. As discussed in Section IV, this is exactly the approach followed by the United States and explained in the U.S. methodology paper. Specifically, the United States calculated a straightforward, conservative estimate of the adverse effects determined to exist in the December 2011 – 2013 period. The United States then annualized these adverse effects and provided a simple formula to update the amount annually to keep pace with inflation. This was the correct approach.

15. When the EU finally turns to objections to the formula and inputs the United States used to value the adverse effects determined to exist, these most often take the form of a vague (and erroneous) criticism of the U.S. approach, followed by the suggestion of an alternative approach. The EU does not actually execute or fully explain these alternative approaches, but rather argues that the United States should do so. Nothing in the DSU or SCM Agreement requires the United States to undertake such efforts. Unless the EU can show that the extent of the countermeasures proposed by the United States is *not* commensurate with the adverse effects determined to exist – which it has failed to do – it has not met its burden, and proposed countermeasures should move forward. The United States remains hopeful that a swift process will finally result in the EU being held to account for the adverse effects of the massive subsidized financing it has conferred on Airbus; such a result appears to be the only hope to induce the EU to comply with the DSB’s recommendations – a key aim of the DSU and SCM Articles 7.9 and 7.10.

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

16. Pursuant to SCM Article 7.10, 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

⁹ *Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding and Article 7 of the SCM Agreement*, WT/DS316/21 (12 Jan. 2012), para. 7 (“Sequencing Agreement”).

features of something, especially when seen as characteristic of it.”¹⁰ 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.¹¹

17. Consistent with the ordinary meaning of commensurate as “corresponding in size or degree; in proportion,” the arbitrator in that dispute found that the “degree” of the adverse effects could be understood as a quantitative element, whereas the “nature” of the adverse effects seems to be more qualitative.¹² 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.¹³

18. The arbitrator in *US – Upland Cotton (22.6 II)* further found that “‘commensurate’ essentially connotes ‘correspondence’ between two elements,”¹⁴ 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’.”¹⁵ Thus, the arbitrator continued, “‘commensurate’ connotes a less precise degree of equivalence than exact numerical correspondence’.”¹⁶ 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.”¹⁷

19. 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 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.”¹⁸ 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

¹⁰ 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).

¹¹ See *US – Upland Cotton (22.6 II)*, paras. 4.20, 4.40-4.48.

¹² *US – Upland Cotton (22.6 II)*, para. 4.41.

¹³ See *US – Upland Cotton (22.6 II)*, paras. 4.88-4.89. See also *ibid.*, para. 4.43.

¹⁴ *US – Upland Cotton (22.6 II)*, para. 4.37.

¹⁵ *US – Upland Cotton (22.6 II)*, para. 4.39.

¹⁶ *US – Upland Cotton (22.6 II)*, para. 4.39.

¹⁷ *US – Upland Cotton (22.6 II)*, para. 4.50.

¹⁸ *US – Upland Cotton (22.6 II)*, para. 3.17.

DSB.¹⁹ 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.²⁰

20. 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.²¹

II. THE EU PRELIMINARY RULING REQUEST PROVIDES NO VALID REASON TO HALT THIS PROCEEDING SO THE EU CAN LITIGATE ITS LATEST CLAIMS OF COMPLIANCE.

A. Introduction

21. The EU, having been found to have used its LA/MSF subsidies to cause adverse effects to the U.S. large civil aircraft industry for (at least) the eighteen years since the beginning of the original reference period, now seeks an indeterminate delay of this arbitration so it can argue that last-minute alleged steps have removed either the benefit of its subsidies or the adverse effects they cause. We have already spent 14 years in this dispute – 14 years while the EU has caused adverse effects through its subsidies without any consequences. The only proper action at this stage is to move forward expeditiously with this arbitration of the amount of countermeasures that the United States may obtain authorization to apply “commensurate with the degree and nature of the adverse effects *determined to exist*.” That authorization will restore the balance of rights and obligations upset for so long by the EU’s relentless subsidization, until such time as the EU can either find a positive solution to the dispute with the United States or establish through an adopted finding of the DSB that it has come into compliance with its obligations.

22. Twice – in 2011 and 2018 – the DSB has adopted reports finding that the EU, through the use of its LA/MSF subsidies, is causing adverse effects to the interests of the United States, contrary to Articles 5 and 6.3 of the SCM Agreement. While the panels focused on evidence from reference periods of 2000-2006 and 2011-2013, they used the evidence to reach ultimate

¹⁹ See Compliance Appellate Report, paras. 6.43-6.44.

²⁰ Sequencing Agreement, para. 6

²¹ *US – COOL (22.6)*, para. 4.12.

findings that the EU *is* acting inconsistently with its obligations by presently causing adverse effects. As the EU itself acknowledges, the adoption of these findings by the DSB entitles the United States, pursuant to DSU Article 22.6 and Article 7.9 of the SCM Agreement, to request authorization to apply countermeasures commensurate with the degree and nature of the adverse effects determined to exist, thereby restoring the balance of rights and obligations upset by the EU's WTO-inconsistent subsidies.

23. The EU contends that immediately after issuance of the appellate report in the first compliance proceeding in May 2018, the relevant member States modified the terms of their LA/MSF to withdraw the subsidy or remove the adverse effects. The United States strongly disagrees that the EU has achieved compliance. The DSB, at the request of the EU, has established a second compliance panel to review the EU's claims of compliance. The EU notes that if the DSB adopts findings that the new measures have achieved full compliance with the covered agreements, the United States would no longer be entitled to apply its countermeasures. The parties do not dispute that the EU is entitled to have these assertions addressed through the dispute settlement system, or that the United States would no longer be entitled to apply WTO-approved countermeasures if the EU were at some point found by the DSB to be in compliance with its obligations.

24. Where the parties disagree is over how these considerations and the relevant provisions of the covered agreements affect the sequence in which the Arbitrator and the second compliance panel should conclude their work.

25. As an initial matter, it is useful to recall how we have arrived at this point. The DSB adopted its recommendations, finding that the EU subsidies were inconsistent with the SCM Agreement, on June 1, 2011, and the EU had six months to comply. The United States requested on December 9, 2011, authorization to impose countermeasures, and the EU objected to the level, referring the matter to arbitration on December 22, 2011. Accordingly, when this arbitration began, it was based on the DSB recommendations of June 11, 2011. The parties agreed on January 12, 2012, to a sequencing agreement that would permit the Arbitrator to take into account the DSB findings from the compliance proceeding. Neither the referral to arbitration nor the sequencing agreement provided for the Arbitrator to wait to further suspend the arbitration as a result of any additional compliance proceeding.

26. Furthermore, as a practical matter, the disagreement centers on which side bears the risk of uncertainty at this point as to whether the EU is in compliance with its WTO obligations. The DSU provides that during the pendency of an original panel proceeding, the responding party may leave the challenged measure in place, and the complaining party may impose no countermeasures. Thus, the complaining party bears the risk because if that measure is in fact WTO-inconsistent, it continues to nullify or impair benefits of the relevant covered agreement (or in the case of Part III of the SCM Agreement, cause adverse effects) to the complaining Member. The DSU provides further that a Member may not take countermeasures during the reasonable period of time ("RPT") to comply and any subsequent arbitration over the level of countermeasures.

27. Thus, if the responding Member fails to comply after the end of the RPT, the complaining Member continues to suffer the nullification and impairment or adverse effects. This was also true during the pendency of the first compliance proceeding in this dispute, due to the sequencing agreement here. Thus, the United States bore the risk of uncertainty as to the EU's WTO compliance through the end of the first compliance proceeding – a risk of harm that was confirmed to be actual harm by the adopted findings that the EU subsidies were causing adverse effects to U.S. interests throughout that time.

28. But the DSB has now found that the EU has failed to comply with the recommendations and rulings of the DSB, and the DSU provides that the DSB shall authorize countermeasures at the level determined by the Arbitrator. Under the DSU, the original complaining Member may keep its countermeasures in place until the parties agree a solution has been found, or the DSB finds that the original responding party has complied. If the original responding party claims to have taken new compliance measures, it is that party that bears the risks of uncertainty as to the WTO consistency of those measures, in that it remains subject to the countermeasures until its claims of compliance have been resolved.

29. The EU's preliminary ruling request proposes a different balance for situations covered by Article 7.8 of the SCM Agreement – that if the original responding party claims after the end of the initial compliance proceeding to have taken new compliance measures, an arbitrator may not determine the level of countermeasures until the end of a second compliance proceeding with regard to those alleged compliance measures. In fact, under the logic of the EU request, if the second compliance proceeding found against the EU, then the EU would be free to assert new claims of compliance that would again halt the arbitration, which commenced almost eight years ago, until a third compliance panel could act, and so on, *ad infinitum*.²² Such a result would negate entirely the United States' right under Article 7.9 of the SCM Agreement and DSU Article 22.6 to take countermeasures in response to the EU's failure to comply with the recommendations and rulings of the DSB. It would also vitiate the agreed view that “this temporary nature indicates that it is the purpose of countermeasures to *induce compliance*.”²³

30. The covered agreements do not require the Arbitrator to halt its work every time that the EU asserts that it has taken steps to comply with the DSB recommendations. Nor have any of the arbitrators' decisions cited by the EU taken such an approach. Rather, since the EU has been found to have acted inconsistently with its WTO obligations, and then found to have failed to comply with the recommendations and rulings of the DSB, the Arbitrator should move expeditiously to determine the level of countermeasures commensurate with the degree and nature of the adverse effects determined to exist. The second compliance panel will address the EU's subsequent claims of compliance.

²² Such a result has been decried by Members as producing an “endless loop of litigation.” *See, e.g.*, Minutes of the DSB Meeting of May 22, 2017 (WT/DSB/M/397), paras. 7.4, 7.21.

²³ *US – Upland Cotton* (22.6), para. 4.59 (emphasis added).

31. It is also important to note that the parties recognized at the beginning of this proceeding that adopted findings regarding compliance might affect the outcome of the arbitration. They entered into a sequencing agreement on January 12, 2012²⁴ to request the Arbitrator to suspend this arbitration until, following a proceeding under DSU Article 21.5, the DSB found that a measure taken to comply does not exist or is inconsistent with a covered agreement, and either party requested that the arbitration resume. As part of that agreement, the EU committed to “cooperate to enable the Arbitrator to circulate its decision within 60 days of the date on which the suspension of its proceedings ends.” The EU’s request in this proceeding (and in the second compliance proceeding) does not comport with that commitment. Moreover, as the parties were certainly aware of the *possibility* that the EU would claim to have taken further measures to comply in response to findings against it in the first compliance proceeding, the sequencing agreement’s provisions can only be read as calling for the arbitration to move forward without regard to subsequent claims of compliance or other proceedings commenced to address those claims.

32. It is noteworthy that the concerns the EU has raised in its preliminary ruling request were not ones that the EU has agreed with in the past. For instance, in a past dispute where there were ongoing compliance proceedings and an arbitration under Article 22.6, the EU did not advocate delaying authorizing the suspension of concessions. Instead, “the EU said that it would expect all parties to act in good faith with a view to reaching agreement. If agreement was impossible, and in view of the ongoing second compliance procedures, the EU said that it would expect both parties to cooperate in order to obtain a rapid adjudication, and to consider in good faith the impact of these ongoing procedures on retaliation.”²⁵

33. Finally, before moving to the detailed analysis, it is important to be clear on terminology. Although the EU most frequently frames its request in terms of “coordinating” with the second compliance panel, in substance it asks the Arbitrator to “await the outcome of the second compliance panel proceedings, before determining whether the United States should receive authorisation to take countermeasures.”²⁶ The key word here is “await.” The history of aircraft proceedings at the WTO suggests that the second compliance proceeding, including any possibility of appeal, will take a number of years before achieving an “outcome,” and the EU provides no reason to think otherwise. Arbitrations under DSU Article 22.6 have typically moved much faster than original panel or compliance proceedings, and the EU provides no reason to consider otherwise for this proceeding. Thus, the “coordination” requested by the EU in actuality involves the Arbitrator putting its work on hold for several more years until the end of the second compliance proceeding (at least).

²⁴ Sequencing Agreement (WT/DS316/21).

²⁵ Minutes of the May 22, 2017 DSB Meeting (WT/DSB/M/397), para. 7.20.

²⁶ EU Preliminary Ruling Request, para. 74 (“EU PRR”).

34. For clarity, this analysis dispenses with the euphemisms and calls the EU request what it is – a request that the Arbitrator halt its work. Nevertheless, it is worth noting that even slowing down the arbitration to accommodate deadlines in the second compliance proceeding would be inconsistent with the parties’ joint commitment “to cooperate to enable the Arbitrator to circulate its decision within 60 days of the date on which the suspension of its proceedings ends.”

B. The DSU and SCM Agreement Do Not Require the Arbitrator to Halt Its Work Until the Second Compliance Panel Resolves the EU Claims to Have Complied.

35. Neither the DSU nor the SCM Agreement dictates that the Arbitrator should “await the outcome of the second compliance proceedings, before determining whether the United States should receive authorisation to take countermeasures.”²⁷ In fact, at no point do they suggest that, despite the DSB findings of inconsistencies with Articles 5 and 6.3 of the SCM Agreement, the Arbitrator should halt its work pending the outcome of the second compliance proceeding.

1. *The relevant provisions of the DSU and SCM do not require an arbitrator to halt its work until the completion of a separate proceeding to evaluate a responding party’s subsequent claims to have complied with the recommendations and rulings of the DSB.*

36. As this proceeding is under DSU Article 22.6, the analysis begins with its requirement that:

if the Member concerned objects to the level of suspension proposed . . . the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator {footnote omitted} appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

The triggering language refers to earlier provisions permitting a Member to request authorization to take countermeasures in response to another Member’s failure to comply with its obligations under the covered agreements, making clear that an arbitration *follows* a proceeding that resulted in that finding. However, it does not make the arbitration subsidiary to or dependent on other proceedings arising in the dispute.

37. DSU Article 22.7 further specifies that the arbitrator “shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment.” The reference to “nullification or impairment” creates a linkage to the situation mentioned in Article 22.3(a) and 22.3(d)(i) in which “the panel or Appellate Body has found violation or other nullification or

²⁷ EU PRR, para. 74.

impairment.” In these provisions, the use of the present perfect “has found” indicates an act that is complete as of the time in question, in this case the finding of a “violation” of Articles 5 and 6.3 made in a report adopted by the DSB.

38. As this arbitration is based on the WTO’s adopted findings that the EU breached its obligations under Articles 5 and 6.3 of the SCM Agreement, Articles 7.2 through 7.10 of the SCM Agreement also apply directly to the Arbitrator’s analysis. DSU Appendix 2 lists these provisions as “special or additional rules and procedures contained in the covered agreements.” DSU Article 1.2 provides that DSU Articles 22.6 and 22.7 apply “subject to such additional rules and procedures.” In the event of a difference between the two sets of rules, “the special or additional rules and procedures in Appendix 2 shall prevail.”

39. Article 7.10 of the SCM Agreement states that:

In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.”

For purposes of evaluating the EU’s preliminary ruling request in this proceeding, a key phrase is in the instruction to focus on “the adverse effects . . . determined to exist.” The use of the past tense and the verb “determine” points the Arbitrator directly to what has already been found to be the case.

40. Articles 7.8 and 7.9 of the SCM Agreement state further that:

7.8 *Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.*

7.9 In the event the Member has not taken appropriate steps to remove the *adverse effects* of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, *commensurate with the degree and nature of the adverse effects determined to exist*, unless the DSB decides by consensus to reject the request.

These provisions make clear that the adverse effects that form the basis of the Arbitrator’s decision under Article 22.6 are those “determined to exist” by the DSB. In each instance, the verb “determine” is in the past tense, driving home that the focus is on what has already been determined prior to the time the Arbitrator makes its evaluation.

41. The overall structure and content of the SCM Agreement and the DSU support an interpretation of Article 7.10 that would allow, and even encourage, an arbitral award based on previous adopted findings instead of a halt in proceedings to allow another evaluation. The SCM Agreement contains what Members considered to be more precise and effective rules for limiting trade-distorting subsidization, including subsidization causing adverse effects to the interests of other Members.²⁸

42. The “disciplines on subsidies” include Articles 5, 6.3, and 7.8. Interpreting Article 7.10 to allow the imposition of countermeasures in response to the adopted findings that the EU acted inconsistently with all of these provisions is clearly consistent with all of these articulations of the object and purpose of the SCM Agreement. Requiring the Arbitrator to wait for yet another evaluation of the EU’s actions in a separate proceeding would not.

43. The DSU does not contain a preamble. However, Article 3.7 sets out explicitly that the “aim of the dispute settlement mechanism is to secure a positive solution to the dispute”. Other provisions reinforce this aim. Article 3.2 provides in part that:

The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

In a similar vein, DSU Article 3.3 provides that:

The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

Interpreting Article 7.10 of the SCM Agreement to make completion of an arbitration contingent on potentially limitless claims of compliance (an “endless loop of litigation”) would directly conflict with the objectives of preserving the rights of the United States to relief in response to

²⁸ See *US – Carbon Steel (AB)*, para. 73 (“{T}he main object and purpose of the SCM Agreement is to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures.”); *US – Softwood Lumber IV (AB)*, para. 64 (“{T}he object and purpose of the SCM Agreement, which is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions.”); *US – CVDs on DRAMs (AB)*, para. 115 (“{T}he SCM Agreement . . . reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures.”).

adopted findings against the EU and of obtaining a positive solution and prompt settlement to a dispute.

44. The United States emphasizes that nothing in these provisions can be read to require a halt in the Arbitrator’s work, especially in light of the requirement under Article 22.6 that the arbitration be completed within 60 days. In addition, the fact that Article 7.10 instructs an arbitrator to rely on adverse effects determined in the past to set the level of countermeasures in the present indicates that the possibility that the situation evolved after that determination does not preclude the arbitrator from completing its work.

2. *The arguments advanced by the EU do not justify its request that the Arbitrator should halt its work.*

45. The EU purports to ground its request in the ordinary meaning of DSU Article 22.6 and Article 7.10 of the SCM Agreement, their context, and the object and purpose of the DSU and SCM Agreement. However, none of its arguments provide a valid reason for the Arbitrator to halt its work.

a. Ordinary meaning

46. The EU’s analysis of the ordinary meaning of DSU Article 22.6 and Article 7.10 of the SCM Agreement does not discuss the significance of the reference to “the adverse effects determined to exist,” or the timing of the relevant determination. Instead, the EU sees those two provisions and their companions in DSU Article 22.2 and Article 7.9 of the SCM Agreement as creating two different “rights”: “the right to request countermeasures” and “the right to authorise countermeasures.”²⁹ In its reading, the “right to request” is triggered by the responding party’s failure to achieve compliance by the end of the implementation period, but the text is “silent on whether the right to authorise countermeasures exists if, following the end of the implementation period, the responding Member has achieved compliance.”³⁰ The distinction is specious. Under Articles 7.9 and 7.10, authorization to take countermeasures is not a separate “right.” It is an action taken by the DSB in response to the request for authorization, which the DSB “shall grant . . . where the request is consistent with the decision of the arbitrator,” unless the DSB decides by positive consensus to reject the request.

b. Context from the DSU

47. The EU attempts to find support for its preliminary ruling request in the statement in DSU Article 22.8 that “{t}he suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered

²⁹ EU PRR, para. 33.

³⁰ EU PRR, para. 33 (underlining and italics original).

agreement has been removed.” It argues that this means that “if the European Union has achieved compliance, the right to authorise countermeasures no longer exists.”³¹

48. Whether characterized (incorrectly) as the “right to authorize countermeasures” or (correctly) as the authorization to suspend concessions or other obligations, what matters under Article 22.8 is not the *assertion* of compliance (as the EU has made here) but a *finding* of compliance adopted by the DSB (which the EU has not obtained). The plain text of Article 22.8 was understood by both the panel and the Appellate Body to support this crucial distinction in *US – Continued Suspension*:

In terms of the first condition in Article 22.8, therefore, the application of the suspension of concessions may continue until the removal of the measure found by the DSB to be inconsistent results in substantive compliance. If a disagreement arises as to whether substantive compliance is achieved, the fulfilment of the first condition in Article 22.8 cannot be confirmed unless the disagreement is resolved through multilateral dispute settlement. Thus, *the suspension of concessions continues to apply pending the outcome of the dispute settlement proceedings concerning the first resolute condition in Article 22.8*. If, by recourse to a multilateral dispute settlement process, the implementing measure is found to bring about substantive compliance, the suspension of concessions may no longer be applied pursuant to the first condition in Article 22.8 and cessation of the suspension is required.³²

49. In that dispute, the United States had received authorization to suspend concessions in response to the EU’s failure to remove a WTO-inconsistent measure. The EU subsequently claimed it had complied, but the United States and Canada disagreed. When the United States declined to rescind its suspension of concession, the EU brought a new dispute claiming that the United States had breached DSU Article 22.8 by continuing to suspend concessions after the EU claimed compliance. In rejecting this claim, the panel and the Appellate Body found that an initial finding of WTO inconsistency *does* support the suspension of concessions even if the responding party claims to have complied, and that termination of the suspension of concessions is required only upon a DSB-adopted finding of compliance.

50. Although the facts of, and provisions applicable to, this proceeding are different, the same logic applies. The fact that the EU *claims* to have complied does not trigger the condition in Article 22.8. Indeed, the arbitrator in *US – Tuna* (22.6) observed:

Thus, just as a statement by a Member that it has come into compliance does not cause the expiry of an existing DSB authorization to suspend concessions (see

³¹ EU PRR, para. 38,

³² *US – Continued Suspension (AB)*, para. 306 (emphasis added).

Appellate Body Report, *US – Continued Suspension*, para. 317), so also such a statement would not affect the continued validity of DSB recommendations and ruling concerning the WTO-inconsistency of a measure taken to comply.³³

Therefore, that provision does not preclude the application of countermeasures, and any countermeasures authorized by the DSB could properly continue until adoption of a finding of compliance.

c. Context from Part III of the SCM Agreement

51. The contextual portion of the EU argument errs in two ways. First, it puts forward as “context” an erroneous conceptual framework in which an evaluation of the negative effects of challenged measures is relevant only to claims under Articles 5 and 6.3 of the SCM Agreement, and irrelevant to claims under other provisions of the covered agreements.³⁴ But this is not the case. Second, it uses this faulty framework not to inform the interpretation of the relevant treaty provisions, DSU Article 22.6 and Article 7.8 of the SCM Agreement, but instead to disregard the requirement in Article 7.8 that the countermeasures be commensurate with the adverse effects determined to exist.³⁵

52. The EU devotes the bulk of its argument to constructing a conceptual framework differentiating Part III of the SCM Agreement from other provisions of the covered agreements on the grounds that Part III requires a finding of both a subsidy and “adverse effects,” while other provisions require only a finding of inconsistency, with “adverse impact” presumed by operation of DSU Article 3.³⁶ But these foundational premises are incorrect. It is not the case that the negative effects of a measure play no role in evaluating compliance with provisions outside of Part III of the SCM Agreement. To take two prominent examples, establishing an inconsistency with the national treatment commitments in GATT 1994 Article III or GATS Article XVII requires a showing that a measure accords less favorable treatment by modifying the conditions of competition to the *detriment* of goods or services of another Member.³⁷

³³ *US – Tuna II (22.6)*, note 70.

³⁴ EU PRR, paras. 41 and 42.

³⁵ EU PRR, paras. 47-51.

³⁶ EU PRR, paras. 41-45.

³⁷ *Korea – Various Measures on Beef (AB)*, para. 137 (“Whether or not imported products are treated ‘less favourably’ than like domestic products should be assessed instead by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.”); *Argentina – Financial Services (AB)*, para. 6.103 “while Article XVII:3 refers to the modification of conditions of competition in favour of domestic services or service suppliers, the legal standard set out in Article XVII:3 calls for an examination of whether a measure modifies the conditions of competition to the detriment of services or service suppliers of any other Member. Less favourable treatment of foreign services or service suppliers and more favourable treatment of like domestic services or service suppliers are flip-sides of the same coin.”).

53. The EU also errs in arguing that the context of Part III could act to supplant the ordinary meaning of Article 7.10 of the SCM Agreement. As explained in Section II.B.1, Article 7.10 explicitly envisages an arbitral award based on adverse effects determined to exist in a *prior* report adopted by the DSB. Assuming *arguendo* that Part III differed from other disciplines in the ways alleged by the EU, it provides no basis to conclude that this supposed context compels an interpretation of Article 7.10 to prohibit what it clearly allows – reliance by an arbitrator on the adverse effects determined to exist in an earlier proceeding.

d. Object and purpose

54. The EU’s analysis does not mention the object and purpose of the SCM Agreement, or the DSU’s statements regarding preservation of the rights of Members and the prompt settlement of disputes. It focuses instead on past arbitrators’ findings that the purpose of countermeasures is to induce compliance, and in particular on the arbitrator’s statement in *US – Upland Cotton (22.6 II)* that:

countermeasures under Article 7.9 of the SCM Agreement constitute temporary measures taken in response to a continued breach of the obligations of the Member concerned, and pending full compliance with the recommendations and rulings of the DSB.³⁸

The EU then returns to its recurrent theme – that if its most recent steps achieved compliance “there remains no basis to authorise countermeasures.”³⁹ It moves on to assert that in such a situation, the countermeasures would be a retrospective remedy of past adverse effects inflicted by the EU, rather than ongoing effects.

55. These statements ignore that the converse is also true. If the Arbitrator declines to determine the level of countermeasures and the second compliance proceeding rejects the EU’s most recent claims of compliance, the Arbitrator will have denied the United States’ right to suspend concessions to restore the balance of rights and obligations upset by the EU’s ongoing WTO-inconsistent subsidization. The EU will continue to cause adverse effects to the United States through the use of the LA/MSF subsidies despite the existence of *two sets* of adopted panel and appellate findings.

56. These observations expose the central fallacy of the EU’s preliminary ruling request – that the EU *claims* to have complied outweigh the adopted *findings* that it has not complied. They do not. As the Appellate Body observed in *US – Continued Suspension*:

To allow the suspension of concessions to expire as a result of the application of a presumption of good faith with respect to a unilateral declaration of compliance

³⁸ *US – Cotton (22.6 – US II)*, para. 4.59, *quoted in* EU PRR, para. 54..

³⁹ EU PRR, para. 55.

would create an imbalance between the rights and obligations of the complainants and the respondents enshrined in the DSU and would undermine the effectiveness of the dispute settlement mechanism in providing security and predictability.⁴⁰

57. While this passage addresses the termination of an already authorized suspension, the same logic applies to a proposal to halt the ongoing arbitration in this dispute. There has been a “long process of multilateral dispute settlement” with multiple decisions by the “relevant adjudicative bodies” regarding the EU’s ongoing WTO-inconsistent subsidies. To stop the process at this late stage to await the outcome of yet another adjudication of the EU’s claims of compliance would truly “create an imbalance between the rights and obligations of the complainants and respondents.”

C. Granting the EU’s Request Would Allow it to Recommence and Prolong the Suspension of this Arbitration, which would be Inconsistent with the Sequencing Agreement and the Terms of the Arbitrator’s 2012 Decision to Grant the Suspension.

58. The parties entered into the sequencing agreement explicitly “to facilitate the resolution of the dispute and reduce the scope for procedural disputes.”⁴¹ The agreement contains a number of provisions in which the parties commit to complete procedural steps within periods shorter than the maximums set out in the DSU and SCM Agreement. In other provisions, the parties committed to cooperate to complete procedural steps within the tight timeframes set out in the DSU. In a communication dated February 2, 2012, the Arbitrator issued a communication referencing the sequencing agreement, and stating: “{i}n accordance with the parties’ joint request, the Arbitrator has suspended the arbitration proceedings from 20 January 2012 until either party requests their resumption.”⁴²

59. The sequencing agreement contained the following provisions regarding this proceeding:

6. The United States has requested the DSB to authorize countermeasures pursuant to Article 22.2 of the DSU and Article 7.9 of the SCM Agreement. As the matter has been referred to arbitration, the United States and the EU shall request the arbitrator to suspend that proceeding. In the event that the DSB following a proceeding under Article 21.5 of the DSU rules that a measure taken to comply does not exist or is inconsistent with a covered agreement, either party may request the Article 22.6 arbitrator to resume its work.

⁴⁰ *US – Continued Suspension (AB)*, para. 317.

⁴¹ Sequencing Agreement, preamble.

⁴² WT/DS316/22 (2 Feb. 2012).

7. The parties will cooperate to enable the arbitrator under Article 22.6 of the DSU to circulate its decision within 60 days of the date on which the suspension of its proceedings ends under paragraph 6.

Thus, there were two conditions for the termination of the suspension of this arbitration: that the DSB adopt findings that a measure to comply does not exist or is inconsistent with a covered agreement (which occurred on May 28, 2018) and that one of the parties request the arbitrator to resume its work (which the United States did on July 13, 2018).

60. The agreement did not provide for the suspension to last longer than the period set out in paragraph 6, or for other acts of the parties to recommence the suspension unilaterally. Yet, by asking the Arbitrator to halt its proceedings, the EU's preliminary ruling request in substance does exactly that. The EU's action is particularly egregious because, after getting the benefit of the sequencing agreement in the form of a nearly seven-year delay, the EU goes back on its commitment to "cooperate to enable the arbitrator under Article 22.6 of the DSU to circulate its decision within 60 days of the date on which the suspension of its proceedings ends under paragraph 6,"⁴³ which fell on September 11, 2018. The United States considers that these facts provide yet more strong reasons that the Arbitrator should move forward with its work expeditiously, and should not grant the EU's request to halt these proceedings.

D. The Findings of Past Arbitrators do Not Support Halting an Arbitration to "Await" the Outcome of a Second Compliance Proceeding.

61. The findings of past arbitrators address a number of factual and procedural situations that influence their decisions as to what issues to address and when to address them. The most recent Article 22.6 arbitration, in *US – Tuna II*, presents the factual and procedural situation most analogous to this proceeding, and confirms that the Arbitrator should not halt its work to await the final results of the second compliance proceeding.

62. Prior to the Tuna arbitration, the DSB found that the U.S. regime for labeling tuna products was inconsistent with Article 2.1 of the TBT Agreement. The United States adopted a new measure, which the arbitrator called the "2013 Tuna Measure," to comply with the recommendations of the DSB. Mexico commenced a compliance proceeding, which resulted in the DSB finding that the new measure failed to bring the United States into compliance. Mexico requested authorization to impose countermeasures. The United States then amended the 2013 Tuna Measure with what the Arbitrator called the "2016 Tuna Measure,"⁴⁴ which in the U.S. view resulted in full compliance with the DSB findings. The United States subsequently referred the matter to arbitration under Article 22.6.⁴⁵ The United States made a preliminary ruling

⁴³ WT/DS316/38 (19 July 2018).

⁴⁴ *US – Tuna II* (22.6), para. 3.2.

⁴⁵ *US – Tuna II* (22.6), para. 1.5.

request asking the arbitrator to find that the 2016 Tuna Measure was the relevant measure for determining the level of suspension of concessions, rather than the 2013 Tuna Measure.

63. The arbitrator rejected that request. The arbitrator found that, reading DSU Articles 22.2 and 22.6,

{i}t is therefore the continued WTO-inconsistency of the original or a compliance measure (where a compliance measure was taken within the RPT) at the time the RPT expires that forms the basis for any request for authorization to suspend concessions. In turn, a request for authorization to suspend concessions typically triggers a request for arbitration under Article 22.6. There is thus a close connection between an Article 22.6 arbitration and the WTO-inconsistent original measure, or a WTO-inconsistent compliance measure, which existed at the time of expiry of the RPT.⁴⁶

The arbitrator found support for this conclusion in references to the level of nullification or impairment in DSU Article 22.4, which in its view “by implication refers to the original or a compliance measure that existed at the time of expiry of the RPT.”⁴⁷ It also cited the reference in Article 22.3(a) to the situation that “the panel or Appellate Body has found a violation or other nullification or impairment.”⁴⁸

64. The arbitrator concluded that, based on these considerations,

when read in the light of its context, the text of Article 22.6 of the DSU mandates an arbitrator to assess the level of nullification or impairment caused by the WTO inconsistent original measure (where no compliance measure was subsequently taken), or a subsequent WTO-inconsistent compliance measure, that was in existence at the time of expiry of the RPT. *This measure may or may not be the most recent version of the relevant measure.*⁴⁹

To state the obvious, if an arbitrator need not consider the effects of “the most recent version of the relevant measure” in the arbitration, it does not need to halt the arbitration to await the final results of another proceeding with regard to that measure.

65. Recognizing that this reasoning weighs against its interpretation of the arbitrator’s duties,⁵⁰ the EU seeks to distinguish the result because “{t}he circumstances of the present case

⁴⁶ *US – Tuna II* (22.6), para. 3.20.

⁴⁷ *US – Tuna II* (22.6), para. 3.21.

⁴⁸ *US – Tuna II* (22.6), para. 3.22.

⁴⁹ *US – Tuna II* (22.6), para. 3.24 (emphasis added).

⁵⁰ EU PRR, para. 59.

are markedly different.”⁵¹ As noted above, the differences weigh against the EU. For instance, here the arbitration commenced years before the EU’s latest claims of compliance. In *Tuna*, the measures taken to comply (2016 Tuna Measure) that were at issue were taken before the matter was referred to arbitration. Also, as explained below, the provisions of the covered agreements governing the arbitration differ in a manner that contradicts the EU’s arguments. The only “difference” that the EU identifies is that this proceeding involves an inconsistency with Articles 5 and 6.3 of the SCM Agreement, and *US – Tuna II* (22.6) addressed an inconsistency with another covered agreement.

66. Moreover, the reasoning of the *US – Tuna II* arbitrator applies with even greater force in proceedings under Part III. Article 7.8 applies “{w}here a panel report or an Appellate Body report is adopted in which it is *determined* that any subsidy has resulted in *adverse effects*.” Article 7.9 provides that, in response to a failure to comply, “the DSB shall grant authorization to the complaining Member to take countermeasures commensurate with the degree and nature of the *adverse effects determined to exist*.” If the responding party objects to the level of proposed countermeasures, Article 7.10 instructs the arbitrator to “determine whether the countermeasures are commensurate with the degree and nature of the *adverse effects determined to exist*.” Thus, there is no need to reason “by implication” as the *US – Tuna II* arbitrator did with respect to Article 22.6 and its context in the DSU. Part III of the SCM Agreement is *explicit* as to the relationship of the arbitration to “the WTO inconsistent original measure . . . or a subsequent WTO-inconsistent compliance measure.” The countermeasures must relate to the adverse effects *determined* in the most recent proceeding to be inconsistent with the SCM Agreement, and not an alleged more recent version of the measure.

67. The EU cites other arbitral reports, but they also do not support its views. The EU gives pride of place to the results of the *EC – Bananas III (US)* arbitration. However, the *US – Tuna II* arbitrator rejected similar arguments with reasoning directly applicable to the situation faced by this Arbitrator:

unlike in *EC – Bananas III*, the DSB in this case has already determined that the measure taken by the United States to comply (the 2013 Tuna Measure) is WTO-inconsistent. Because of these existing adverse DSB recommendations and rulings, the issue does not arise in this case whether as arbitrators acting under Article 22.6 we could and should undertake our own evaluation of the WTO-consistency of the 2013 Tuna Measure. Further, there are (as yet) no overriding panel and/or Appellate Body findings that have been adopted by the DSB, or a notified mutually agreed solution, concerning the 2016 Tuna Measure that could have affected the continued validity of the adverse DSB recommendations and rulings concerning the 2013 Tuna Measure. We therefore conclude that the

⁵¹ EU PRR, para. 68.

arbitrator's decision in *EC – Bananas III* does not support the United States' view that we should base our assessment on the 2016 Tuna Measure.⁵²

As these observations are equally true of pre-June-2018 LA/MSF and the EU's latest alleged compliance steps, the result in *EC – Bananas III* does not support the EU view that the Arbitrator should halt its work to await the second compliance panel's assessment of the latest measures.

68. The EU also seeks to find support in the *US – Upland Cotton* arbitrator's decision to deny countermeasures for the U.S. Step 2 program, which the United States had revoked after the end of the RPT but before the establishment of the compliance panel. However, in that instance, the complaining party had asked for a finding of noncompliance with respect to the Step 2 payments, but the compliance panel declined because the measure did not exist at the time of the panel's establishment. As the arbitrator explained:

There has therefore been no multilateral determination that the United States has failed to comply with the recommendations and rulings of the DSB in respect of Step 2, despite a specific request by Brazil to make such findings precisely with respect to the same past period of time in relation to which it now seeks to be authorized to take countermeasures.⁵³

In contrast, there *have* been multilateral findings that existing LA/MSF causes adverse effects to the United States in breach of the SCM Agreement. The *US – Upland Cotton* arbitrator's treatment of Step 2 payments is accordingly inapplicable to the EU request.

69. The EU also cites the *Brazil – Aircraft* arbitration. The *US – Tuna II* arbitrator also addressed and rejected a similar argument, finding:

We agree with Mexico that the facts in *Brazil – Aircraft* were similar to those in *EC – Bananas III*, inasmuch as there were no existing adverse DSB recommendations and rulings pursuant to Article 21.5 at the time the arbitrator began its work. There were therefore no existing recommendations and rulings on whether the responding party had failed to bring its measure into compliance before the expiry of the RPT, which failure, as we have explained above, is the event that allows the complaining party to have recourse to the procedures in Article 22 of the DSU.⁵⁴

In short, an arbitrator's decision that it would consider a compliance panel's findings concerning a responding party's claims of compliance does not justify an arbitrator's decision to halt an

⁵² *US – Tuna II* (22.6), para. 3.36.

⁵³ *US – Upland Cotton* (22.6), para. 3.42.

⁵⁴ *US – Tuna II* (22.6), para. 45.

arbitration proceeding when the responding party's initial claim of compliance has failed, the DSB has adopted findings of WTO inconsistency in the post-implementation period, and the responding party has commenced a second compliance proceeding.

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

70. 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.”⁵⁵ At the time the Arbitrator resumed its work on July 17, 2018,⁵⁶ 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.

71. In its written submission, the EU argues that the U.S. “estimate{ }”⁵⁷ in its 2011 request for authorization of \$7-10 billion “{b}ased on currently available data in a recent period,”⁵⁸ 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’.”⁵⁹ 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’.”⁶⁰ The EU’s argument is meritless.

72. The EU’s reasoning ignores a significant part of the U.S. request. The U.S. request for countermeasures describes them in the following terms:

{T}he United States requests authorization from the Dispute Settlement Body (“DSB”) to take countermeasures with respect to the European Union (“EU”) *at*

⁵⁵ WT/DS316/18, p. 2 (12 Dec. 2011).

⁵⁶ WT/DS316/38 (19 July 2018).

⁵⁷ WT/DS316/18, p. 2 (12 Dec. 2011).

⁵⁸ WT/DS316/18, p. 2 (12 Dec. 2011).

⁵⁹ EU Written Submission, para. 86 (*quoting EC – Bananas (22.6 – Ecuador)*, para. 24 (emphasis added by EU)).

⁶⁰ EU Written Submission, para. 86 (*quoting EC – Bananas (22.6 – Ecuador)*, para. 24).

an annual level commensurate with the degree and nature of the adverse effects caused to the interests of the United States by the failure of the EU and certain member States to withdraw subsidies or remove their adverse effects in compliance with the recommendations and rulings of the DSB. This amount corresponds to the annual value of lost sales, of imports of US large civil aircraft displaced from the EU market, and of exports of US large civil aircraft displaced from third country markets. The amount will be updated annually using the most recent publicly available data. ***Based on currently available data in a recent period***, the United States *estimates* this figure to be between \$7 and \$10 billion per year.⁶¹

73. The U.S. request for countermeasures subsequently explains:

In considering what countermeasures to take, the United States followed the principles and procedures set forth in Article 22.3 of the DSU. As required by Article 7.9 of the SCM Agreement, the countermeasures are commensurate on an annual basis with the degree and nature of the adverse effects determined to exist.⁶²

74. Thus, 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.”⁶³ This point is further underscored by the indication that the United States would update the figure annually using the most recent publicly available data.

75. 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

⁶¹ WT/DS316/18, p. 1 (12 Dec. 2011) (footnote omitted).

⁶² WT/DS316/18, p. 2 (12 Dec. 2011).

⁶³ The EU states that “{e}ven if the United States had not requested application of a formula taking into account changes in the PPI, the recurring amount of countermeasures calculated by the United States for 2013 (*i.e.*, USD 10.56 billion) would similarly have been above the ceiling set by the United States in its Article 22.2 request.” EU written submission, para. 84. This assertion misses the point. Prices in the LCA industry typically increase over time. Aircraft estimated as worth USD 7-10 billion “{b}ased on currently available data in a recent period” on December 7, 2011, would have been worth USD 7.4 – 10.5 in calendar year 2013. (Calculated using average PPI of 243.3 for January-October 2011 and 256.3 for calendar year 2013. PPI Industry Data File for Aircraft Manufacturing – Civilian Aircraft, Not Seasonally Adjusted (Jan. 1986-July 2018), Producer Price Indexes – Program Overview, U.S. Department of Labor, Bureau of Labor Statistics (Exhibit USA-21).) Thus, the estimated value of countermeasures in 2013 dollars is in line with the estimated value as of December 2011.

DSB.⁶⁴ In doing so, they evinced the clear intention that the results of that report would inform the work of the Arbitrator.⁶⁵ 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.⁶⁶

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

76. The U.S. countermeasures, detailed in the U.S. methodology paper, 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.

77. 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 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.

78. 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 adverse effects that provides the basis for countermeasures.⁶⁷ 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.

⁶⁴ Sequencing Agreement, para. 6.

⁶⁵ 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.

⁶⁶ *Cf.* EU Written Submission, para. 85.

⁶⁷ *See* SCM Agreement, Art. 7.9.

79. 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.

80. 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).⁶⁸

81. As the DSB found, LA/MSF causes “product effects;” that is, it enables Airbus to launch and bring to market new LCA models.⁶⁹ 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.⁷⁰ 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.”⁷¹ LA/MSF subsidies to one aircraft program also have been found to enable Airbus to build on the competitive advantages from LA/MSF subsidies,⁷² and further, to provide Airbus with technologies, experience, and financial benefits that make it easier to bring to market subsequent new LCA models, which the compliance appellate report recognized as “indirect effects.”⁷³

82. 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.⁷⁴ Given these adopted findings, the existing LA/MSF

⁶⁸ WT/DS316/35 (29 May 2018).

⁶⁹ Compliance Appellate Report, para. 5.587.

⁷⁰ See, e.g., Compliance Appellate Report, paras. 5.725-5.726, 5,740.

⁷¹ Compliance Panel Report, para. 6.1528.

⁷² See Compliance Appellate Report, para. 5.644.

⁷³ See Compliance Appellate Report, paras. 5.637-5.639.

⁷⁴ See Original Appellate Report, para. 1264; Compliance Appellate Report, paras. 5.725-5.726, 5,740.

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."

83. 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.⁷⁵ 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 year after year, 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.⁷⁶

84. 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. Subsections A-C below rebut the arguments in Sections VII.A, VII.B, and VII.C of the EU's written submission. Subsections D-F rebut the arguments in Sections VIII.A, VIII.B, and VIII.C of the EU's written submission.

A. Countermeasures Applied Annually are Commensurate with the Degree and Nature of the Adverse Effects Determined to Exist, as Confirmed by the Adopted Findings from the Compliance Proceeding.

85. The EU advances two basic arguments to support its assertion that the findings from the compliance proceeding do not justify ongoing countermeasures.⁷⁷ First, it argues that the

⁷⁵ 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).

⁷⁶ 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.

⁷⁷ See EU Written Submission, Section VII.A. The EU uses the phrase "recurring countermeasures." "Recurring" is commonly used as a term of art to describe a type of subsidy. To our knowledge, it has never been used to describe countermeasures under the SCM Agreement. Because this phrase needlessly risks confusion, the United States refers to the proposed countermeasures as "ongoing" or "annual," consistent with previous arbitrator decisions. See *US – Upland Cotton (22.6 II)*, para. 6.1 (determining an "annual level of countermeasures").

adverse effects findings were limited to the five specific lost sales campaigns and the VLA country markets during the December 2011 – 2013 period underlying the findings of impedance, and that therefore the countermeasures must reflect only those transactions. Second, the EU argues that the subsidies are non-recurring, and therefore the countermeasures must not be applied annually on an ongoing basis. The first argument ignores the adopted DSB findings about the nature of LA/MSF and how it continues to cause adverse effects. The second argument rests on a flawed analysis of previous arbitrator decisions. Both are meritless.

86. First, the EU attempts to cast the five specific sales campaigns and the specific country markets during the period of review as “the specific type of adverse effects that have been determined to exist.”⁷⁸ Of course, neither the 2012 Cathay Pacific order nor the Australia very large aircraft market from December 1, 2011 – 2013 is a “type” of adverse effect under the SCM Agreement. Rather, the types of adverse effects under the SCM Agreement relevant here are certain forms of serious prejudice, namely, significant lost sales and impedance under SCM Article 6.3. And the findings from the compliance proceeding, which are stated in the present tense, are that, after the end of the implementation period, the EU subsidies continue to cause significant lost sales and impedance.⁷⁹

87. The individual sales campaigns (in the case of significant lost sales) or geographic markets (in the case of impedance) are the most significant evidence cited in support of the finding that the LA/MSF subsidies continue to cause adverse effects in the form of serious prejudice. Indeed, these lost sales and impeded market share (through deliveries) are instances of adverse effects – significant lost sales and impedance, respectively – identified during the December 2011 – 2013 period examined. And because the DSB adopted those findings, they remain the best indication of the extent to which A380 LA/MSF and A350 XWB LA/MSF cause adverse effects over a period of 25 months. But the subsidies’ effects were in no way limited to those transactions or the period reviewed for purposes of the adopted reports, and there were no findings in the compliance proceeding that the adverse effects ended by the end of the December 2011 – 2013 period examined.

88. There is nothing in the reasoning of the original panel report, the first compliance panel report, or either of the two appellate reports that supports the EU’s assertions in this regard. Rather, there is detailed analysis of the “product effects” of LA/MSF.⁸⁰ The specific instances provided the evidence that established that EU LA/MSF subsidies continue to cause adverse effects after the end of the implementation period. The EU sought to establish that these effects

⁷⁸ EU Written Submission, para. 105 (quoting *Upland Cotton* (22.6), para. 4.43).

⁷⁹ See Compliance Panel Report, paras. 7.1(xii)-(xvi), 7.2; Compliance Appellate Report, paras. 6.31(a), 6.37(a), 6.42(a).

⁸⁰ See, e.g., Original Panel Report, paras. 7.1932-7.1949, 7.1984-7.1985; Original Appellate Report, para. 1264; Compliance Appellate Report, paras. 5.550-5.647, 5.725-5.726, 5.740.

had ceased as of December 2011. It failed. The EU cannot now ask the Arbitrator to base countermeasures on the assumption that it prevailed.

89. Second, the EU argues that, because the WTO-inconsistent measures are the LA/MSF subsidies and not an overarching program involving recurring subsidies, there is no basis for ongoing countermeasures.⁸¹ The EU relies on *Canada – Aircraft Credits and Guarantees* (22.6), arguing that the arbitrator there determined “non-recurring” countermeasures to be appropriate because of the non-recurring nature of the subsidy. This is an inaccurate portrayal of that decision and its relevance to the analysis here.

90. In *Canada – Aircraft Credits and Guarantees* (22.6), the arbitrator was attempting to determine the “appropriate” level of countermeasures for a prohibited export subsidy under Article 4.10 of the SCM Agreement.⁸² Consistent with past prohibited subsidy arbitrations, the arbitrator adopted a methodology based on the value of the subsidy, not the trade effects of the subsidy.⁸³ Already, this makes *Canada – Aircraft Credits and Guarantees* inapposite because, in this arbitration, the appropriate inquiry is whether the countermeasures are commensurate with the adverse effects determined to exist.

91. In addition, the arbitrator did not rely on the fact that the subsidy was non-recurring *per se*. Rather, what was critical was that “the measures found to be illegal were the granting of subsidies to a number of *transactions*,”⁸⁴ namely, subsidized financing provided specifically for the purchases of Bombardier regional jets by Air Wisconsin, Comair, and Air Nostrum.⁸⁵ For this reason, Brazil requested countermeasures only on the basis of those orders, and, more specifically, the one of those three orders (Air Wisconsin) for which deliveries remained outstanding as of the end of the RPT.⁸⁶ By contrast, in this dispute, LA/MSF subsidies are *not* measures that subsidize a particular sales transaction. Rather, LA/MSF was found to enable

⁸¹ EU Written Submission, para. 106.

⁸² *Canada – Aircraft Credits and Guarantees* (22.6), paras. 3.20, 3.37-3.38.

⁸³ *Canada – Aircraft Credits and Guarantees* (22.6), paras. 3.36 (noting that “the amount of the subsidy was used as a basis for setting the level of countermeasures in *Brazil – Aircraft* and *US – FSC*”), 3.52 (“find{ing} it proper as a starting-point to use a methodology based on the amount of the subsidy for the calculation of ‘appropriate countermeasures’ in this case”).

⁸⁴ *Canada – Aircraft Credits and Guarantees* (22.6), para. 3.110 (emphasis added).

⁸⁵ See *Canada – Aircraft Credits and Guarantees (Panel)*, para. 8.1(e) (“uphold{ing} Brazil’s claim that the EDC Canada Account financing to Air Canada constitutes a prohibited subsidy contrary to Article 3.1(a) of the SCM Agreement”), (f) (equivalent finding with respect to Air Nostrum), (g) (equivalent finding with respect to Comair); *Canada – Aircraft Credits and Guarantees* (22.6), para. 3.110.

⁸⁶ See *Canada – Aircraft Credits and Guarantees* (22.6), paras. 3.1 (“Brazil argues, given the circumstances of this case, the appropriate level of countermeasures should be set in light of the sales that Brazil (i.e., Embraer) lost to Bombardier in connection with the transactions for which the Panel found that Canada had provided prohibited export subsidies.”), 3.69 (confirming that uncompleted transactions as of the end of the RPT concerned only the contract with Air Wisconsin); see also *ibid.*, para. 1.1 (indicating that the RPT expired on May 20, 2002).

Airbus's launch and development of its major aircraft programs, with potential effects on all orders and deliveries of the subsidized aircraft.⁸⁷

92. Finally, the EU quotes at length *Canada – Aircraft Credits and Guarantees* (22.6) in support of the proposition that the arbitrator there “referred to the non-recurring nature of the subsidy at issue as a reason to reject the higher countermeasures Brazil had proposed to deter future subsidization.”⁸⁸ The EU emphasizes the arbitrator's statements that “{the} DSB recommendations and rulings clearly cannot be interpreted as extending the right to take countermeasures to the maintaining of those programs ‘as such’”⁸⁹ and that “the findings of the Panel do not extend beyond the particular instances where the application of those programmes was found to be illegal.”⁹⁰

93. The EU ignores critical distinctions between the measures and causal pathway in *Canada – Aircraft Credits and Guarantees* (22.6) and the measures and causal pathway in this dispute. Specifically, the quotations relied upon by the EU were about “future subsidisation,” and the measures subject to findings were particular applications of programs that provided subsidized financing to particular transactions. Here, the proposed countermeasures are based on LA/MSF subsidies present in the post-implementation period and subject to findings of WTO-inconsistency adopted by the DSB. Thus, the United States is in no way seeking countermeasures for theoretical future measures not found to be illegal.

94. This is clear from the context in which the statements were made. After adopting a methodology based on the value of the subsidy, the arbitrator considered arguments by Brazil that the authorized retaliation should be adjusted upward from the value of the subsidy for various reasons. One reason raised by Brazil was “the risk of other ‘hit and run’ measures.”⁹¹ According to Brazil, a higher level of countermeasures was necessary to deter Canada from subsidizing future sales of regional jets.⁹²

95. It was in the context of rejecting this basis for adjusting the countermeasures upward from the value of the subsidy that the arbitrator noted that there were no “as such” findings against an export subsidy program.⁹³ The arbitrator noted that the panel's findings instead

⁸⁷ See Compliance Appellate Report, para. 5.587.

⁸⁸ EU Written Submission, para. 110.

⁸⁹ *Canada – Aircraft Credits and Guarantees* (22.6), para. 3.110.

⁹⁰ *Canada – Aircraft Credits and Guarantees* (22.6), para. 3.111. The first sentence of the quotation reproduced by the EU indicates the critical distinction previously discussed by the United States: “In the present case, the measures found to be illegal were the granting of subsidies to a number of transactions.” *Ibid.*, para. 3.110.

⁹¹ *Canada – Aircraft Credits and Guarantees* (22.6), paras. 3.108-3.113.

⁹² *Canada – Aircraft Credits and Guarantees* (22.6), para. 3.108.

⁹³ *Canada – Aircraft Credits and Guarantees* (22.6), para. 3.110.

related to transaction-specific financing provided for a specific order by a specific customer. The arbitrator further noted that the legislation authorizing this financing was discretionary, not mandatory, and it discussed the importance of that distinction.⁹⁴ The arbitrator concluded that it would not be appropriate to adjust the value of the subsidy upward on the basis of speculation that the government would grant equivalent subsidies to future customers for future transactions with no findings to that effect.⁹⁵

96. Thus, in *Canada – Aircraft Credits and Guarantees (22.6)*, in light of the nature of the subsidies subject to findings of WTO-inconsistency – financing of a particular order – the parties agreed that the effects were limited to that order. And the arbitrator was unwilling to speculate about future *subsidies* that were not subject to DSB findings.

97. Clearly, this is not at all relevant to the situation here, where the subsidies enable the development of a family of aircraft that can be sold over decades to customers worldwide, not a particular transaction. And the United States is not asking the Arbitrator to increase the value of countermeasures based on the need to deter the grant of new subsidized LA/MSF to a new LCA program in the future. Furthermore, the inquiry here is based on the adverse effects determined to exist, not the value of the subsidy, and therefore, there is no “deterrence” argument related to adjustments that should be made to the value of the subsidy in the first place. For these reasons, the EU’s reliance on *Canada – Aircraft Credits and Guarantees (22.6)* is misplaced. That decision in no way suggested that, where a measure is non-recurring, an arbitrator should not award ongoing countermeasures.

98. Notably *US – Upland Cotton (22.6 II)* addressed a far more analogous situation. In that case, as in this one, there was a determination of ongoing adverse effects. The arbitrator found that annual countermeasures with no set end date was commensurate with the adverse effects determined to exist, and the annual amount was based on the post-RPT period evaluated in the compliance proceeding.⁹⁶ Thus, the decision there fully supports the U.S. approach here.

B. The U.S. Methodology Properly Reflects the Adverse Effects Determined to Exist, which is Faithful to the Treaty Text and Produces the Most Reliable Estimate of Annual Adverse Effects that the EU Subsidies Cause.

99. The EU argues that ongoing countermeasures do not reflect the actual continued adverse effects over time.⁹⁷ According to the EU, the United States errs by basing its calculations on past adverse effects and must instead take account of, for example, alleged changes to the subsidy

⁹⁴ See *Canada – Aircraft Credits and Guarantees (22.6)*, para. 3.112.

⁹⁵ *Canada – Aircraft Credits and Guarantees (22.6)*, para. 3.113.

⁹⁶ See *US – Upland Cotton (22.6 II)*, paras. 4.118-4.119, 6.1.

⁹⁷ See EU Written Submission, paras. 113-130.

measures and alleged changes affecting the causal link.⁹⁸ The EU asserts that its position is supported by contrasting the situation here with that in *US – Upland Cotton*. But this argument is merely another attempt to relitigate compliance in this arbitration. And the EU’s analysis of *US – Upland Cotton* is flawed; that arbitration actually *supports* the U.S. position here.

100. First, the EU makes clear that it bases its critique on the United States’ reliance on the adopted DSB findings, instead of an assessment of the EU’s newest assertion of compliance.⁹⁹ As addressed elsewhere, the parties suspended this arbitration specifically so that compliance could be assessed in the DSU Article 21.5 proceeding initiated at the request of the United States. They allowed for either party to request that the Arbitrator resume its work to allow the Arbitrator to evaluate the EU’s objection to the *extent* of countermeasures based on the first compliance proceeding’s assessment. The EU’s newest assertions of compliance will be evaluated in a new proceeding under DSU Article 21.5, not in this arbitration. The EU’s failure to achieve compliance by the end of the implementation period, as confirmed in findings adopted by the DSB, creates the basis for countermeasures to be authorized. The EU dragged out a compliance proceeding for nearly seven years while the arbitration remained in suspension, and now that its failure to comply was finally confirmed, it is arguing that changes over those seven years compel the United States to prove its case anew. Such a result is unacceptable and would be perverse in the extreme.

101. The EU next attempts to contrast *US – Upland Cotton* with this dispute. According to the EU, the authorization of ongoing countermeasures in *US – Upland Cotton* reflected the fact that adverse effects were caused by “‘recurring annual payments’ under a ‘subsidy programme’.”¹⁰⁰ It is true that, in that dispute, ongoing countermeasures were authorized because the payments were made year after year. But countermeasures must be commensurate with the degree and nature of the *adverse effects*. Thus, the arbitrator considered that yearly payments led to adverse effects year after year. Similarly, and regardless of whether the LA/MSF subsidies are “‘recurring,” they cause effects year after year, including well after the final disbursement of funds.¹⁰¹ That is unassailably established by, *inter alia*, the findings that A380 LA/MSF caused adverse effects in the original 2000 – 2006 reference period and continued to do so in the compliance period of review from December 1, 2011 – 2013, despite that A380 LA/MSF was not “‘recurring.”

102. Furthermore, payments under the program were “time limited” in that the new authorizing legislation (the 2008 Farm Bill) only covered the five-year period from 2008 to

⁹⁸ See EU Written Submission, paras. 121-123.

⁹⁹ See EU Written Submission, para. 122, notes 115-118.

¹⁰⁰ EU Written Submission, para. 125.

¹⁰¹ See Compliance Panel Report, para. 6.1528 (noting that these subsidies by their nature are “profound and long lasting”).

2012, and by its specific terms would expire after that point.¹⁰² Nevertheless, the arbitrator approved annual countermeasures, or as the EU would put it, applied them “indefinitely.”¹⁰³

103. Furthermore, the *US – Upland Cotton (22.6 II)* report undermines the EU’s argument that the United States bases its countermeasures on the adverse effects determined in the December 2011 – 2013 period, and that it therefore does not “reflect a reasonable estimate of ‘the *actual continued* adverse effects of the measure *over time*.’”¹⁰⁴ In *US – Upland Cotton (22.6 II)*, the arbitrator issued its decision in August 2009 based on the level of price suppression observed in marketing year (MY) 2005, which included a period immediately after the end of the implementation period.¹⁰⁵ The arbitrator recognized the “inherent uncertainty” in estimating the value of adverse effects¹⁰⁶ and that “prices vary considerably from year to year.”¹⁰⁷ The arbitrator nonetheless accepted Brazil’s use of MY 2005 to value the level of price suppression and rejected the U.S. proposal to use a three-year period that included more recent data.¹⁰⁸ Thus, the arbitrator determined that a valuation of the adverse effects from the evaluated post-implementation period would reflect “the actual continued adverse effects of the measure over time.”¹⁰⁹

104. The annual countermeasures sought by the United States here are based on the adopted DSB findings that the EU failed to comply by the end of the implementation period. The ongoing adverse effects caused by LA/MSF fully support ongoing countermeasures. And, of course, they are only ongoing until the DSB finds that the EU has fulfilled its obligations or the parties reach a positive solution. The United States is well aware that it is not entitled to impose WTO-authorized countermeasures if the EU has achieved full compliance.¹¹⁰ Indeed, the primary U.S. objective is to secure that compliance, and the United States is hopeful that the countermeasures will assist in inducing that result.

105. Moreover, if there is a disagreement about whether the EU has achieved compliance, there is a process under DSU Article 21.5 to resolve that disagreement. Indeed, the EU has wasted no time in availing itself of that option. But unless and until the DSB adopts new findings that the EU has indeed achieved compliance, the DSB’s adopted findings remain that

¹⁰² *US – Upland Cotton (22.6 II)*, para. 3.4.

¹⁰³ *US – Upland Cotton (22.6 II)*, para. 6.1.

¹⁰⁴ EU Written Submission, para. 123. *See also ibid.*, para. 120.

¹⁰⁵ *US – Upland Cotton (22.6 – US II)*, paras. 4.115, 4.118-4.119.

¹⁰⁶ *US – Upland Cotton (22.6 – US II)*, para. 4.117.

¹⁰⁷ *US – Upland Cotton (22.6 – US II)*, para. 4.118.

¹⁰⁸ *US – Upland Cotton (22.6 – US II)*, para. 4.118.

¹⁰⁹ *See US – Upland Cotton (22.6 – US II)*, para. 4.117.

¹¹⁰ *See DSU*, Art. 22.8.

the EU **has not** complied with its obligations after the end of the implementation period. It is on this basis that the extent of the countermeasures that the DSB will authorize must be assessed. As the arbitrator found in *US – Tuna II* (22.6), “a statement by a Member that it has come into compliance does...not affect the continued validity of DSB recommendations and rulings concerning the WO-inconsistency of a measure taken to comply.”¹¹¹ As long as the EU has not demonstrated that the U.S. countermeasures are not commensurate with the adverse effects determined to exist in the first compliance proceeding, the extent of the U.S. countermeasures proposed by the United States must be affirmed.

106. The EU further argues that, because adverse effects “will ordinarily dissipate over time,” the adverse effects suffered in the 2011 – 2013 period evaluated by the first compliance panel cannot be used as an estimate for present and future adverse effects.¹¹² As an initial matter, the nature of the subsidies and how they cause adverse effects differs from case to case. Here, there was clearly no finding to suggest that the adverse effects declined along some linear path over time, as the EU argument implies. Rather, A380 LA/MSF was found to cause adverse effects in the original proceeding and again in the compliance proceeding. There was no suggestion by the compliance panel or the Appellate Body that the adverse effects caused by A380 LA/MSF were declining between the 2000 – 2006 period analyzed in the original proceeding and the December 2011 – 2013 period analyzed in the compliance proceeding.

107. At some uncertain point the adverse effects from both A380 LA/MSF and A350 LA/MSF will dissipate. But this is simply an argument that, as of that point, the EU will no longer have an obligation to remove the adverse effects under SCM Article 7.8. Again, whenever that moment does arrive, DSU Article 22.8 will take effect and, in the words of the Appellate Body, “cessation of the suspension is required.”¹¹³ But it is not for the Arbitrator to speculate about when in the future the EU will achieve compliance with the DSB’s recommendations. Either the parties will agree that the point has come, they will otherwise achieve a mutually agreed solution, or the DSB will adopt findings that the EU has complied fully with its obligations. As of now, the only adopted findings are that the EU **failed** to comply after the end of the implementation period by its subsidies continuing to cause adverse effects.

108. In addition, the EU puts forward a factual argument about why the countermeasures sought by the United States cannot reflect a reasonable estimate of the actual or future adverse effects. Its argument is based on an invalid apples-to-oranges comparison. The EU states that the requested countermeasures correspond to 48 A380 aircraft – which the EU derives by adding up all of the A380s in the VLA lost sales campaigns and the delivered A380s in the six country markets that served as the basis for the impedance findings (which it totals as 101 aircraft), and

¹¹¹ *US – Tuna II* (22.6), note 70.

¹¹² EU Written Submission, para. 127.

¹¹³ *US – Continued Suspension (AB)*, para. 306.

then divides by 25/12 to arrive at an annualized figure.¹¹⁴ The EU compares this annual figure of 48 A380 aircraft to [BCI] A380 aircraft that it maintains Airbus will deliver in 2018.¹¹⁵

109. But this ignores that the 48 A380 aircraft figure it derived represents both lost sales *and* impedance of very large aircraft. The impedance findings adopted by the DSB were based on deliveries in the 25-month period evaluated in the first compliance proceeding. The separate and distinct significant lost sales findings were based on orders during that period. It is only by combining the two that the EU gets the annual total of 48 aircraft. Therefore, an equivalent figure for 2018 would have to similarly include both orders and deliveries. Yet, the EU omits 2018 A380 orders. Emirates ordered 36 A380s in 2018.¹¹⁶ Taking those into account, there are, at the very least, [BCI] A380 aircraft ordered or delivered in 2018, a number comparable with the 48 aircraft the EU argues are “unreasonable.”

110. The EU repeats its apples-to-oranges error in its discussion of the number of the A380 aircraft that would correspond to the countermeasures over five years. Again, the EU only accounts for deliveries scheduled as of now for that five-year period, but ignores completely the new A380 orders that could occur during that period (as well as, theoretically, deliveries during that period pursuant to orders not yet placed). Therefore, it is the EU’s deficient approach – by omitting one of the forms of adverse effects (significant lost sales) – that leads it to conclude that the results are “absurd” and based on data “that is obviously not representative.”¹¹⁷

C. DSU Article 22.8 Does Not Require the Arbitrator to Set an End Date to Countermeasures in Light of the Current Findings that EU Has Failed to Achieve Compliance after the End of the Implementation Period.

111. The EU notes correctly that, “because countermeasures aim to induce compliance, they constitute ‘temporary measures...in response to a continued breach...and pending full compliance’.”¹¹⁸ The United States understands that it would not be entitled to impose WTO-authorized countermeasures if the EU reaches full compliance, and the United States has not sought authorization to apply countermeasures past the endpoint set out in DSU Article 22.8. Rather, it has sought authorization to apply countermeasures *up to that point*, recognizing that when that point will arrive is uncertain. If in response to a disagreement about whether the EU

¹¹⁴ EU Written Submission, note 27, paras. 42, 128.

¹¹⁵ EU Written Submission, para. 128.

¹¹⁶ *Emirates firms up orders for 36 A380s worth US\$ 16 billion*, Emirates Media Centre, <https://www.emirates.com/media-centre/emirates-orders-36-a380s-worth-us-16-billion> (accessed October 25, 2018) (Exhibit USA-23).

¹¹⁷ EU Written Submission, para. 129.

¹¹⁸ EU Written Submission, para. 131 (quoting *US – Upland Cotton*) (22.6), para. 4.59) (emphasis added by EU omitted).

has achieved compliance, the DSB adopts findings that the EU has done so, the United States would no longer be permitted to impose countermeasures.

112. But the EU is wrong that, because at some future point grants of LA/MSF to a particular aircraft will be unactionable under Article 7.8 of the SCM Agreement, the Arbitrator cannot award ongoing countermeasures. The adopted DSB findings as of this time establish that the EU has not achieved compliance after the implementation period, and it is not for the Arbitrator to speculate about when in the future the EU will achieve full compliance. Therefore, the timeline for the application of proposed countermeasures is not infinite, but it is appropriately indefinite.

113. Indeed, the entirety of the EU's objection in this arbitration undermines the aim of inducing compliance. Having upset the balance of rights and concessions by applying massive, WTO-inconsistent subsidized financing unabated to every major Airbus LCA program, and having thus far avoided any countermeasures to right that balance, the EU seeks to avoid consequences for its WTO-inconsistent behavior altogether. This would hardly induce compliance. If anything, it would induce more of the unabated WTO-inconsistent behavior.

D. The U.S. Proposed Countermeasures Properly Apply Annually, Without a Fixed Term, and Otherwise Reflect the Degree and Nature of the Adverse Effects Determined to Exist.

114. Following a DSU Article 21.5 compliance proceeding, the DSB adopted findings that A380 LA/MSF and A350 XWB LA/MSF cause significant lost sales and impedance in the post-implementation period. As the United States has already explained, the nature of the adverse effects determined to exist – including the causal link between the subsidies, their “product effects,” and the adverse effects – require that commensurate countermeasures be ongoing. Accordingly, the United States has properly proposed annual countermeasures that reflect the instances of adverse effects identified in the December 2011 – 2013 post-implementation period evaluated in the compliance proceeding.

115. Moreover, because the current adopted findings are that the EU remains out of compliance after the end of the implementation period, the United States appropriately did not speculate about an end date. When the EU has fulfilled its existing obligation to achieve compliance, there will no longer be a valid basis for countermeasures. However, no such findings have been adopted. Accordingly, and consistent with the parties' sequencing agreement, the level of the countermeasures should be based on the current adopted findings that the EU has failed to comply after the end of the implementation period.

116. The EU's criticisms of the U.S. approach are largely based on a conceptual flaw that repeatedly plagues the EU submission. The EU views the countermeasures as punishment for the instances of adverse effects determined to exist in the December 2011 – 2013 period. But this is inaccurate. As explained in greater detail below, countermeasures are prospective and respond to the adopted findings that LA/MSF continues to cause – in the present tense – adverse

effects to the United States’ interests in the form of significant lost sales and impedance. Therefore, the EU criticisms are meritless.

117. The EU first argues that the countermeasures must end “with the final delivery related to the specific adverse effects determined to exist.”¹¹⁹ This argument is based on the erroneous premise that the adverse effects that LA/MSF subsidies cause are limited to the specific instances of lost sales and impedance markets in the December 2011 – 2013 period. The DSB has now twice adopted findings that LA/MSF causes significant lost sales and displacement or impedance. These are present, ongoing adverse effects in the post-implementation period. The specific transactions that served as the basis of those findings should similarly serve as the basis for measuring the extent of the adverse effects caused over the period evaluated. But there was no finding or reasoning that would support the notion that the adverse effects themselves were limited to the reviewed transactions or country market share data for particular years.

118. The EU’s error is conclusively shown by the adopted findings in the compliance proceeding. According to the EU’s logic, the A380 lost sales findings in the original proceeding would be limited to only those orders that served as the basis for the significant lost sales finding. Following the EU’s reasoning, the first compliance panel’s assessment would have focused on whether any of those original A380 lost sales had outstanding deliveries after the end of the implementation period. And any such outstanding deliveries would have been reflected in the findings of WTO inconsistency with respect to significant lost sales in the VLA market.

119. Of course, this was decidedly *not* the compliance panel’s analysis. Rather, the compliance panel found that the same A380 LA/MSF continued to cause lost sales after the end of the implementation period.¹²⁰ Indeed, the EU attempted to make essentially the same argument to the compliance panel that it advances here. The EU listed as a compliance step delivery of aircraft pursuant to orders that were found to be lost sales in the original proceeding. The compliance panel found this to be a response “to an argument that the United States does not make.”¹²¹ The compliance panel continued:

As already noted, the United States’ position in this dispute is that the European Union and certain member States have failed to comply with the obligation in Article 7.8 of the SCM Agreement to “take appropriate steps to remove the adverse effects” *not* because any of the “adverse effects” found to have been caused by the challenged subsidies in the original proceeding have not been

¹¹⁹ EU Written Submission, para. 147.

¹²⁰ See Compliance Panel Report, paras. 7.1(xii)-(xiii), (xvi), 7.2.

¹²¹ Compliance Panel Report, para. 6.1112.

“removed”, but rather because the challenged subsidies *continue to cause* the same types of “adverse effects” today.¹²²

120. The EU’s argument that the adverse effects were limited to the specific instances of lost sales identified in the compliance proceeding suffers from the same mischaracterization of the U.S. claims and findings against it. The United States argued, and the DSB adopted findings, that LA/MSF continues to cause adverse effects to the interests of the United States. There were no findings in the compliance proceeding based on undelivered aircraft from past instances of lost sales. There were also no findings limiting the continuing adverse effects to the specific transactions and deliveries in the December 2011-2013 period, or that those effects ended by the end of the December 2011 – 2013 period.

121. The EU also conspicuously ignores how its theory would be applied to the impedance findings against it. Under the EU’s theory, because the findings of present impedance were based on actual deliveries during the December 2011 – 2013 period, there would of course be no “outstanding deliveries.” Therefore, there would be no basis for countermeasures with respect to the adopted impedance findings.¹²³

122. Thus, if the EU’s premise were true there would necessarily be no remedy for adverse effects in the form of impedance (or displacement). Indeed, the only reason a very limited remedy would exist in the case of significant lost sales findings is the unusually long lag time between order and delivery in the LCA industry. This would obviously undermine the utility of the SCM Agreement disciplines on subsidies causing adverse effects, frustrate the intentions of the Members in agreeing to dispute settlement with a remedial component, and directly contradict the aim of inducing compliance.

E. Countermeasures Are a Prospective Remedy for Ongoing Adverse Effects that the EU Subsidies Cause.

123. Second, the EU argues that the countermeasures must not pertain to any aspect of the adverse effects that has ceased to exist.¹²⁴

124. At the outset, the EU attempts, as it does elsewhere in its submission, to gain support from the assertion in the U.S. request for countermeasures that the retaliation number will be

¹²² Compliance Panel Report, para. 6.1112 (emphasis original).

¹²³ See EU Written Submission, para. 146 (“These adverse effects consist of five specific ‘lost sales’ (for the A380 and A350 XWB) and ‘impedance’ in certain specific third country markets (for the A380 only).”), 147 (“Specifically, once the final Airbus aircraft is delivered (or, rather, when the corresponding Boeing aircraft would be delivered in the counterfactual scenario), the United States is no longer affected by the adverse effects determined to exist in the December 2011 to December 2013 period.” (internal citation omitted)).

¹²⁴ See EU Written Submission, paras. 149-164.

“updated annually using the most recent publicly available data.”¹²⁵ The United States has proposed doing just this by using the public PPI index to adjust annually the adverse effects determined to exist to keep pace with inflation from one year to the next.

125. The EU tries to read this more broadly as updating the retaliation figure every year for the number of lost sales and other adverse effects that occur in a given year. But this inaccurate since there is no “publicly available data” (outside of the adopted reports in this dispute) on the adverse effects that EU aircraft subsidies cause for purposes of the SCM Agreement in a particular year.

126. The EU’s main argument is that adverse effects cease to exist when a delivery has taken place in the past.¹²⁶ This argument again relies on the erroneous premise that the transactions found to be lost sales in *EC – Large Civil Aircraft (21.5)* themselves are the extent of the significant lost sales adverse effects findings, as the EU itself reiterates.¹²⁷ The United States has already explained that the SCM Agreement indicates that serious prejudice may arise when “the effect of the subsidy is,” *inter alia*, significant lost sales.¹²⁸ The compliance panel specifically rejected the EU’s characterization of the claims in this dispute.¹²⁹ The specific transactions that serve as the basis for that finding remain the most objective, least speculative way to measure the extent of the adverse effects that the WTO-inconsistent subsidies cause on an annual basis. But they are in no way the full extent of the ongoing adverse effects that LA/MSF was found to continue to cause.

127. The EU attempts to rely on the original panel report in *US – Large Civil Aircraft* for the proposition that both lost sales and impedance are focused on deliveries. The EU rests this argument on a statement in that report about sales starting at the time an order is obtained and continuing up to and including delivery (or not) of the aircraft. However, the EU’s reliance on *US – Large Civil Aircraft* is misplaced.

128. In the compliance proceeding, as here, the EU argued that the original panel’s statement meant that the adverse effects associated with significant lost sales continued through the delivery of the aircraft ordered in the transaction. The compliance panel rejected this assertion, explaining that¹³⁰:

¹²⁵ U.S. Arbitration Request, WT/DS316/18. See EU Written Submission, para. 150.

¹²⁶ EU Written Submission, para. 152.

¹²⁷ See EU Written Submission, para. 152.

¹²⁸ SCM Art. 6.3.

¹²⁹ Compliance Panel Report, para. 6.1112.

¹³⁰ *US – Large Civil Aircraft (21.5) (Panel)*, paras. 9.308-9.309 (footnotes original).

We note that the relevant paragraphs of the panel report explaining the findings of significant price suppression and lost sales suffered by Airbus in the 200-300 seat LCA product market do not explicitly mention the idea that price suppression and lost sales begin at the time of an order and continue up to and including the delivery of an aircraft, which suggests that these findings were made with respect to orders only.¹³¹ The European Union contends that, in respect of “sales of A330 family LCA to customers that placed orders during the original 2004-2006 reference period”, “[t]he original panel found that, for those sales, the significant price suppression continued from the initial order through each of the aircraft deliveries”.¹³² Actually, no explicit statement to that effect appears in the panel report. The only discussion of the role of deliveries appears in the context of the panel’s finding that lost sales of A330 and Original A350 LCA constituted evidence of a threat of displacement or impedance of exports from certain third country markets.¹³³

Moreover, the Appellate Body made findings of significant price suppression and lost sales solely based on orders without referring to deliveries. Following its reversal of the panel’s findings of significant price suppression and significant lost sales in the 100 to 200 and 300 to 400 seat LCA product markets¹³⁴, the Appellate Body proceeded to complete the analysis through an analysis of evidence related to specific sales campaigns. The Appellate Body made no reference to the role of deliveries in this regard.¹³⁵

Consistent with this approach, and of principal importance, the findings adopted by the DSB in this dispute make clear that LCA “sales” are “lost” at the time of order.¹³⁶

129. The EU expands its argument by asserting that a focus on deliveries exclusively is necessary to avoid double-counting (or over-counting) adverse effects from lost sales and

¹³¹ Panel Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 7.1781-7.1788.

¹³² European Union’s first written submission, para. 1231 (emphasis omitted). We note that with regard to the panel’s findings of significant price suppression and significant lost sales in the 100 to 200 seat LCA product market, the Appellate Body noted that it was “uncertain whether the Panel was referring to orders, or to deliveries, or whether it was referring to such orders or deliveries occurring inside or outside the reference period”. (Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1222).

¹³³ Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.1791.

¹³⁴ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1249.

¹³⁵ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1262-1274.

¹³⁶ See Compliance Appellate Report, para. 5.417 (“Third, examining the impact of the ‘product effects’ of the challenged LA/MSF subsidies in the relevant product markets, the Panel found that all of the orders of Airbus LCA identified by the United States in the post-implementation period represented ‘significant’ lost sales to the US LCA industry.”).

impedance.¹³⁷ But the U.S. countermeasures do not present a risk of double-counting. The United States simply measures the value of the lost sales and deliveries that formed the basis of the significant lost sales and impedance findings in the compliance proceeding. There was no overlap or duplicative element of these forms of adverse effects in those years.

130. Had the United States obtained significant lost sales findings based on a particular order and then threat of impedance findings based on the projected future deliveries in that customer's geographic market based on the deliveries associated with that same order, then that would present a double-counting problem. But that did not occur in this dispute. Indeed, as the compliance panel stated in *US – Large Civil Aircraft (21.5)*, “there would be little to be gained by the Panel making a finding of impedance of imports or exports in relation solely to lost sales that are already the subject of a finding of significant lost sales.”¹³⁸

131. The bottom line is that, over the course of 25 months, the adverse effects in the form of significant lost sales and impedance totaled, ***without duplication or double-counting***, over \$21.2 billion (in 2013 dollars).¹³⁹ By annualizing this figure, the United States has calculated the extent of ***non-duplicative*** adverse effects that the United States was found to have suffered per year. Therefore, as long as this figure is used to set the annual countermeasures, by definition, there is no double-counting (or over-counting).

132. The EU also misreads the relevance of a statement in *US – Upland Cotton (22.6 I)*. The EU asserts that the arbitrator in that case found that “countermeasures authorised in response to unimplemented prohibited subsidy findings must ‘bear some relationship to the extent to which the complaining Member has suffered from the trade-distorting impact of the illegal subsidy’.”¹⁴⁰ The EU reasons that, “if commensurate countermeasures are authorized in response to unimplemented *actionable* subsidy findings, which are not prohibited *per se*, an even closer relationship must be shown between the countermeasures and the extent to which the *complaining member* has suffered from the *trade-distorting impact* of the actionable subsidy.”¹⁴¹ But the EU misunderstands the significance of the distinction between the prohibited subsidy inquiry there and the actionable subsidy inquiry here. As a result, it improperly introduces new terms and standards not contained in the text of the covered agreement that obscure the unambiguous text.

¹³⁷ EU Written Submission, para. 155-156.

¹³⁸ *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.480; *see also ibid.*, para. 9.481.

¹³⁹ *See* Revised Aggregation of Adverse Effects Determined to Exist by Year (Exhibit USA-28(HSBI)). This number is updated to account for the adjustments described in Section V.B.2.b.i-ii.

¹⁴⁰ EU Written Submission, para. 157 (quoting *US – Upland Cotton (22.6 I)*, para. 4.87) (emphasis added by EU omitted).

¹⁴¹ EU Written Submission, para. 157 (emphasis original).

133. The EU omits the first part of the passage it quotes, which states that “countermeasures, ***in order to be ‘appropriate’***, should bear some relationship to the extent to which the complaining Member has suffered from the trade-distorting impact of the illegal subsidy.”¹⁴² The question that arises in the case of SCM Article 4.10, where countermeasures must be “appropriate,” is what is “appropriate” given that the subsidies are prohibited, and therefore do not require a showing of any effects in the proceeding establishing a breach. The phrase “trade-distorting impact” was not used as a term of art in *US – Upland Cotton (22.6 I)*, but rather as a way to describe simply the notion that, where a subsidy is prohibited solely on the basis of its features, the countermeasures must bear some relationship to the injury or trade effects or harm (or other equivalent *concept*, and not term of art) suffered by the complaining Member.

134. By contrast, actionable subsidies require a finding not just of a subsidy, but also that the subsidy causes adverse effects. And SCM Article 7.9 specifically states that the countermeasures must be commensurate with those “adverse effects.” Therefore, the reasoning quoted from *US – Upland Cotton (22.6 I)* is not relevant to the case of actionable subsidies, where no similar question about what is “appropriate” even arises. This is particularly obvious because an arbitrator issued a separate report under DSU Article 22.6 and SCM Article 7.10 in response to actionable subsidies in *US – Upland Cotton (22.6 II)*. The EU does not cite that report.

135. Accordingly, there is no reason to even introduce the terms “trade-distorting impact” or “trade effects” into this conversation, much less interpret them. It is clear that what must be valued is the adverse effects determined to exist.

136. If the EU uses the terms “trade-distorting impact” or “trade effects” in a way that makes them synonymous with deliveries as appears to be the case – for example, using “trade effects” to refer to the movement of goods across borders¹⁴³ – then it is not the proper reference point because the text clearly states that the countermeasures are to be commensurate with the adverse effects determined to exist. Of course, significant lost sales, based on orders, is one such form of serious prejudice, which in turn is a form of adverse effects.

137. The EU then discusses the specific December 2011 – 2013 orders underlying the significant lost sales findings, and faults the United States for not subtracting the value of aircraft from these orders that allegedly have already been delivered.¹⁴⁴ This is yet another argument based entirely on the flawed premise that the adopted findings were that LA/MSF caused adverse effects only in the specific transactions reviewed in the compliance proceeding. The compliance panel specifically rejected the EU’s attempt to make the dispute about outstanding deliveries from past lost sales rather than the ongoing adverse effects that the subsidies continue to

¹⁴² *US – Upland Cotton (22.6 I)*, para. 4.87 (emphasis added).

¹⁴³ See EU Written Submission, para. 153.

¹⁴⁴ EU Written Submission, paras. 160-161.

cause.¹⁴⁵ Therefore, the EU’s attempts to figure out how many of those ordered aircraft remain outstanding for delivery in 2018 are irrelevant. The countermeasures applied in 2018 (or any future year) based on the DSB’s adopted significant lost sales findings reflect the value of lost sales that LA/MSF causes annually, not the value of aircraft delivered in 2018 pursuant to orders in 2012 and 2013.

138. Second, the EU argues that the U.S. countermeasures improperly include values for the four A380s sold to Transaero airlines because the order was eventually cancelled. The EU is in essence arguing that A380 LA/MSF did not cause the U.S. LCA industry to lose this sale to Airbus. This is directly contrary to the adopted findings. As discussed repeatedly, the adopted findings are that LA/MSF causes adverse effects in the form of significant lost sales and impedance. Those findings are reflected in the value of the aircraft the U.S. LCA industry would have sold in the case of significant lost sales, and the value of the aircraft that the U.S. LCA industry would have delivered in the case of impedance. The findings from the compliance proceeding provide the most reliable, least speculative measure on the annual amount of adverse effects that LA/MSF causes. But they are not the adverse effects themselves. Therefore, post-hoc factual arguments about the particular transactions should not affect the valuation of adverse effects. Again, to ignore the Transaero sale would be to overturn the adopted finding that this constituted a lost sale for purposes of the SCM Agreement Article 6.3(c) analysis.

F. The United States Properly Proposed Prospective Countermeasures Rather Than Countermeasures in Response to the Specific Instances of Adverse Effects from December 2011 through 2013.

139. The EU also argues that “countermeasures must be distributed over time so as to correspond to the occurrence over time of the trade effects that arise – *i.e.*, the deliveries that relate to the adverse effects determined to exist.”¹⁴⁶ Again, the EU’s argument is based on the erroneous premise that the countermeasures in present and future years are meant to capture deliveries in those years of aircraft ordered in the specific 2012 and 2013 sales campaigns that provided the basis for the significant lost sales findings. The compliance panel specifically rejected this interpretation of the U.S. claims.¹⁴⁷ The United States claimed, and the DSB adopted findings, that LA/MSF subsidies continue to cause ongoing harm. Therefore, the EU’s argument fails.

140. The EU complains that the United States requests countermeasures annually that corresponds to the value of 24 A350 XWBs per year regardless of how deliveries of these aircraft are distributed over time.¹⁴⁸ This is because the findings relevant to this discussion were

¹⁴⁵ See Compliance Panel Report, para. 6.1112.

¹⁴⁶ EU Written Submission, paras. 165-173.

¹⁴⁷ See Compliance Panel Report, para. 6.1112.

¹⁴⁸ EU Written Submission, para. 171.

of significant lost sales. They were based on customers ordering A350 XWBs, not deliveries of A350 XWB, in the December 2011 – 2013 period reviewed in the compliance proceeding. Thus, the EU engages in an apples-to-oranges comparison when citing the expected deliveries in a particular year. And it further errs when it limits the data to just those deliveries that correspond with 2012 and 2013 orders analyzed in the compliance proceeding.

141. The United States notes, however, that in valuing the lost sales found in the 2011 – 2013 period, the U.S. calculation did not ignore the distribution of deliveries pursuant to those orders over time. The United States relied on an estimated delivery schedule for each order, calculated the value of each ordered aircraft in the year of delivery, and then discounted that value to the order year.

V. THE EU FAILS TO DEMONSTRATE QUANTIFICATION ERRORS IN THE U.S. METHODOLOGY.

142. In this section, the United States responds to the EU arguments in Section IX of its written submission. Subsection A below demonstrates that the EU is wrong to argue that the U.S. calculation is conceptually flawed. Subsection B shows that the EU has alleged technical errors in the U.S. calculation that do not, in fact, exist. These discussions underscore the validity of the U.S. methodology and further confirm that the EU has failed to establish that the U.S. calculation results in a level of countermeasures that is not commensurate with the degree and nature of the adverse effects determined to exist.

A. The EU fails to Identify Flaws in the U.S. Approach to Quantifying the Degree of Adverse Effects.

143. The EU purports to identify two conceptual flaws in the U.S. approach to quantifying the adverse effects determined to exist. First, the EU contends that the United States erred in basing its significant lost sales calculations on the orders lost during the December 2011 – 2013 post-implementation period evaluated by the compliance panel.¹⁴⁹ Second, the EU contends that the U.S. methodology for quantifying the adverse effects from impedance lacked a basis in the compliance findings.¹⁵⁰ The EU's criticisms are erroneous.

144. In fact, the U.S. methodology for calculating the adverse effects for significant lost sales and impedance is reasonable and well founded in the compliance findings. It properly reflects the counterfactual market situations contemplated in the adopted findings, including Airbus's inability to offer or deliver the A380 or A350 XWB in the post-implementation period. It also properly reflects the different natures of the significant lost sales and impedance findings, where the former are determined to exist at the time an order is placed while the latter is based on deliveries. It further reflects that the adopted lost sales and impedance findings are additive, not

¹⁴⁹ See EU Written Submission, para. 178.

¹⁵⁰ See EU Written Submission, para. 179.

duplicative, such that fully accounting for both forms of adverse effects is necessary to arrive at a level of countermeasures that is “commensurate” with the degree and nature of the adverse effects determined to exist. The alternative approaches suggested by the EU ignore these findings adopted by the DSB, as explained in greater detail below.

1. *The U.S. approach towards quantifying lost sales avoids speculation by relying on the facts known to the parties, and avoids double-counting.*

145. In the methodology paper, the United States valued instances of lost sales as of the time that the U.S. industry lost the aircraft orders to Airbus, consistent with the findings of the compliance panel as modified by the Appellate Body. The EU criticizes this approach, contending that the only permissible method is to use “actual deliveries in the relevant years as the basis for quantifying the trade effects from lost sales (*i.e.*, a delivery-centric metric).”¹⁵¹ In other words, for each undelivered aircraft from the five transactions that were lost sales in the December 2011 – 2013 period, the EU would calculate the value at the time of delivery, and then countermeasures would be set equal to that value and applied only in the year of delivery. The EU is mistaken.

146. Under Article 7.9 of the SCM Agreement, the level of countermeasures must be “commensurate with the degree and nature of the adverse effects determined to exist.” The type of “adverse effects determined to exist” relevant to this discussion is significant “lost sales” within the meaning of Article 6.3(c). Each of the forms of serious prejudice described in Article 6.3(a)-(c) is distinct, and significant lost sales is no exception. The assessment of whether the proposed extent of countermeasures is commensurate with both the “degree” and “nature” of the adverse effects found must take account of the specific adopted findings regarding significant lost sales.

147. The EU’s criticism is premised on the notion that any adverse effects findings, including significant lost sales, must be valued on the basis of deliveries, not orders. But the findings adopted by the DSB were based on orders, not deliveries. Thus, when the EU criticizes the United States’ reliance on orders as “wrong,” it is not arguing that the U.S. countermeasures are not commensurate with the adverse effects determined to exist; rather, it is essentially arguing that the adverse effects were wrongly determined to exist.

148. In any event the compliance panel and the Appellate Body correctly focused on orders of LCA rather than the EU’s own, *non-textual* concept that deliveries are the only “trade effect” that matters for purposes of Part III of the SCM Agreement. Article 6.3 identifies specific types of serious prejudice that are forms of adverse effects, which does not include the EU’s conceptual understanding of “trade effects.” It does include significant lost sales. Unlike displacement and impedance under Articles 6.3(a) or (b), Article 6.3(c) does not mention “exports” or “imports”

¹⁵¹ EU Written Submission, para. 187.

with respect to lost sales (or significant price undercutting, price suppression, or price depression, for that matter). Contrary to the EU's arguments, significant lost sales may be found to exist for purposes of Article 6.3(c) before any exports, imports, or deliveries occur. This is evident from the adopted significant lost sales findings in the original proceeding and the compliance proceeding in this dispute, as well as those in *US – Large Civil Aircraft*.¹⁵²

149. In each of those cases, the Appellate Body made or upheld lost sales findings where a customer had ordered aircraft, but deliveries had not yet occurred, including aircraft that were not even in production.¹⁵³ In doing so, the Appellate Body treated the actual deliveries associated with the lost orders as an afterthought, to the extent it referenced them at all.¹⁵⁴ Moreover, while they duly made findings as to the type and number of aircraft ordered in lost sales, neither the Appellate Body nor any panel in this dispute or *US – Large Civil Aircraft* has discounted the significance or extent of those lost sales in order to account for the future scenarios the EU references – *i.e.*, the possibilities that orders might be cancelled, rescheduled, or converted to orders for different aircraft models.¹⁵⁵

¹⁵² See Original Panel Report, paras. 7.1750 (“Boeing and Airbus primarily compete with each other to secure orders for new aircraft, to be delivered at some time in the future. At the moment an order is placed, the terms and conditions of the delivery of aircraft pursuant to that order will in large part be set. Aircraft specification, net price, discounts, non-price concessions and financing arrangements will be determined at the time of order. . . . Moreover, the competition between manufacturers for a sale to a particular customer is a competition for the order, and the delivery dates are negotiated as part of that competition. Thus, information concerning orders will be relevant to considering the question of lost sales, as well as assessing the United States' claims of price effects, given that the pricing of LCA is largely, albeit not entirely, determined at the time of ordering. Therefore, we will consider order information in certain aspects of our analysis of the United States claims under Article 6.3(c).”), 7.1828 (launch sales of A380 to Singapore Airlines, Emirates, and Qantas constitute lost sales), 7.1845 (finding lost sales based on outcomes of sales campaigns), 8.2(d); Original Appellate Report, paras. 1220 (finding that a lost sales assessment “can focus on a specific sales campaign when such an approach is appropriate given the particular characteristics of the market”), 1414(l)(o)-(p); Compliance Panel Report, paras. 6.1780-6.1781, 6.1798; Compliance Appellate Report, paras. 6.31, 6.37; *US – Large Civil Aircraft (AB)*, paras. 1051-1055, 1064-1068.

¹⁵³ See Original Appellate Report, paras. 1414(l)(o)-(p) (upholding lost sales findings involving, *inter alia*, the A380, which was in development at the time of the sales campaigns); Compliance Appellate Report, paras. 6.31, 6.37; *US – Large Civil Aircraft (AB)*, paras. 1051-1055, 1064-1068 (upholding lost sales findings involving the Boeing 787, which was in development at the time of the sales campaigns).

¹⁵⁴ See Original Appellate Report, paras. 1217, 1219-1220, 1222-1228, 1306-1356, 1414(l)(o)-(p); Compliance Appellate Report, paras. 6.31, 6.37; *US – Large Civil Aircraft (AB)*, paras. 1051-1055, 1064-1068. This is not to say that an LCA producer's offer to meet a certain delivery schedule could not be a significant factor in the customer's order decision, but that the order decision is the critical point when adverse effects in the form of lost sales arise in the LCA industry. Actual deliveries have never played a meaningful role in the assessment of lost sales claims in this dispute or *US – Large Civil Aircraft*.

¹⁵⁵ See Original Panel Report, paras. 7.1750, 7.1828, 7.1845, 8.2(d); Original Appellate Report, paras. 1220, 1414(l)(o)-(p); Compliance Panel Report, paras. 6.1780-6.1781, 6.1798; Compliance Appellate Report, paras. 6.31, 6.37; *US – Large Civil Aircraft (AB)*, paras. 1051-1055, 1064-1068.

150. Those lost sales findings reflect the conditions of competition in this industry: a sale is won or lost *at the time of order*. As the original panel found, “the competition between manufacturers for a sale to a particular customer *is a competition for the order*, and the delivery dates are negotiated as part of that competition. . . Thus, *information concerning orders will be relevant to considering the question of lost sales.*”¹⁵⁶ Moreover, as the Appellate Body observed in the original proceeding, “{t}he United States directed its allegations of lost sales in this case against specific sales campaigns and *the Panel focused its analysis on those sales campaigns. The European Union has not challenged the Panel’s approach on appeal.*”¹⁵⁷ Thus, findings of lost sales are based on *orders*.

151. Therefore, the EU has it backwards in arguing that the Arbitrator is legally bound to discard “an order-centric metric” in favor of “actual deliveries in the relevant years (*i.e.*, a delivery-centric metric).”¹⁵⁸ The United States has used an order-centric metric because lost sales in this industry is an “order-centric” form of adverse effects, and the significant lost sales findings adopted by the DSB are themselves “order-centric.”

152. The EU also fails to support its position by referencing prior Article 22.6 arbitrations. *US – Upland Cotton (22.6 II)* involved the application of Article 7.9 of the SCM Agreement, and it both supports the U.S. approach and contradicts the EU’s critique. There, the arbitrator approved countermeasures up to a fixed amount each year for an indefinite period going forward.¹⁵⁹

153. It issued this award in August 2009 based on the level of price suppression observed in marketing year (MY) 2005, which included a period immediately after the end of the implementation period.¹⁶⁰ The arbitrator recognized the “inherent uncertainty” in estimating the value of adverse effects¹⁶¹ and that “prices vary considerably from year to year.”¹⁶² The arbitrator nonetheless accepted Brazil’s use of MY 2005 to value the level of price suppression and rejected the U.S. proposal to use a three-year period that included more recent data.¹⁶³

154. Here, the United States similarly proposes to base the countermeasures on adverse effects determined to exist (lost sales, in this case) in a period immediately following the end of the

¹⁵⁶ Original Panel Report, para. 7.1750 (emphasis added).

¹⁵⁷ Original Appellate Report, para. 1217 (emphasis added).

¹⁵⁸ See EU Written Submission, para. 187.

¹⁵⁹ See *US – Upland Cotton (22.6 – US II)*, para. 6.5(a).

¹⁶⁰ *US – Upland Cotton (22.6 – US II)*, paras. 4.115, 4.118-4.119.

¹⁶¹ *US – Upland Cotton (22.6 – US II)*, para. 4.117.

¹⁶² *US – Upland Cotton (22.6 – US II)*, para. 4.118.

¹⁶³ *US – Upland Cotton (22.6 – US II)*, para. 4.118.

implementation period. The EU has failed to show that this approach is conceptually flawed, whether in its order-centric focus or in any other respect.

155. The EU also errs in ascribing two kinds of negative consequences to the U.S. methodology.

156. *First*, the EU refers to the discussion in Section VIII.C of its written submission and contends that the U.S. order-based approach would artificially inflate the level of countermeasures because it “incorporates into its adverse effects calculations for the December 2011 to December 2013 period transactions that occur at a later point in time, and therefore result in adverse effects at a later point in time.”¹⁶⁴ The EU’s criticism is unfounded, as the United States discusses in response to that argument in Section IV.F.

157. The Appellate Body based its findings of adverse effects in the form of significant lost sales on “the *orders* identified in Table 19 of the Panel Report,”¹⁶⁵ which indisputably occurred in the December 2011 – 2013 post-implementation period. The Appellate Body found that those orders “*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.”¹⁶⁶ If the EU were correct that deliveries were the exclusive proper measure of adverse effects, those December 2011 – 2013 lost orders would have resulted in a threat of significant lost sales based on projected deliveries “at a later point in time,” as the EU would have it.¹⁶⁷ But that is not what either the compliance panel or the Appellate Body found.

158. Accordingly, the United States, taking into account the nature of these adverse effects as arising through lost orders, quantified the degree of adverse effects from those lost sales as of the time the sales were lost, based upon what the parties knew at that time. Thus, there is no artificial inflation. Rather, the U.S. approach properly reflects the adverse effects determined to exist.

159. *Second*, the EU argues that there is a risk of double-counting where orders are used to value lost sales and deliveries are used to value impedance. It attempts to illustrate this risk by referencing the 2013 Emirates VLA lost sales campaign – in which Emirates ordered Airbus A380s instead of U.S. VLA – and the finding of impedance in the UAE market for VLA, on the

¹⁶⁴ EU Written Submission, para. 190.

¹⁶⁵ Compliance Appellate Report, paras. 6.31(a), 6.37(a) (emphasis added).

¹⁶⁶ Compliance Appellate Report, paras. 6.31(a), 6.37(a) (emphasis added).

¹⁶⁷ EU Written Submission, para. 190.

ostensible basis that impeded deliveries into the UAE market would be deliveries to Emirates.¹⁶⁸ The EU’s double-counting argument is incorrect.

160. As an initial matter, lost sales under Article 6.3(c) and impedance under Article 6.3(b) are distinct forms of adverse effects that must be established according to distinct criteria indicated by the terms of each article, as discussed above. Further, lost sales and impedance can each have a different temporal focus, as confirmed by the prior reports in this dispute and *US – Large Civil Aircraft*.¹⁶⁹ There is no basis in Article 7.9 (or anywhere else in the covered agreements) for the proposition that the level of countermeasures for one form of adverse effects must be netted against other forms of adverse effects determined to exist, particularly where there is no indication of double-counting in the adopted findings.¹⁷⁰

161. Here, subsidies were found to cause both significant lost sales *and* impedance in the post-implementation period. The significant lost sales findings are based on market phenomena (*i.e.*, certain order transactions) that were *not* also the basis for findings of impedance (or threat of impedance). Neither the compliance panel nor the Appellate Body has identified any instance of double-counting. In such a situation, the level of countermeasures must account for both forms of adverse effects in order to be commensurate with both the *degree* and the *nature* of the adverse effects determined to exist.

162. Moreover, it is simply untrue as a factual matter that the U.S. approach poses a double-counting problem. There is no evidence or compliance finding that the 2013 Emirates lost sale resulted in deliveries on which the Appellate Body based its finding of impedance in the UAE VLA market, and the EU does not assert otherwise. Thus, the adverse effects arising from the Emirates lost sale and the impedance in the UAE VLA market are distinct harms—they are *additive, not duplicative*. The level of countermeasures must reflect that to be “commensurate.”

163. Finally, the United States makes an additional observation about the EU’s “delivery-centric” approach. The EU’s proposed alternative fails to provide the certainty that the EU ascribes to a “delivery-centric” approach. The EU would base the lost sales component of the countermeasures calculation on estimated, counterfactual deliveries in the future of aircraft covered by the lost sales in the December 2011 – 2013 period.¹⁷¹ In other words, ironically, the EU’s approach would base the lost sales component of countermeasures on data other than

¹⁶⁸ EU Written Submission, para. 192.

¹⁶⁹ See, *e.g.*, Original Panel Report, paras. 7.1750-7.1828, 7.1845; Original Appellate Report, paras. 1177-1182, 1217, 1219-1220, 1222-1228, 1306-1356, 1414(l)(o)-(p); Compliance Panel Report, paras. 6.1780-6.1781, 6.1798; Compliance Appellate Report, paras. 5.723-5.730, 5.732-5.742, 6.31, 6.37, 6.41; *US – Large Civil Aircraft (AB)*, para. 901.

¹⁷⁰ Cf. EU Written Submission, footnote 185.

¹⁷¹ See, *e.g.*, EU Written Submission, para. 211.

“actual deliveries” and thereby incur uncertainties that the EU treats as a fatal flaw in the U.S. approach.

2. *The U.S. approach towards quantifying impedance is well founded.*

164. The U.S. methodology for valuing impedance in the six VLA country markets at issue is based on a counterfactual situation in which the Airbus A380 deliveries that actually occurred are replaced by deliveries of U.S. VLA (*i.e.*, the Boeing 747-8I). The EU contends that this approach “is not supported by the findings of the panel and the Appellate Body in the first compliance proceedings.”¹⁷² To the contrary, the U.S. approach is well founded in the compliance findings. It is also the most reasonable method available for valuing impedance in a manner consistent with those findings.

165. To recall, the compliance appellate report upheld the compliance panel’s findings that Boeing’s VLA imports into the EU VLA market and exports to the third country VLA markets of Australia, China, Korea, Singapore, and the UAE – *i.e.*, 747-8I deliveries – were impeded by deliveries of the A380, an aircraft that would have been unavailable without LA/MSF subsidies existing in the post-implementation period.¹⁷³ The United States and the EU agree that the compliance appellate report found that “the US LCA industry would have achieved a higher volume of deliveries and market share than its actual level in the post-implementation period.”¹⁷⁴ However, the parties disagree as to the implications of this finding. According to the EU, this finding can be read extremely narrowly as implying that the actual and counterfactual market situations differed by as little as the delivery of a single aircraft:

{T}he Appellate Body’s finding of a ‘higher market share’ for Boeing absent the MSF subsidies at issue may imply a scenario in which Airbus makes one less delivery, while Boeing makes no additional delivery. Similarly, a “higher volume of deliveries” may imply a scenario in which Boeing makes one additional delivery, while Airbus’ deliveries remain constant.”¹⁷⁵

This characterization – which we refer to as the “one plane less scenario” as a shorthand – distorts the relevant underlying findings.

166. The findings of impedance in the compliance proceeding, and the U.S. methodology for valuing the nature and degree of that impedance, are based on the findings that the “product

¹⁷² EU Written Submission, para. 197.

¹⁷³ See Compliance Appellate Report, paras. 5.740-5.742.

¹⁷⁴ Appellate Body Compliance Report, para. 6.41, *quoted in* EU Written Submission, para. 198. See also EU Written Submission, para. 199.

¹⁷⁵ EU Written Submission, para. 199.

effects” of LA/MSF existing in the post-implementation period enabled Airbus to offer, sell, and deliver the A380 when and as it did in the post-implementation period.

167. The relevant findings begin with those from the original proceeding, which were examined closely in the compliance proceeding appeal.¹⁷⁶ The appellate report interpreted those findings as follows:

We agree with the United States that these findings from the original proceedings reveal that, *without A380 LA/MSF, Airbus would have been unable to fund the timely launch of the A380 programme relying exclusively on its own financial resources and outside financing*. This in turn suggests that A380 LA/MSF had “direct effects” on Airbus’ ability to launch the A380.¹⁷⁷

It then observed that:

In this sense, A380 LA/MSF had a genuine impact on Airbus’ ability to fund the timely launch of the A380. The original panel’s findings, together with the Panel’s analysis, indicate that *these “direct effects” of A380 LA/MSF continued after the original reference period*, given that the A380 LA/MSF subsidies had not expired, as well as the fact that Airbus continued to receive significant sums of money as disbursements under the French, German, and Spanish A380 LA/MSF contracts at a time when it was experiencing severe financial difficulties resulting from the extensive production delays in the A380 programme. We therefore disagree with the European Union’s claim under Article 11 of the DSU that the Panel’s understanding of the “direct effects” of A380 LA/MSF on Airbus’ ability

¹⁷⁶ See Compliance Appellate Report, para. 5.604 (“{W}e recall that the original panel, having examined the evidence on the record, agreed with the United States that, even if Airbus had been confident that the A380 programme would have been viable without LA/MSF, it would not have been able to fund the programme relying exclusively on its own resources and ‘outside financing’. The original panel rejected the European Communities’ argument that the creation of EADS increased Airbus’ financial flexibility. For the original panel, it was not clear how or to what degree the corporate restructuring of Airbus Industrie GIE, Aérospatiale, CASA, and Deutsche Airbus affected the ability of Airbus France (or Airbus SAS) to raise the very large amounts of capital needed for the A380 programme. Finally, the original panel also observed that the European Communities had ‘submitted no evidence to support the contention that merely because, reportedly, Boeing was able to finance a significant portion of the non recurring costs of development of the 787 through risk-sharing supplier arrangements, Airbus would necessarily have been able to do the same with respect to the A380.’ The Appellate Body upheld the original panel’s overall conclusion that ‘either directly or indirectly, LA/MSF was a necessary precondition for Airbus’ launch in 2000 of the A380’, noting that it was based on multiple considerations, including the A380 business case, evidence of Airbus’ ability to fund the A380 in the absence of LA/MSF, and the financial and technological impact of LA/MSF provided in relation to previous models of Airbus LCA.”).

¹⁷⁷ Compliance Appellate Report, para. 5.605 (emphasis added).

to launch, bring to market, and continue developing the A380 as and when it did lacks a sufficient evidentiary basis.¹⁷⁸

168. The Appellate Body summarized its causation findings as follows:

In other words, the existing LA/MSF subsidies that Airbus continued to receive made it possible to proceed with the timely launch of the A350XWB – a high-risk and expensive programme of considerable strategic importance to Airbus – and to bring to market the A380, which had suffered extensive delays.

In sum, our 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.¹⁷⁹

169. The Appellate Body relied on these findings in making its significant lost sales and impedance findings concerning the A380. Its findings with respect to lost sales help to clarify what the EU now seeks to obscure with respect to impedance:

Our review of the Panel’s findings, as well as the relevant findings from the original proceedings, indicates that, *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*. In other words, *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*.¹⁸⁰

170. Notably, the Appellate Body rejected the EU’s arguments that the A380’s product characteristics (such as greater size compared to the 747-8I) constituted non-attribution factors that explained the Emirates and Transaero lost sales. The Appellate Body did “not view these factors as unrelated to the effects of the subsidies. Rather, our review of findings from the original proceedings and the Panel’s findings shows that, absent the LA/MSF subsidies existing

¹⁷⁸ Compliance Appellate Report, para. 5.609 (emphasis added). *See also ibid.*, para. 5.646.

¹⁷⁹ Compliance Appellate Report, paras. 5.646-5.647 (emphasis added).

¹⁸⁰ Compliance Appellate Report, paras. 5.725-5.726 (quoting Compliance Panel Report, para. 6.1789) (emphasis added)

in the post-implementation period, Airbus would not have been able to launch and bring to market the A380 at the time it did.”¹⁸¹

171. The Appellate Body similarly found that existing LA/MSF’s product effects supported findings of impedance:

As explained above, our review of the Panel’s findings with respect to the A380 and A350XWB programmes, as well as relevant findings from the original proceedings, indicates that, 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*. Furthermore, we recall that, as the Panel’s analysis of the competitive dynamics in the VLA market shows, *Boeing’s and Airbus’ respective product offerings – the 747-8 and the A380 – are sufficiently substitutable*. Therefore, the Panel’s conclusion regarding impedance, insofar as the VLA market is concerned, is supported by its findings on the “product effects” – including those of the A380 LA/MSF subsidies existing in the post-implementation period – and by the data concerning the deliveries of the subsidized Airbus LCA – the A380 – that hindered the sales of competing US LCA in the VLA markets concerned. Thus, contrary to the situation regarding alleged impedance in the twin-aisle LCA market, the “product effects” of the LA/MSF subsidies existing in the post implementation period, including the A380 LA/MSF subsidies, and the VLA delivery data underlying the United States’ claim, concern the same aircraft model, and, as explained above, the Panel made necessary findings on both “product effects” and delivery data. On the basis of these considerations, we see no error in the Panel’s conclusion that, absent the LA/MSF subsidies, the US LCA industry would have achieved a higher volume of deliveries and market share in the VLA markets at issue than its actual level in the post implementation period.¹⁸²

Thus, as with the lost sales findings concerning Transaero and Emirates in the December 2011 – 2013 period, the ultimate conclusion as to impedance rests on a finding that, in the counterfactual situation absent LA/MSF for the A380 and A350 XWB, “Airbus would not have been able to offer the A380 at the time it did.”¹⁸³

172. If Airbus could not have *offered* the A380, it could not have delivered the A380 to customers. It therefore follows that the EU’s one plane less scenario is incorrect, since it could occur only if the A380 were not just available in the market, but delivered to customers, as and

¹⁸¹ Compliance Appellate Report, para. 5.729.

¹⁸² Compliance Appellate Report, para. 5.740 (emphasis added). *See also ibid.*, para. 6.41.

¹⁸³ Compliance Appellate Report, para. 5.740. *See also ibid.*, para. 6.41.

when it was in reality.¹⁸⁴ Accordingly, the EU is wrong to posit “a broad spectrum of possibilities” extending from the one plane less scenario contemplated by the EU to the scenario reflected in the U.S. methodology.¹⁸⁵

173. In fact, the compliance findings discussed above show that, in the proper counterfactual, the A380 is neither offered nor delivered to customers and the VLA markets are instead supplied solely with 747-8Is. Moreover, inelasticity of customer demand for LCA strongly suggests that, in the counterfactual situation, VLA customers would demand deliveries at levels similar to what was actually observed.¹⁸⁶ Consistent with those findings, the United States reasonably estimated that (1) VLA demand in the EU and third country markets would have been for the same amount of deliveries and at the same times as actually observed, and (2) in the absence of the A380, those customers would have satisfied their requirements by taking deliveries of the 747-8I.

174. Thus, the EU fails to show that the U.S. approach is not “commensurate” with the impedance determined to exist. Its primary critique is premised on an erroneous interpretation of the compliance findings, discussed above, which contemplates possible counterfactual A380 deliveries where the Appellate Body has already confirmed that Airbus could not have offered – much less delivered – the A380 in the post-implementation period.

175. In addition to these efforts to recast the adopted findings of adverse effects, the EU argues that the U.S. methodology failed to address three sets of issues that supposedly would affect a determination of the degree of impedance.¹⁸⁷ This criticism is unavailing. Merely asserting that a range of issues need to be explored does not satisfy the EU’s burden in an arbitration under Article 7.9 of showing that the U.S. methodology does not result in a level “commensurate” with the adverse effects determined to exist. That aside, the EU’s arguments regarding these issues do nothing to undermine the U.S. approach.

176. The first set of issues – “the economic mechanisms” through which LA/MSF affected competition¹⁸⁸ – was already resolved in the compliance proceeding, as discussed previously: absent LA/MSF subsidies to the A380, Airbus would have been unable to offer the A380, and the A380 would therefore have been absent from the market.¹⁸⁹ No further analysis is required or appropriate in this respect.

¹⁸⁴ See EU Written Submission, para. 199.

¹⁸⁵ See EU Written Submission, para. 199.

¹⁸⁶ See *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.17; Original Panel Report, note 5180.

¹⁸⁷ See EU Written Submission, para. 200.

¹⁸⁸ See EU Written Submission, para. 200, first bullet.

¹⁸⁹ See Compliance Appellate Report, para. 5.740. See also *ibid.*, para. 6.41

177. The second set of issues concerns VLA customer demand, but the EU’s assertions again rely on a premise directly contradictory to the panel and appellate findings – that the A380 would have been present in the market.¹⁹⁰ Moreover, customer demand for LCA is inelastic,¹⁹¹ undermining the EU’s assumption that VLA demand would have been materially different in a properly constructed counterfactual situation.¹⁹² Accordingly, the EU fails to cast doubt on the reasonableness of basing counterfactual VLA demand on the number of VLA deliveries that was actually observed. Indeed, doing so is the best reflection of the adverse effects *determined* to exist.

178. Finally, the third set of issues concerns VLA supply. The EU once more errs in presuming that Airbus would have had an aircraft available for delivery in the VLA markets – for example, where it posits that Airbus might engage in “aggressive bidding in certain key campaigns.”¹⁹³ The EU also ignores that the adopted reports engaged in a counterfactual analysis and found:

- in the original proceeding that the U.S. industry would have won significant VLA sales to Emirates, Singapore Airlines, and Qantas in the early 2000s,¹⁹⁴ and
- in the compliance proceeding that the U.S. LCA industry would have won the 2013 Emirates and Transaero orders¹⁹⁵ and would have enjoyed higher deliveries and market share in the VLA markets in the EU, Australia, China, Korea, Singapore, and the UAE.¹⁹⁶

To ask the Arbitrator to question whether the U.S. industry would have been able or willing to satisfy observed VLA demand is to seek to negate in part or in full the findings that Boeing lost *these sales* and that U.S. exports were impeded from the named markets. That is not the Arbitrator’s role. The EU therefore fails demonstrate that the U.S. methodology results in countermeasures that are not commensurate with the impedance determined to exist.

¹⁹⁰ See EU Written Submission, para. 200, second bullet (referring to “longer A380 delivery schedules”).

¹⁹¹ See *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.17; Original Panel Report, note 5180.

¹⁹² Cf. EU Written Submission, para. 200, second bullet.

¹⁹³ See EU Written Submission, para. 200, third bullet.

¹⁹⁴ See Original Appellate Report, para. 1414(o)-(p).

¹⁹⁵ See Compliance Appellate Report, para. 6.37(a).

¹⁹⁶ See Compliance Appellate Report, paras. 5.732, 5.740-5.742.

B. The EU Fails to Identify Technical Errors that Undermine the U.S. Methodology.

179. This subsection addresses the arguments in Section IX.B of the EU written submission regarding supposed technical errors in the U.S. quantification of significant lost sales and impedance determined to exist. The EU’s criticisms fail to undermine the U.S. methodology.

1. The U.S. approach to quantifying lost sales is valid and produces results that are “commensurate” with the adverse effects determined to exist.

a. The United States relies on the correct pricing evidence to value lost sales.

180. In quantifying adverse effects in the form of significant lost sales, the United States started with the orders from five sales campaigns identified by the Appellate Body as reflecting lost sales caused by LA/MSF subsidies in the December 2011 – 2013 period.¹⁹⁷ The United States sought to obtain the best possible information to determine the value of these orders as if the U.S. LCA industry had won them. Where available, such information would consist of aircraft prices that (1) the customer contractually agreed to pay, (2) for a Boeing model that was the closest substitute (the “closest Boeing model”) to the Airbus model that the customer ordered in the lost sale at issue, (3) at or around the time of the lost sale at issue.

181. Such information provides a reliable basis for valuing lost sales because it constitutes real-world data on the aircraft prices that the customer was willing to pay for Boeing aircraft that are substitutes for the Airbus aircraft ordered in the lost sale transactions. Such information was available to value four of the five lost sales at issue: the Cathay Pacific (2012), Singapore Airways (2013), and United Airlines (2013) twin-aisle sales, and the Transaero (2012) VLA sale.¹⁹⁸ In each of those cases, the same customer placed firm orders for the closest Boeing model within one or two years of the Airbus order.¹⁹⁹ Because such information was not available for the Emirates (2013) lost sale, the United States used [BCI] the Emirates lost sale.²⁰⁰

182. The EU does not contest that the United States has correctly identified the closest Boeing models for this counterfactual quantification exercise. However, the EU argues that the U.S. calculation rests on the wrong evidence because it did not use “information from Boeing’s actual offers to the actual customer at issue.”²⁰¹ The EU assumes that, for each lost sale, Boeing

¹⁹⁷ See U.S. Methodology Paper, paras. 27, 32. See also Compliance Appellate Report, paras. 5.705, 5.723, 6.31, 6.37.

¹⁹⁸ See U.S. Methodology Paper, para. 46.

¹⁹⁹ See U.S. Methodology Paper, para. 46.

²⁰⁰ See U.S. Methodology Paper, para. 48.

²⁰¹ EU Written Submission, para. 209.

submitted a final offer that was rejected in favor of a competing Airbus offer. That, as a factual matter, is incorrect. Specifically, [BCI].²⁰²

183. In any event, a Boeing offer price to a customer is not as reliable as the price that the customer has contractually agreed to pay for a Boeing aircraft. The EU has already complained, in the case of Emirates, that the United States relied on [BCI] where Boeing did not make a sale to Emirates of the relevant aircraft around the time of the lost sale. The EU criticized the U.S. reliance on [BCI], arguing that an accepted price would likely be lower.²⁰³ Yet, curiously, the EU in this section argues that the United States errs by not relying *exclusively* on [BCI].²⁰⁴

184. Thus, the EU's proposed alternative of using final Boeing offers was not a possibility as a factual matter. And even if it were, merely raising an alternative approach to a calculation, that has its own, different risks, is not sufficient to demonstrate that the U.S. approach results in countermeasures that are not commensurate with the adverse effects determined to exist.²⁰⁵

b. The United States uses valid delivery schedule estimates.

185. The United States did not simply value lost sales by multiplying the number of firm orders in the lost sales by the Boeing per-aircraft prices discussed in the preceding section, although that too would have been a valid approach. Rather, the United States (1) estimated the delivery schedules that the customer had agreed to with Airbus at the time of the lost sale, (2) escalated the counterfactual Boeing per-aircraft prices to the delivery years of the estimated delivery schedules, and then (3) discounted those prices to the year of order to arrive at lost sales values that would accurately reflect the serious prejudice to the interests of the United States, at the times of the orders representing lost sales.²⁰⁶ In the first of those three steps, the United States estimated the delivery schedule for Airbus aircraft ordered in the lost sales campaigns at issue, as of the time of order, because that was the best available reflection of the delivery timing acceptable to the relevant customer.

186. The logic for the U.S. approach is clear and straightforward. In each of the five campaigns, the customer accepted Airbus's offer in terms of delivery schedule. The inference that requires the least speculation is that the customer would have found an identical delivery schedule of Boeing aircraft acceptable. Notably, customer demand for LCA is inelastic.²⁰⁷ Because the United States did not possess the exact schedule Airbus agreed to with each

²⁰² See Second Boeing Declaration, paras. 4-8 (Exhibit USA-24(BCI)).

²⁰³ See EU Written Submission, para. 243.

²⁰⁴ See EU Written Submission, note 215 (acknowledging this problem).

²⁰⁵ See *US – Upland Cotton (22.6 II)*, para. 4.116.

²⁰⁶ See U.S. Methodology Paper, para. 35.

²⁰⁷ See *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.17; Original Panel Report, note 5180.

customer, the United States had Boeing estimate each delivery schedule based on its knowledge and expertise.

187. Nevertheless, the EU argues that the United States' use of an estimated delivery schedule is flawed for three reasons. First, according to the EU, the United States was required to use the delivery schedule that Boeing offered each customer in its final offer (which is wrongly assumed to exist). Second, the EU argues that United States failed to consider the realities of Boeing's own production pipeline in the counterfactual. And third, the EU contends that the United States improperly included deliveries that Airbus did not actually make in reality. All three criticisms fail.

188. *First*, the EU is incorrect that the United States wrongly focused on Airbus's delivery schedule at the time of order.²⁰⁸ Rather, the United States rightly considered that the delivery schedule agreed to with Airbus at the time of order was the most reasonable delivery schedule to use for counterfactual U.S. LCA deliveries in valuing the adverse effects. That is because Airbus's delivery schedule at the time of order is, by definition, a delivery schedule that the customer was willing to accept, such that it reliably indicates the counterfactual delivery schedule the customer would have accepted from Boeing if it had won the sale. Accordingly, the United States asked Boeing, based on its expertise, to estimate the delivery schedule that Airbus and the customer agreed to at the time of order because the United States did not have access to the actual contractual agreements.

189. The EU complains about this evidence, going so far as to urge the Arbitrator to treat the estimates as unsupported.²⁰⁹ As an initial matter, the Boeing declaration submitted by the United States is evidence, and there is no basis to ignore that evidence. Of course, the EU was welcome to provide rebuttal evidence that in its view undermines the weight of the U.S. evidence. Notably, the EU could have obtained from Airbus the exact delivery schedule agreed to at the time of order for each of the five sales. Yet, it did not submit this evidence to the Arbitrator.

190. Moreover, as the United States explained above, there are not Boeing final offers for all of the five sales campaigns as the EU assumes. Therefore, this was not even a possibility. The EU also asserts – without any basis in fact – that the United States chose this approach because it produced a level of countermeasures higher than the approach now suggested by the EU. The United States objects to the EU assertion that the United States rejected any valid approaches because they resulted in a lower level of countermeasures.

191. *Second*, the EU wrongly argues that the United States was obligated to engage in a highly speculative exercise as to how a counterfactual Boeing would have made managed capacity and production and prioritized various customers; how counterfactual customers would have

²⁰⁸ See EU Written Submission, para. 223.

²⁰⁹ EU Written Submission, note 220.

behaved; and the results of counterfactual negotiations between the counterfactual Boeing and the counterfactual customers. As noted above, engaging in this sort of exercise would be to question impermissibly the adopted finding that Boeing lost *these sales*. And, again, it is highly speculative and therefore much *less* reliable.

192. In any event, the EU's supposition that in the counterfactual Boeing would have delivered aircraft later than indicated in the terms of the order does not have a material effect. The delivery dates are only relevant to the number of years of discounting from delivery year to order year for each aircraft. The difference of an extra year or two of discounting would have only a tiny effect. "Commensurate," in SCM Article 7.9, requires proportionality, but not exact numerical correspondence.²¹⁰ Nothing in the DSU or Part III of the SCM Agreement requires complaining parties to engage in highly speculative counterfactual exercises in an attempt to achieve tiny – and possibly illusory – increases in precision, especially when that apparent precision is actually unreliable because it mostly reflects a significant number of highly speculative inputs.

193. For example, the EU argues that Boeing could not have delivered 747s according to the delivery schedules estimated for these transactions given its current rate of production and commitment to other customers.²¹¹ In doing so, the EU ignores that Boeing's current production rate has been depressed by LA/MSF subsidies that caused it to lose sales and experience lower delivery and market share levels. The EU ignores that, in the counterfactual world it seeks to construct, Boeing likely would have maintained 747 production rates at their significantly higher pre-A380 levels, or even increased production.

194. Moreover, to implement the EU's preferred approach, there would be endless variables to fill in (*e.g.*, production capacity, existing delivery commitments) and counterfactual events (*i.e.*, delivery dates to lost sales customers) with no real way to reliably determine how the events would have played out in that counterfactual world. To engage in such speculation would only provide a misleading appearance of exactitude. In truth, it would make the calculation dependent on highly speculative inputs and the interplay between them. Thus, whatever the apparent precision resulting from such an exercise, as a practical matter, it would be far less reliable.

195. To take another example, consider as a starting point the DSB's adopted findings that the 2012 Transaero and 2013 Emirates orders were sales that Boeing would have obtained in the absence of the subsidies. Suppose, to adopt part of the EU's argument, that counterfactual production capacity would have remained the same, or at minimum, would not have increased enough to fulfill customer preferences regarding delivery timing. The result would be Boeing negotiating with each customer about delivery slots. This requires speculation about how Boeing would prioritize various customers at the time of each order. Of course, Boeing is only one side

²¹⁰ See *US – Upland Cotton (22.6 II)*, para. 4.39.

²¹¹ EU Written Submission, para. 224.

of the negotiations. The exercise would also require assuming (likely with almost no evidence) how various customers would have handled a negotiation. In other words, the exercise envisioned by the EU would require piling speculation upon speculation.

196. And while it is theoretically possible that, in this counterfactual world, some deliveries to lost sales customers would be later, it is also possible that some deliveries would be earlier. The EU even suggests that the price terms might change as a result of those hypothetical negotiations.²¹² As this example shows, this exercise quickly devolves into a welter of speculation untethered to any form of reality. This would hardly be a better way of valuing the adverse effects determined to exist.

197. *Third*, the EU criticizes the United States for including orders for which Airbus ultimately made no deliveries. The only example it raises is the Transaero sale. As noted elsewhere, the EU's argument is simply asking the Arbitrator to reverse findings adopted by the DSB on the basis of more recent information. This arbitration does not serve the function of revisiting the first compliance panel's findings based on new evidence.

198. The United States has measured the value of this lost sale at the time it was lost based on the findings adopted by the DSB, which remain in force. The United States is not required to ignore the compliance panel and appellate findings; therefore, it is perfectly reasonable to include the aircraft in this order as part of the total value of the adverse effects determined to exist.

c. The delivery prices in the U.S. lost sales calculation are not "exaggerated."

199. The EU next alleges four flaws in the prices used by the United States to value lost sales, in some instances repeating criticisms it makes elsewhere. Below the United States explains why each allegation fails. In fact, the United States uses valid delivery price inputs, which reasonably estimate the value of the lost sales, are properly documented, and escalated to the year of delivery using the valid escalation rates.

i. The United States uses valid delivery prices.

200. First, the EU argues that the United States should have used the final offers in the actual campaigns that the compliance panel considered lost sales. This is the same argument the EU made in Section IX.B.1.a of its written submission. It fails for the same reasons.

201. Principally, the EU fails to acknowledge that the U.S. approach requires the least speculation about counterfactual prices in the five sales campaigns because, in the four instances where it was possible, the United States uses prices that the same customer agreed to pay for

²¹² EU Written Submission, para. 225.

substitutable Boeing aircraft within one to two years of the lost sale. Moreover, the information the EU prefers simply does not exist for [BCI] of those five sales campaigns. Finally, the EU itself has suggested that a losing bid may not accurately reflect the value of a lost sale if, for example, the customer rejected the bid because the price was too high, or other terms were not attractive enough, to secure the sale.²¹³

ii. *The prices used in the U.S. calculation are reasonable for the purpose of valuing adverse effects.*

202. The EU also criticizes the prices used by the United States because they do not reflect the same conditions as the orders found to be lost sales, including the delivery horizons and order sizes.²¹⁴ The EU's criticisms again assume the existence of final Boeing offers to the lost sale customers that provide a more reliable indication of counterfactual pricing. As such offers do not exist for [BCI] of the five lost sales, the EU's argument fails.²¹⁵ These EU criticisms are also meritless in their own right.

203. *First*, the EU focuses on the size of the orders Airbus secured compared to the size of the “comparator sales” where Boeing sold the closest model to the same customer around the same time in four of the five instances. But in three of the four instances – United, Singapore Airlines, and Transaero – Boeing actually sold the same number to the customer, not less.²¹⁶ In only one instance – Cathay Pacific – did the Boeing “comparator” sale involve fewer aircraft (3 vs. 10).²¹⁷

204. While size of the order can affect the per-aircraft price, so can many other factors. The EU has not analyzed the two Cathay Pacific transactions across any other factors. For example, the three 777-300ERs ordered in 2013 were not Cathay Pacific's first orders for that model; the airline already had a large installed fleet of 38 777-300ERs and outstanding orders for a further 12 (not including the three orders at issue) at the time of the order announcement.²¹⁸ As such a large operator of the model, Cathay Pacific could be expected to obtain attractive pricing for the three incremental orders it placed.

²¹³ See EU Written Submission, note 215, para. 243. In this section, the EU again accuses the United States of having chosen an invalid approach because it produced a high level of countermeasures. The EU provides no support for this accusation. Indeed, there are numerous examples in which the United States made conservative assumptions that tended to reduce the level of countermeasures over other possible approaches.

²¹⁴ EU Written Submission, para. 235.

²¹⁵ See EU Written Submission, para. 235.

²¹⁶ See EU Written Submission, para. 237, Table 1.

²¹⁷ EU Written Submission, para. 237, Table 1.

²¹⁸ See *Cathay Pacific Announces Additional Aircraft Order*, Cathay Pacific Press Release (Dec. 27, 2013) (Exhibit USA-6).

205. Moreover, with Airbus having just expanded the A350 XWB's presence at Cathay Pacific with the 2012 orders, Boeing would likely have been more aggressive in seeking to place additional 777-300ERs with the airline. That would tend to lower the price, suggesting that the price in the 2012 counterfactual sale could have been higher than Boeing's actual sale in 2013. Again, rather than engage in speculation about how myriad factors would have been resolved in hypothetical negotiations, which is unknowable, the United States used the best proxy it could find based on actual data. There are no perfect, real-world data about what the exact counterfactual price would have been. The proxy the United States uses is the best available. In any event, it is certainly reasonable, and the EU has not demonstrated that it is in any way inaccurate or suggested any available input that is more reliable.²¹⁹

206. *Second*, the EU again criticizes the U.S. calculation for using estimated Airbus delivery schedules at the time of order. The EU's preferred approach is to use supposed delivery schedules offered by Boeing (which do not exist for [BCI] of the five lost sales transactions at issue), adjusted by changes to the Airbus delivery schedule arising after the time of order. This is unduly speculative. As the United States has pointed out elsewhere,²²⁰ the EU advocates a counterfactual exercise that ignores the interplay of a broad range of elements that would all have to be estimated (*e.g.*, counterfactual production capacity, the results of counterfactual negotiations with numerous customers). This type of approach is needlessly complicated and ultimately less reliable because it requires speculation as to numerous inputs and the interplay among them. Where the DSB adopted findings that, in the absence of LA/MSF, the U.S. LCA industry would have won sales that Airbus won instead, the most reasonable basis for the calculation remains the delivery schedule to which the customer contractually agreed at the time the sale was lost.

207. For example, the EU lists the delivery positions for the United order as being one in 2025 and nine in 2026, and then accuses the United States of being off by nearly a decade.²²¹ In so doing, the EU assumes that, where the customer wanted to push back the deliveries for its own business reasons, Boeing would have agreed to the post-order adjustments to which Airbus agreed, which is not necessarily true. The EU also ignores the contractual consequences of those decisions, which may not have been the same in a counterfactual Boeing order. Furthermore, it is possible that in some instances, deliveries were pushed back because of Airbus issues. If that were the case, the EU's analysis would erroneously assume that Boeing would have faced identical problems.

208. Ironically, after criticizing the United States for estimating delivery positions prior to those United preferred, the EU also argues that, as a rule, customers prefer earlier delivery

²¹⁹ See *US – Upland Cotton (22.6 II)*, para. 4.16; *US – COOL (22.6)*, para. 4.12.

²²⁰ See *supra*, Section V.B.1.c.i.

²²¹ See EU Written Submission, para. 239.

positions.²²² In truth, when a customer prefers to take delivery is a function of many considerations, including its financial situation, its current fleet, the timing of its needs for new aircraft (*e.g.*, the expected dates that it needs to replace aging aircraft), its financial obligations on its current fleet, prices for used aircraft in the secondary market, and others.

209. Finally, the United States notes again that this is only relevant to the number of years of discounting from the delivery year to the order year. The effect on the extent of the countermeasures based on adjustments to the delivery schedule would be very minor, and “commensurate” does not require exact numerical correspondence.²²³

210. *Third*, the EU argues that the United States ignores the learning curve effects from its additional deliveries in the counterfactual. The EU asserts that Boeing can be expected to share such savings with customers at the time of order.²²⁴ The EU gives no explanation of from where it derives this expectation. Furthermore, it ignores all of the other effects in the counterfactual world, including the absence of the current competitive dynamic with Airbus’s closest model.

211. Lastly, the EU turns to the one lost sale where Boeing did not make a relatively contemporaneous sale of the nearest model to the same customer. The United States recalls that, for the Emirates lost sale, the United States used a [BCI] from Boeing. The EU argues that LCA contract prices [BCI], meaning the likely price would have been lower.²²⁵

212. It attempts to support this assertion with a comparison between the price from the [BCI] and a price paid by Lufthansa.²²⁶ The EU argues that the Lufthansa order was much smaller, and [BCI].²²⁷ But, again, the EU ignores numerous factors, including that Lufthansa was a launch customer for the 747-8I, a factor the EU found critical elsewhere.²²⁸ And, again, in its counterfactual exercise, the EU ignores the impact on all actual prices of competition with the nearest competing Airbus model, which reflects the impact of the LA/MSF subsidies.

iii. The EU’s criticism of the U.S. documentation of prices is meritless.

213. The United States submitted detailed pricing information from Boeing with respect to each of the five lost sales campaign customers, along with a declaration from Boeing indicating exactly how Boeing keeps its records and how it sourced the relevant pricing and other relevant

²²² See EU Written Submission, para. 240.

²²³ *US – Upland Cotton (22.6 II)*, para. 4.39.

²²⁴ EU Written Submission, para. 242.

²²⁵ EU Written Submission, para. 243.

²²⁶ EU Written Submission, para. 244.

²²⁷ EU Written Submission, para. 244.

²²⁸ See EU Written Submission, para. 252.

terms from the transactions at issue. The EU argues that a declaration is insufficient, but there is no basis to ignore this evidence, nor any reason to doubt its veracity.

214. The EU further argues that the United States fails to properly evidence the prices it submits because the price-related information is non-transparent and unreliable.²²⁹ It is neither.

215. *First*, the EU argues that the United States does not explain what these prices represent. This is not true, however. They represent exactly what they purport to be – the price the customer was contractually obligated to pay for each aircraft, as of the time of order. The EU notes that the United States does not explain whether the prices are inclusive or exclusive of engines, what types of engines, what type of flight deck equipment, and other specifics.²³⁰

216. The relevant product in this dispute is LCA. For each LCA, there is a bottom line price. This is the amount that Boeing would recognize as revenue from a sale in its financial statements.²³¹ This is the amount that a customs service would treat as the value of an imported LCA. Indeed, the compliance panel’s section under the heading “Product at issue” provides, in its entirety:

The product at issue in this dispute is the same as the product that was the subject of the original proceeding, i.e. LCA, as distinguished from smaller (regional) aircraft and military aircraft. LCA can generally be described as large (weighing over 15,000 kg) “tube and wing” aircraft, with turbofan engines carried under low-set wings, designed for subsonic flight. LCA are designed for transporting 100 or more passengers and/or a proportionate amount of cargo across a range of distances serviced by airlines and air freight carriers. LCA are covered by tariff classification heading 8802.40 of the Harmonized System (“Airplanes and other aircraft, of an unladen weight exceeding 15,000 kg”).²³²

Whatever the total price of a particular LCA was, that is the price that the United States reported. And that was the appropriate price to report.

217. The EU further complains that the United States did not provide any information, such as pre-delivery payments, order size, or delivery schedule, for so-called comparator sales.²³³ According to the EU, this lack of information does not permit the Arbitrator or the EU to verify

²²⁹ EU Written Submission, para. 247.

²³⁰ EU Written Submission, para. 250.

²³¹ See Boeing Declaration, note 5 (Exhibit USA-5(BCI)).

²³² Compliance Panel Report, para. 1.32.

²³³ See EU Written Submission, para. 250.

whether the price of the comparator sales is a reasonable approximation of the prices for the five lost sales at issue.²³⁴

218. Nothing in DSU Article 22.6 or Article 7 of the SCM Agreement requires such an exercise. As noted above, the prices paid by the same customer for the same product at roughly the same time as the lost sale transaction are the best evidence to estimate what the customer would have paid Boeing in the counterfactual. The EU has provided no basis to conclude that the terms of these real world Boeing sales differ in any meaningful way from the terms the parties would have agreed upon for the counterfactual sales. Thus, the assertion that the United States could, but did not, take this approach is irrelevant to an evaluation of whether the level of the proposed countermeasures is commensurate to the adverse effects determined to exist. “Commensurate” in SCM Article 7.9 does not require exact numerical correspondence.²³⁵ Thus, the EU cannot succeed by criticizing the United States for failing to introduce unnecessary complexity.

219. *Second*, the EU argues that the prices reported for two of the five sales (*i.e.*, to Singapore Airlines and United Airlines) are not “credible.”²³⁶ But it fails to support these assertions.

220. The EU alleges that, as a launch customer for the 787-10, Singapore Airlines would not have paid as much as it actually paid.²³⁷ The EU makes no reference to a price it would have expected Singapore Airlines to pay. In other words, it is not even clear to what price the EU is comparing the Singapore price in making the assessment that it is somehow high. This is nothing more than an unfounded assertion of the EU’s subjective impression of what a 787-10 launch price should be.

221. Similarly, the EU speculates that the United prices are not credible because, in 2015, the 777-300ER program was near the end of its life.²³⁸ Again, however, the EU does not even explain with respect to what reference point it assesses these prices to be high, much less incredibly so.

222. Therefore, the EU has given no reason to doubt the prices reported, which were taken directly from Boeing’s electronic revenue management system.

²³⁴ See EU Written Submission, para. 250.

²³⁵ See *US – Upland Cotton (22.6 II)*, para. 4.39.

²³⁶ EU Written Submission, para. 252.

²³⁷ EU Written Submission, para. 252.

²³⁸ EU Written Submission, para. 253.

iv. The United States uses valid escalation rates.

223. The EU criticizes the United States' use of [BCI] escalation rates, based on contractual escalation formulae, in the lost sales calculations.²³⁹ However, as explained previously, the United States appropriately valued these instances of lost sales at the time the sale was lost. The United States remained consistent in this approach. Therefore, the United States correctly used the escalation rates that were [BCI] at the time Boeing made the relevant sale. Notably, [BCI].

224. Moreover, the EU's escalation rate criticisms are both erroneous and misleading. The EU purports to show meaningful price discrepancies between [BCI] and [BCI] escalation rates calculated according to the escalation formulae agreed to by Boeing and the customer.²⁴⁰ As an initial matter, for at least [BCI] calculations, the EU calculations fail to apply the correct contractual escalation formulae, including by relying [BCI].²⁴¹ Thus, the EU calculations do not show what they purport to prove.

225. Next, and leaving aside the importance of valuing lost sales as of the time of order, the EU fails to mention that the use of [BCI] escalation rates was unavoidable in most instances because [BCI]. For [BCI].²⁴² For [BCI].²⁴³ Thus, the United States could not have used [BCI] escalation rates for these estimated deliveries. Accordingly, when the EU cites its escalation rate comparison calculations for Transaero, it is not using a representative example, since using [BCI] escalation rates was not an option for [BCI].²⁴⁴ In fact, when one examines the only other [BCI] estimated deliveries (to Emirates), the differences between [BCI] and [BCI] escalation rates are more than [BCI] than the differences the EU calculates for Transaero.²⁴⁵

226. In sum, the EU's escalation rate critique is conceptually flawed, reliant on incorrect calculations, and focused on a misleading "example."

²³⁹ EU Written Submission, para. 255.

²⁴⁰ See EU Written Submission, paras. 258-260; Exhibit EU-66-HSBI.

²⁴¹ Compare Exhibit EU-66-HSBI with [BCI].

²⁴² See U.S. Methodology Paper, paras. 59, 70, 75.

²⁴³ See U.S. Methodology Paper, para. 80.

²⁴⁴ Cf. EU Written Submission, para. 259.

²⁴⁵ See EU Written Submission, para. 258, Table 3.

d. The United States used the proper rate to discount to the time of order the value of aircraft to be delivered in the future.

227. The EU contends that that the U.S. approach of discounting estimated delivery year prices to the time of order is “unwarranted” and that the U.S. applied the wrong discount rate.²⁴⁶ The EU’s criticisms are misplaced and fail to undermine the U.S. methodology.

228. The EU begins by re-raising its objection to the United States’ focus on the time of order for lost sales.²⁴⁷ The United States notes that the DSB adopted findings of present significant lost sales, not threat of significant lost sales. The findings are also based on orders that Airbus won at the expense of the U.S. LCA industry. That is when Airbus and Boeing both consider a sale won or lost. In sum, an order-centric approach to lost sales is an integral part of the findings in the original panel report, the compliance panel report, and both appellate reports.²⁴⁸

229. The EU then turns to criticizing the 10-year T-Bond yield the United States used as the discount rate.²⁴⁹ All of the EU criticisms suffer from the same flaw. They seek to adjust for the time value to Boeing of future revenues from sales. This, however, does not address the relevant issue under Article 7.10 of the SCM Agreement – the degree and nature of adverse effects to the interests *of the United States*.

230. The SCM Agreement disciplines subsidies that cause “adverse effects to the interests of other Members.”²⁵⁰ To state the obvious, the United States is a WTO Member; Boeing is not. As the United States explained, the discount rate is meant to capture the notion that economic activity today is worth more *to the United States* than economic activity tomorrow.²⁵¹ And the time value to the United States of future economic activity is best captured by the borrowing rate of the United States, as reflected in the U.S. methodology by the ten-year T-Bill rate. Because the EU misses this point, its criticisms are inapposite.

2. The U.S. approach to quantifying impedance is not undermined by the EU’s allegations of technical errors.

231. As discussed above, the adopted findings of impedance under Articles 6.3(a) and (b) of the SCM Agreement are based on (i) the “product effects” of non-withdrawn LA/MSF in the

²⁴⁶ See EU Written Submission, paras. 261, 264.

²⁴⁷ See EU Written Submission, paras. 262.

²⁴⁸ Original Panel Report, paras. 7.1750, 7.1828, 7.1845, 8.2(d); Original Appellate Report, paras. 1217, 1220, 1414(l)(o)-(p); Compliance Panel Report, paras. 6.1780-6.1781, 6.1798; Compliance Appellate Report, paras. 6.31, 6.37

²⁴⁹ See EU Written Submission, paras. 263-290.

²⁵⁰ SCM Agreement, Art. 5.

²⁵¹ U.S. Methodology Paper, paras. 49-50.

post-implementation period, which enabled Airbus to offer and deliver the A380 where it would have otherwise been unable to do so, (ii) the substitutability between Airbus's A380 and Boeing's 747-8I, the only two VLA passenger models available to customers in the post-implementation period, and (iii) delivery data in six country markets during the December 2011 – 2013 period.²⁵² The United States closely adhered to these findings in valuing the degree of impedance determined to exist, while at the same time minimizing speculation.²⁵³ Accordingly, the U.S. calculation proceeds as if Boeing would have satisfied the demand served by the A380 deliveries that Airbus would have been unable to make (per the adopted findings), by delivering the closest substitute, the 747-8I.²⁵⁴

232. To value those deliveries, and to minimize the risk that data selection choices would skew the results, the United States used global average 747-8I per-aircraft delivery prices in the year of delivery for 2012 and 2013, since such data were available.²⁵⁵ For 2011, where such delivery data were not available, the United States estimated a global average 747-8I delivery price derived from global average order prices for 2011.²⁵⁶ The EU criticizes the U.S. approach both in terms of the number of counterfactual 747-8I deliveries incorporated in the U.S. calculation, and the prices used to value those deliveries. Below, the United States demonstrates that, with one exception, each of the EU's criticisms is invalid.

a. The EU's criticisms of the quantities of 747-8I deliveries incorporated in the U.S. calculation are erroneous.

233. The EU contends that the counterfactual 747-8I delivery volumes in the U.S. calculation are "exaggerated" because they are not supported by the adopted compliance findings and because Boeing lacked the production capacity to make such additional deliveries. To the contrary, the delivery volumes in the U.S. calculation are strongly supported by the adopted findings. The EU errs further in arguing that adopted impedance findings can be ignored based on the EU's presumption that Boeing's 747-8I counterfactual production capacity would not have risen to satisfy VLA demand where Airbus was unable to offer the A380. These points are explained in greater detail below.

i. The compliance findings support the U.S. calculation of impedance.

234. The EU argues that the United States errs in assuming that all of the A380 deliveries would have been deliveries of U.S. LCA absent the subsidies. But this is the exact logic adopted

²⁵² See Compliance Appellate Report, para. 5.740. See also *ibid.*, para. 6.41.

²⁵³ See U.S. Methodology Paper, paras. 28, 82-85.

²⁵⁴ See U.S. Methodology Paper, para. 82.

²⁵⁵ See U.S. Methodology Paper, paras. 86-87.

²⁵⁶ See U.S. Methodology Paper, para. 88.

in the compliance proceeding and resulting in the findings against the EU measures. The EU acknowledges that this argument is, with one exception, the same as it made in Section IX.A.2.²⁵⁷ of its written submission. Accordingly, the United States directs the Arbitrator to its response to the arguments in that section, which can be found in Section V.A.2 of this submission.

235. The one exception is an additional point. The EU asserts that Boeing held an 18.5 percent market share in the six country VLA markets examined in the compliance proceeding.²⁵⁸ The EU criticizes the United States for failing to substantiate that Boeing's market share would have jumped to 100 percent. This wrongly ignores both the DSB-adopted findings concerning the nature of the LA/MSF subsidies and causation and the U.S. approach to valuing the adverse effects.

236. First, as has been discussed in numerous other places in this submission, the relevant adopted findings are of ongoing adverse effects that the subsidies continue to cause by enabling the launch and market presence of the A380. The closest competing model to the A380, and only other model in the VLA market, is Boeing's 747. It stands to reason, and the adopted findings did in fact reason, that absent the A380's market presence, the U.S. industry would have made the deliveries.

237. SCM Article 7.9 requires that countermeasures be commensurate with the adverse effects determined to exist. Because it is the least speculative and relies most heavily on the findings actually adopted by the DSB, the United States valued the instances of adverse effects actually identified in the compliance reports over the period evaluated. This shows that the EU's subsidies cause [BCI] per year in impedance in the VLA product market.²⁵⁹ The United States thus did not rely on a projected market share in the six specific markets that were evaluated as the basis for the impedance findings. The United States simply valued the adverse effects determined to exist.

ii. *The EU's contention that Boeing would have lacked the ability or capacity to deliver VLA are spurious.*

238. The EU makes two arguments. First, the EU contends that the Airbus deliveries made between December 2011 and April 2012, when Boeing delivered the first 747-8I, must be ignored. Second, the EU argues that capacity constraints make it implausible for Boeing to have delivered VLA corresponding to the Airbus delivery schedule alongside its VLA deliveries to existing customers. Neither criticism withstands scrutiny.

²⁵⁷ See EU Written Submission, para. 297.

²⁵⁸ EU Written Submission, para. 297.

²⁵⁹ See Revised Aggregation of Adverse Effects Determined to Exist by Year, cells J, K, and L (Exhibit USA-28(HSBI)).

239. The EU is wrong that deliveries in the four months between December 2011 and April 2012 should be ignored.²⁶⁰ These deliveries were included in, and integral to, the impedance findings adopted by the DSB. The point of the calculation is to measure the annual extent of the adverse effects the subsidies continue to cause. Thus, while measuring the actual transactions reviewed by the compliance panel remains the best approach and the one faithful to the text, the purpose of the exercise is to set countermeasures for future application. The countermeasures are not intended to be retroactive punishment for past adverse effects. Therefore, even if the 747-8I strictly speaking could not have been delivered at the exact time of the estimated counterfactual delivery (which is not necessarily the case as explained below), it would still make sense to use the 747-8I price to value the adverse effects determined to exist because there is no dispute that delivery of 747-8Is is possible in the years in which the countermeasures will be applied.

240. Moreover, it is not the case that Boeing had yet to deliver *any* 747-8s prior to April 2012. Boeing delivered nine freighter versions of the 747-8 (the 747-8F) in 2011.²⁶¹ Given that Airbus cancelled its planned freighter version of the A380, it is no surprise that Boeing's 747-8 freighter has outsold its passenger version, or that the 747-8F entered service before the 747-8I passenger variant. But in the counterfactual situation, Airbus would have been unable to offer the A380, and Boeing would have sold more 747-8Is. The EU therefore cannot assume as it does that, in the counterfactual, Boeing could not have made 747-8I deliveries starting four months before the model actually entered service.

241. In addition, assuming first delivery of the 747-8I would not have moved up in the counterfactual world, as the EU does, the customers may take delivery a few months later than they took delivery in the actual world from Airbus. This would have no real effect on the extent of the countermeasures. However, under no circumstance could the relevant deliveries be ignored altogether. Doing so would be tantamount to reversing the impedance findings adopted by the DSB.

242. The EU's second argument is that capacity constraints would have made Boeing's delivery schedule implausible.²⁶² The EU ignores that, in the counterfactual world, Boeing would likely maintain or even increase its pre-A380 levels of VLA production. Moreover, the EU fails to deal with how Boeing could manage its skyline²⁶³ and the delivery schedule for other customers. And this is understandable. It would be highly speculative to simulate Boeing's counterfactual production decisions, and then project how negotiations would play out between

²⁶⁰ See EU Written Submission, para. 301.

²⁶¹ See Orders and Deliveries Query: 747-8 Deliveries in 2011, Boeing Website (Exhibit USA-25).

²⁶² See EU Written Submission, paras. 303-304.

²⁶³ "Skyline" generally refers to a manufacturer's production schedule for its backlog of ordered aircraft.

Boeing and numerous customers against the backdrop of the changed production capacity. That is why the U.S. approach is far more reliable.

243. And, again, the only potential import of any exercise would be to determine which minor model of the 747 Boeing would have delivered to the customer. Under no circumstance would the deliveries be ignored, effectively reversing the adopted findings of the DSB.

b. The 747 prices in the U.S. calculation remain valid.

i. The United States was not required to undertake the exercise urged by the EU to determine prices.

244. The EU argues that the United States' use of global average pricing exaggerates the price estimates and should be rejected.²⁶⁴ The EU contends instead that the United States was required to pursue the EU's preferred approach of: (1) identifying the customers to which the A380 was delivered in the relevant markets and time period leading to impedance findings; (2) identifying airline customers in the same markets that have purchased 747-8Is at around the 2011 – 2013 period; and (3) establishing reasonable price comparisons between regions, customers, and campaigns.²⁶⁵

245. The EU asserts that using global average pricing inflates the countermeasures, but this is baseless. Undertaking country-specific data collection is no more likely to result in an above-average price than a below-average price. Moreover, the EU provides no evidence or valid basis to assume that a customer in a geographic market will receive pricing more similar to another customer in that market or region than the average global price. There are many factors that go into the pricing of a particular transaction.

246. The United States notes that "commensurate," within the meaning of SCM Article 7.9, requires proportionality, but not exact numerical correspondence.²⁶⁶ In this instance, the EU has provided no basis to consider that the data it seeks will produce more accurate results. Thus, even if the Arbitrator considers that the EU's approach would have been acceptable when considered in isolation, the mere proposal of an alternative approach does not satisfy an original responding party's burden under DSU Article 22.6 and Article 7.10 of the SCM Agreement.²⁶⁷

²⁶⁴ EU Written Submission, paras. 308-311.

²⁶⁵ EU Written Submission, para. 312.

²⁶⁶ See *US – Upland Cotton (22.6 II)*, para. 4.39.

²⁶⁷ See *US – Upland Cotton (22.6 II)*, paras. 4.116.

ii. The United States is willing to exclude prices to non-airline customers.

247. The EU argues that certain of the 2012 deliveries to so-called VIP customers should be excluded from the global average price.²⁶⁸ These are sales of LCA, and neither the U.S. claims in this dispute, nor the findings adopted by the DSB, were limited to airline customers. As such, their inclusion in the U.S. calculation would not result in a level of countermeasures that is not commensurate with the adverse effects determined to exist. Nonetheless, upon further review, the prices for those aircraft [BCI].

248. Therefore, to minimize areas of disagreement between the parties where possible, the United States is willing to exclude deliveries to such VIP customers for the purposes of calculating a global average price for the 747-8I. The effect of this adjustment [BCI] the 2012 average global delivery price from \$[[HSBI]] to \$[[HSBI]].

iii. The 2011 global average price for the 747-8I is not inflated.

249. The EU begins by reiterating its point about the availability of the 747-8I in 2011. We have addressed that elsewhere²⁶⁹ and will not repeat that rebuttal here.

250. The EU argues that the 2011 average price is tainted by its incorporation of the 2012 average price.²⁷⁰ The EU suggests that the 2012 price should exclude deliveries to VIP customers, and that the revised 2012 price should be discounted to 2011 using contractual escalation rates.²⁷¹ As discussed in the previous subsection, the United States has agreed to exclude the deliveries to so-called VIP customers.

251. The EU also argues that the U.S. ratio approach for deriving the 2011 delivery price is unnecessarily complicated and arbitrary, and suggests that the United States instead could have discounted the 2012 average price using the Lufthansa contractual escalation formula.²⁷² This criticism is baseless.

252. There is no perfect way to determine the 2011 delivery price when no deliveries took place in 2011. The United States used a common extrapolation approach to estimate an

²⁶⁸ EU Written Submission, para. 322-325.

²⁶⁹ See *supra*, Section V.B.2.a.ii.

²⁷⁰ EU Written Submission, para. 328.

²⁷¹ EU Written Submission, para. 330. The United States notes that it does not view a simple ratio as complicated, nor does it view the ratio it used to derive the 2011 price as arbitrary. See EU Written Submission, para. 329. However, the United States does appreciate the EU acknowledgment that it is preferable to adopt complicated methodologies only when necessary.

²⁷² EU Written Submission, para. 329.

unknown value. The EU has not shown anything about it that would make it invalid. Moreover, the United States does not consider calculating a ratio to be “unnecessarily complicated.”

253. Therefore, the United States has maintained its approach for deriving a 2011 delivery price. However, because the United States accepted the EU’s refinement of the 2012 delivery price – which is one of the inputs to the ratio – the 2011 delivery price will still change. This adjustment results in a 2011 delivery price of \$[[HSBI]].²⁷³

254. The adjustments to the 2011 and 2012 delivery prices reduce the adverse effects determined to exist from \$10.6 billion to \$10.2 billion per year in 2013 dollars.²⁷⁴ This translates into a reduction from \$11.2 billion to \$10.8 billion in countermeasures to be applied in 2018.²⁷⁵

3. *The EU errs in attempting to identify flaws in the U.S. formula for deriving commensurate countermeasures to be applied in a particular year.*

a. The U.S. methodology for calculating year-specific levels of countermeasures is straightforward and appropriately reflects the value of adverse effects.

255. As an initial matter, the United States notes the EU’s acknowledgment again that the complexity of any formula or inquiry is relevant to whether it is reasonable to adopt.²⁷⁶ However, the United States disagrees that the methodology it has put forward is unnecessarily complex. To the contrary, it is straightforward and appropriately values the annualized adverse effects determined to exist.

256. The EU criticizes the United States for escalating a price, discounting the value to the order year, and then updating the adverse effects determined to exist to current year dollars.²⁷⁷ The EU wrongly assumes that these three methodological steps serve the same purpose. They do not.

257. The escalation is an effort to value the good in the year that it is scheduled for delivery. This step is about determining the value of the good, which is best reflected in the market price actually paid, which in this industry depends on the delivery year.

²⁷³ Revised Calculation of 2011 747-8I Delivery Prices (Exhibit USA-27(HSBI)).

²⁷⁴ Revised Aggregation of Adverse Effects Determined to Exist by Year (Exhibit USA-28(HSBI)).

²⁷⁵ The United States recognizes that, given the timetable established by the Arbitrator, the application of countermeasures will not be authorized for 2018. Nevertheless, the United States continues to use 2018 as the current reference point and to maintain consistency with previous submissions.

²⁷⁶ See EU Written Submission, para. 336.

²⁷⁷ See EU Written Submission, paras. 337-338.

258. The discounting step is meant to account for the fact that economic activity today is more valuable than economic activity tomorrow. Therefore, to calculate the value to the United States of a 2012 lost sale, the U.S. methodology discounts the value of the good as stated in delivery year dollars to the order year.

259. Finally, the inflation step is designed to make sure that the countermeasures remain commensurate with the adverse effects determined to exist when applied in subsequent years. Because those adverse effects are valued in 2013 dollars, to keep pace with inflation, the value must be updated annually. Otherwise, the countermeasures would no longer be commensurate with the adverse effects determined to exist. Contrary to the EU's suggestions, this step is not the same as reconsidering the extent to which the subsidies cause adverse effects, which is what the EU urges when it requests that the Arbitrator consider "several variables," but should be rejected.²⁷⁸

b. The EU errs in alleging that the United States' choice of inflator is wrong.

260. The EU again complains about the use of contractual escalation rates and the use of the PPI index as an inflator.²⁷⁹ As discussed previously, these are two distinct steps designed to capture two different concepts for two different purposes. Therefore, there is no valid reason why they should be the same. Failing to recognize this, the EU engages in a hypothetical exercise that brings base year aircraft prices to the year of imposition of countermeasures, which is irrelevant because the countermeasures applied in future years are a prospective remedy for the adverse effects the subsidies continue to cause, not as punishment for adverse effects from the December 2011 – 2013 period.²⁸⁰

261. Next, the EU argues that the contractual escalation rates are a better "inflator" for purposes of the U.S. countermeasures formula. This argument suffers from the same defect. It is unrelated and fails to capture the proper purpose of the inflation aspect of the U.S. formula. Accordingly, the EU's arguments fail.

4. There is no basis to reduce the U.S. countermeasures by the share of production value that is produced abroad.

262. The EU argues that, because U.S. LCA incorporate inputs made outside the United States, the value of those inputs must be subtracted from the value of the LCA for purposes of calculating commensurate countermeasures.²⁸¹ This is clearly erroneous.

²⁷⁸ EU Written Submission, para. 334.

²⁷⁹ See EU Written Submission, paras. 345-352.

²⁸⁰ See EU Written Submission, paras. 346-349.

²⁸¹ See EU Written Submission, paras. 353-354.

263. The dispute, and the findings adopted by the DSB, pertain to large civil aircraft. That is a distinct product produced by the United States. There is no basis in the SCM Agreement to treat significant lost sales of LCA, or impedance of LCA, as if it were anything less than that. The EU's approach would treat the adverse effects here as related to lost value-added through final assembly activities and lost sales of fuselages. Because those were not the findings adopted by the DSB, the EU's approach is obviously improper.

264. Moreover, it would render the countermeasures not at all "commensurate," and for that reason would severely undermine the aim of inducing compliance. The United States will apply countermeasures to imports of EU goods. In ensuring that the United States does not divert more trade than is authorized by the DSB, the United States will base its application of tariffs on the value of trade in goods potentially subject to countermeasures. Those values will be a function of the goods' prices.

265. Inevitably, many of those EU goods will similarly be the product of an international supply chain and will incorporate non-EU, and in some cases U.S., inputs. To ensure an apples-to-apples comparison, the extent (or level) of countermeasures must be stated as a value of the adverse effects with respect to LCA as a product, not just part of the product. And, as discussed above, this is also clearly required based on the claims brought by the United States and the findings adopted by the DSB.

CONCLUSION

266. For the reasons set out above, the United States respectfully requests the Arbitrator to reject the EU's challenge to the level of countermeasures proposed by the United States.