European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft: Recourse to Article 21.5 of the DSU by the European Union and Certain Member States

(DS316)

RESPONSES OF THE UNITED STATES TO THE QUESTIONS FROM THE PANEL

EU Business Confidential Information (BCI) and
EU Highly Sensitive Business Information (HSBI) Redacted

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TABLE OF REPORTS

Short Title	Full Case Title and Citation
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
Chile – Price Band System (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
Colombia – Textiles (21.5) (Panel)	Panel Reports, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Panama*, WT/DS461/RW and Add. 1, circulated 5 October 2018
First Compliance Appellate Report / *EC – Large Civil Aircraft (21.5 – AB)*	Appellate Body Report, *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*, WT/DS316/AB/RW, adopted 28 May 2018
First Compliance Panel Report / *EC – Large Civil Aircraft (21.5 – Panel)*	Panel Report, *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*, WT/DS316/RW, adopted 28 May 2018
EC – Biotech (Panel)	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006
EC – Chicken Cuts (AB)	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
Japan – DRAMs (AB)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007
Japan – DRAMs (Panel)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R
Original Appellate Report / *EC – Large Civil Aircraft (AB)*	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011

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Original Panel Report / *EC – Large Civil Aircraft (Panel)*	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R
US – Large Civil Aircraft (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Large Civil Aircraft (21.5) (Panel)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (Recourse to Article 21.5 of the DSU by the European Union)*, WT/DS353/RW, circulated 9 June 2017
US – Large Civil Aircraft (21.5) (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (Recourse to Article 21.5 of the DSU by the European Union)*, WT/DS353/AB/RW and Add.1, adopted 11 April 2019
US – Lumber CVDs IV (21.5) (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS257/AB/RW, adopted 20 December 2005
US – Upland Cotton (21.5) (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton– Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008
US – Zeroing (EC) (21.5) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009

1 The European Union's claims of withdrawal of certain LA/MSF subsidies

1.1 German A350XWB LA/MSF

Question 1 (Both parties)

> **(*To both parties*) Referring to the Appellate Body Reports in *Chile – Price Band System* and *EC – Chicken Cuts*, the United States argues that as long as a measure's essential features remain unchanged, the measure continues to exist.[1]**
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> [1] **United States' second written submission, para. 112.**
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> **a. Is this guidance relevant to the measures at issue in this dispute, in particular the amendments to the German A350XWB LA/MSF and A380 loan agreements?**

1. The cited reports address original proceedings in which the responding party amended the measure referenced in the panel request after the date of panel establishment, and the question was whether the amended measures were within the panel's terms of reference. Therefore, they do not address the situation presented in this reverse Article 21.5 proceeding, in which the party requesting the compliance panel ("complaining party") (here, the original respondent) argues that measures amending the measures subject to the recommendations and rulings of the DSB have brought it into compliance. Nonetheless, the issues addressed in those reports are sufficiently similar to the issues in this proceeding that those reports provide relevant guidance.

2. In both *Chile – Price Band System* and *EC – Chicken Cuts*, the Appellate Body analyzed the relationship between two sets of measures based on their essential characteristics.[1]

3. The EU contends in this proceeding that its member States' amendments to terms of the original subsidy instruments achieved withdrawal because they "replaced" the original subsidy measures with new measures.[2]

4. In *Chile – Price Band System*, the Appellate Body found that a measure has both essential and non-essential features, and as long as the essential features remain unchanged, the measure challenged in the panel request continues to exist.[3] That measure, in its amended form, is within the terms of reference of the panel, and subject to a recommendation under DSU Article 19 if found to be inconsistent with the covered agreements. The same logic, applied to this proceeding, indicates that the original measures subject to the recommendations and rulings of the DSB continue to exist, and calls on the compliance panel to evaluate whether, as amended, those measures have come into compliance with the adopted findings from the original proceedings.

5. As explained below, the specific terms amended in the German A350XWB and A380 LA/MSF agreements do not constitute the essence of the measures at dispute. Therefore, the

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[1] *Chile – Price Band System (AB)*, paras. 132-133; *EC – Chicken Cuts (AB)*, para. 154.

[2] EU FWS, paras. 70-80.

[3] US SWS, para. 50.

amendments left the original LA/MSF agreements essentially unchanged in terms of their essence, and in other words, unwithdrawn.

b. What are the essential features in the context of the basic structure of the original loan agreement?

6. The first compliance panel identified the essential features of LA/MSF measures, finding that all LA/MSF subsidies to Airbus:

> are of a very similar *nature* because of at least the following four important commonalities – they are all: (a) *loan* agreements; (b) containing the *same four "core" repayment terms*; (c) entered into by essentially *the same parties* (Airbus and the Airbus governments); and (d) for the purpose of *financing the development costs of Airbus LCA (in particular, a new model of Airbus twin-aisle LCA)*…[4]

The first compliance panel further recognized that:

> the repayment of the LA/MSF is back-loaded, primarily levy-based, dependent on the sales of aircraft and unsecured. To this extent, the A350XWB LA/MSF contracts share the same core features as the LA/MSF measures considered in the original proceeding.[5]

Thus, any LA/MSF measure that has these features shares the same nature or essence as other LA/MSF measures.

7. There is no evidence that any of the amendments to the A380 LA/MSF agreements from all four member States and the German A350 XWB LA/MSF agreement touched on the pre-existing subsidies' status as loan agreements containing the same four core repayment terms, involving the same parties (Airbus and the Airbus governments), for financing the development costs of Airbus LCA. Indeed, as admitted by the EU, the amendments to the A380 and German A350XWB LA/MSF retained the nature or essence of those measures. For the German A350XWB LA/MSF, the EU admitted that the 2018 amendment "retain{ed} the basic structure of the A350XWB MSF loan" and served to **[***]**.[6] For the A380 LA/MSF, the amendments **[***]**, and the EU admitted that the amendments preserved the "success-dependent" nature of the

[4] First Compliance Panel Report, para. 6.130 (emphasis original).

[5] First Compliance Panel Report, para. 6.286.

[6] EU FWS, para. 94; German A350 XWB **[***]** Amendment, preamble (Exhibit EU-9(BCI)).

original A380 LA/MSF agreements and the MSF lenders still assume a "'risk that would otherwise fall on the aircraft manufacturer.'"[7]

Question 2 (US)

> **At paragraph 49 of its oral statement, the European Union states that "{w}hen Article 7.8 identifies withdrawal of the "subsidy" as one of the compliance options under it, the term has the meaning assigned to it in Article 1.1." Based on this, the European Union argues that the Panel may not ignore the Appellate Body's guidance from *Japan – DRAMs (Korea)* regarding amendment of an existing financial contribution. Please comment.**

8. Articles 1.1 and 7.8 of the SCM Agreement serve two different purposes. Article 1.1 defines a subsidy, and Article 7.8 provides the compliance obligation with respect to a particular type of WTO-inconsistent subsidy.

9. The word "subsidy" appears in both clauses of Article 7.8. The first clause refers to "any subsidy" that "has resulted in adverse effects to the interests of another Member within the meaning of Article 5," as determined in an adopted panel or Appellate Body report. The second clause, through the word "such" and the definite article "the," refers back to the "subsidy" in the first clause, which is the subsidy previously determined in an adopted report to cause adverse effects to the interests of another Member. Therefore, the compliance obligation is not with respect to any subsidy as defined in Article 1.1, but to "the subsidy" that has been determined to exist and be inconsistent with the SCM Agreement in past findings.

10. This is consistent with the Appellate Body's discussion of the withdrawal obligation in *US – Upland Cotton (21.5)*. In particular, it found with respect to withdrawing a subsidy that:

> The question then becomes: With respect to which subsidies must the implementing Member take such action? Such action would certainly be expected with respect to subsidies granted in the past and which may have formed the basis of a panel's determination of present serious prejudice and adverse effects.[8]

11. Thus, the Appellate Body understood Article 7.8 as requiring compliance action with respect to a subsidy that was granted in the past and was the basis of a DSB-adopted finding of inconsistency with Articles 5 and 6. This confirms that the phrase "the subsidy" in Article 7.8 refers to a subsidy that was the subject of such recommendations and rulings.

12. There is no dispute that, with respect to this EU claim, the "subsidy" for purposes of Article 7.8 of the SCM Agreement consists of the provision of the A350 XWB and A380

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[7] *See* EU FWS, para. 121 (citing First Compliance Panel Report, para. 7.343, 7.462, 7.1881).

[8] *US – Upland Cotton (21.5) (AB)*, para. 237.

LA/MSF to Airbus by France, Germany, Spain, and the UK at below-market rates. The EU appears to argue that under the logic of *Japan – DRAMs (Korea)* this "subsidy" no longer exists because "the amendment of the terms of an existing financial contribution amounts to a new financial contribution."[9] This argument imputes to the Appellate Body a finding it did not make, based on facts that did not exist.

13. *Japan – DRAMs (Korea)* addressed a countervailing duty proceeding with regard to the modification of the repayment terms of existing loans and their conversion into equity without any exchange of money or other financial assets. The question was whether the modifications could be properly characterized as a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i).[10] The panel found that they could be so characterized, and the Appellate Body upheld the panel's finding.[11] Importantly, the original loans were never determined (or even alleged) to be subsidies. Thus, the panel and Appellate Body did not face, let alone address, the question whether amendment of a subsidy measure so as to confer a new financial contribution on subsidized terms means that the original subsidy ceases to exist or is "replaced."

14. Thus, the United States is not suggesting that the Panel "ignore" the reasoning in *Japan – DRAMs (Korea)* – we merely observe that it does not address the legal question of how to evaluate the amendment of a measure determined to be a subsidy. The answer to that question would depend heavily on the facts, including the nature of the subsidy and the effect of the amendment. An amendment might confer a whole new financial contribution ***additional*** *to* the existing subsidy – for example, by adding a grant to an existing subsidized loan. It might withdraw the subsidy – for example, by modifying the terms to eliminate the difference in terms with the benchmark that led to the finding of a benefit. Conversely, as in this case, the amendment might modify the terms so as to ***widen*** the gap between the subsidy measure and the market benchmark that led to the finding of a benefit. It is even possible that an amendment might modify the subsidy so as to make it a new and different financial contribution.

15. In each case, the analysis cannot assume as a matter of law – as the EU proposes – that the subsidy subject to the recommendations and rulings of the DSB has ceased to exist or been "replaced." Rather, the analysis must address the original subsidy, consider how the amendment affected the benefit determined to exist, and whether the amendment confers a new subsidy, which may be in addition to or a replacement of the existing subsidy.

Question 3 (EU)

Please comment on the United States' argument at paragraph 35 of its second written submission that the panel and Appellate Body reports in *Japan – DRAMs (Korea)* are inapposite because there was no finding that the initial loan at issue

[9] EU Oral Statement, para. 49.

[10] *Japan – DRAMs (Panel)*, para. 7.439.

[11] *Japan – DRAMs (Panel)*, para. 7.439; *Japan – DRAMs (AB)*, para. 256.

was in its own right a subsidy, such that the modification gave rise to a new and separate subsidy.

Question 4 (Both parties)

At paragraph 2 of the A350XWB Report (Exhibit EU-11-BCI), TradeRx states that the 2018 amendment to the German A350XWB LA/MSF loan agreement: (i) "was intended to [***]; (ii) "allowed Germany to [***]; and (iii) "was achieved [***]".

a. How do changes to the [***] affect the repayment of the German A350XWB LA/MSF loan and the accrual of interest, compared with the repayment and interest accrual of the unamended loan agreement?

16. The EU has not provided a complete set of loan documents or information on the evolution of German LA/MSF for the A350 XWB. The U.S. response to this question is necessarily based on the incomplete information available.

17. As the United States explained in its first written submission, the original German LA/MSF contract for the A350 XWB entitled Airbus to borrow **[***]** on the unsecured, success-dependent, levy-based, back-loaded terms and conditions that characterize LA/MSF to Airbus generally. The original contract provided that **[***]**.[12] The original contract also allowed **[***]** for the **[***]**.[13]

18. According to the EU, **[***]**.[14] Airbus appears to have **[***]**.[15]

19. In the first compliance dispute, Dr. Jordan and the EU's consultant, Professor Whitelaw, both assumed that the **[***]** on the **[***]** was **[***]**.[16] The EU has thus far failed to provide the actual **[***]** that Germany received for **[***]**. NERA therefore assumed that the **[***]** on the **[***]** – *i.e.*, **[***]** – or, alternatively, **[***]**.[17]

20. On **[***]** 2018, Germany and Airbus agreed to amend the German A350 XWB LA/MSF contract **[***]**.[18]

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[12] US FWS, para. 88.

[13] US FWS, para. 89.

[14] US FWS, para. 90.

[15] US FWS, para. 90.

[16] First NERA A350 XWB Report, para. 5 (Exhibit USA-26(HSBI)); James Jordan, *Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks* (Oct. 18, 2012) ("Jordan Report"), p. 4, Table 1 (Exhibit USA-114 (USA-475-FCP)(HSBI)); Robert Whitelaw, *Update on certain calculations of IRRs and Macaulay durations* (Apr. 14, 2014), Table 1 (Exhibit USA-115 (EU-507-FCP)(HSBI)).

[17] First NERA A350 XWB Report, para. 5, note 5 (Exhibit USA-26(HSBI))

[18] US FWS, para. 91.

21. The **[***]** amendment thus **[***]** the **[***]** on German A350 XWB LA/MSF, resulting in **[***]** accrual of interest. However, it does not impact **[***]**.[19]

b. Please comment on NERA's statement at paragraph 2 of Exhibit USA-26-BCI that the A350XWB Report analysis "ignores the existence of the Original LA/MSF Agreement, and instead relies on a benchmark that would not have been meaningful to a market lender considering whether to enter into the {2018} amendment".

22. To summarize, as NERA explains in its first report on the German A350 XWB LA/MSF amendment, Professor Klasen used the wrong analytical framework in his A350 XWB Report.[20] Professor Klasen's analysis, which is modeled on that of Dr. Jordan in the first compliance proceeding, compares the IRR of the amended loan (considering only cash flows from 2018 onward) with a market benchmark that he constructs.[21] This framework might be appropriate to determine whether a *new* loan confers a subsidy, but, as NERA correctly states, it completely ignores the existence of the original German A350 XWB LA/MSF agreement.[22]

23. To analyze whether an amendment to a pre-existing, subsidized loan withdraws the subsidy, it is necessary to analyze the effect of the amendment on the pre-existing loan.[23] A market lender in Germany's position considering whether to enter into the 2018 amendment would have done so only if it expected the amendment to improve its financial position.[24] Professor Klasen's benchmark – which indicates what a borrower should expect to pay for a new loan in 2018 – would have no relevance for a market lender in the position of Germany, *i.e.*, one with a pre-existing loan at a comparatively attractive rate.[25]

c. Please comment on NERA's statement at paragraph 8 of Exhibit USA-150-BCI that "{i}t is unclear why TradeRx believes that the transaction entailed no cost to KfW, since … the IRR under the {2018} Amendment is lower than the IRR under the pre-existing contract without the amendment".

24. To summarize, NERA demonstrated in its first report on German LA/MSF for the A350 XWB that the IRR of the original LA/MSF contract (without any amendment) is greater than the

[19] *See* German A350 XWB LA/MSF Agreement, clause 6.1 (Exhibit EU-10(BCI)).

[20] *See* US FWS, para. 96; First NERA A350 XWB Report, para. 12 (Exhibit USA-26(HSBI)).

[21] First NERA A350 XWB Report, para. 13 (Exhibit USA-26(HSBI)).

[22] First NERA A350 XWB Report, para. 14 (Exhibit USA-26(HSBI)).

[23] *See* US FWS, para. 96.

[24] First NERA A350 XWB Report, para. 11 (Exhibit USA-26(HSBI)).

[25] First NERA A350 XWB Report, para. 15 (Exhibit USA-26(HSBI)).

IRR of the contract after the 2018 amendment.[26] Thus, NERA concluded that the 2018 amendment increased the pre-existing German A350 XWB LA/MSF subsidy to Airbus.[27]

25. Professor Klasen's Report on German A350 XWB LA/MSF asserts that the 2018 amendment "was achieved **[***]**."[28] However, the alleged **[***]** are not part of the original German A350 XWB LA/MSF contract or the 2018 amendment, and the EU has failed to provide any details regarding the terms of the **[***]**. Thus, it is unclear what the relevance of the **[***]** is. It also appears that taking account of the costs or revenues associated with the **[***]** would measure the cost of the transaction to the government, rather than the terms paid to the recipient. As the Appellate Body found in *Canada – Aircraft*, the existence of a "benefit" for purposes of Article 1.1(b) of the SCM Agreement depends on "whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market,"[29] and not the "cost to government" of providing the financial contribution.[30]

26. It is clear, however, that the IRR under the 2018 amendment is lower than the IRR under the pre-existing contract, meaning the transaction did entail a cost for KfW.[31] To illustrate the effect of the 2018 amendment on Germany's financial position, NERA calculated that the difference between the **[***]** Germany would have received under the original A350 XWB LA/MSF contract and the contract as amended in **[***]** is at least **[***]** in 2018 alone.[32] Overall, NERA estimates that Germany would have received from **[[HSBI]]** more in interest under the original contract.[33] Simply put, Germany would have been in a better financial position if it had simply left the terms of the original A350 LA/MSF contract unamended.

Question 5 (EU)

At paragraph 31 of Exhibit EU-11-BCI, TradeRx explains that the [***].

a. At the time of signing the original agreement, what were the expectations regarding which [***]? Was the [***] applied before the 2018 amendment?

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[26] First NERA A350 XWB Report, para. 8 (Exhibit USA-26(HSBI)).

[27] *See* First NERA A350 XWB Report, para. 8 (Exhibit USA-26(HSBI)).

[28] *See* Klasen Report on German A350 XWB LA/MSF, para. 36 (Exhibit EU-11(BCI)).

[29] *Canada – Aircraft (AB)*, para. 157.

[30] *Canada – Aircraft (AB)*, para. 155 ("the reference to "benefit *to the recipient*" in Article 14 also implies that the word 'benefit', *as used in Article 1.1*, is concerned with the 'benefit *to the recipient*' and not with the 'cost to government', as Canada contends." (emphasis in original)) .

[31] First NERA A350 XWB Report, para. 8 (Exhibit USA-26(HSBI)).

[32] First NERA A350 XWB Report, para. 9 (Exhibit USA-26(HSBI)).

[33] *See* First NERA A350 XWB LA/MSF, Appendices 1 & 2 (Exhibit USA-26(HSBI)); Klasen Report on German A350 XWB LA/MSF, Annex. (Exhibit EU-11(BCI))

b. What was the [***] under the original agreement? Was the [***] applied before the 2018 amendment?

c. Please explain whether the [***] made the arrangement more advantageous for Airbus, for the German government, or both parties.

Question 6 (EU)

Please comment on the United States' argument at paragraph 26 of its oral statement that the European Union does not indicate any way in which the amendment lessened either the [***] differential that gave rise to the subsidy or the *ex ante* expectations as to the "life" and trajectory of that benefit, therefore failing to demonstrate withdrawal of the subsidy.

Question 7 (EU)

The United States argues at paragraph 28 of its oral statement that the European Union erred in assessing the commercial consistency of the German A350XWB LA/MSF because this would require a comparison that the European Union did not conduct between the IRR of the amendment and the IRR of activating the repayment provision.

a. Did Professor Klasen factor into his assessment whether receiving full and immediate repayment was more financially advantageous for Germany than entering into the 2018 amendment of the German A350XWB LA/MSF loan agreement? Please explain.

b. Did Germany have a choice to decline to accept the amendment and leave it to Airbus to fully prepay the outstanding principal and interest? Please explain.

Question 8 (EU)

How does the 2018 delivery forecast, which factors into the 2018 amendment, factually compare to the delivery forecast at the time of signing the original A350XWB LA/MSF loan agreement?

Question 9 (EU)

At paragraph 5 of Exhibit USA-26-BCI, the NERA states that the European Union has not provided the actual [***] for [***] NERA therefore follows two approaches, one based on a [***], and another based on a [***] that NERA states [***] Could the European Union clarify what actual [***] applied to the [***]

Question 10 (EU)

At paragraph 6 of Exhibit USA-26-BCI, NERA comments that Professor Klasen does not provide sufficient information to enable NERA or the Panel to verify his IRR calculation of [***]. Please explain the basis for the IRR calculation for the amendment of the German A350XWB LA/MSF loan agreement, as presented in the Annex to Exhibit EU-11 (HSBI). In doing so, please address the following:

a. How was the amount in column A, row 1 calculated and what does this amount represent? How does this amount compare to the maximum amount available under the German A350XWB LA/MSF loan agreement?

b. How does the basis for the IRR calculation account for repayments made *following* the grant of German A350XWB LA/MSF but *prior* to 2018?

c. Why is the amount in column G, row 1 not included in the total calculated in Column H, row 1?

d. At paragraph 9 of Exhibit USA-26-BCI, NERA states that Germany would have received [***] from Airbus in 2018 under the original A350XWB LA/MSF loan agreement, but will receive approximately [***] as a result of the 2018 amendment to the original agreement. Is this observation accurate, and if so, is this difference reflected in Professor Klasen's IRR assessment? Please explain.

Question 11 (EU)

At paragraph 27 of Exhibit EU-17-BCI, PwC states that "a calculation of an internal rate of return (IRR) of an A380 MSF loan agreement and potential changes thereto is not necessary, because the member states are not faced with an investment decision considering different alternatives with different IRRs". To the extent this statement is relevant to the assessment of the 2018 A380 LA/MSF amendments, why is it not also relevant in the context of the 2018 German A350XWB LA/MSF amendment? Please explain.

Question 12 (EU)

At paragraphs 3 and 4 of Exhibit USA-150-BCI NERA states that TradeRx fails to identify any factual basis for its assertion that Airbus had already decided to seek refinancing, and would have done so either through the 2018 amendment to the German A350XWB LA/MSF contract or by exercising its right to [***]

a. Is there evidence that Airbus would have made an early repayment of the full amount of outstanding principal and accrued interest absent refinancing?

b. Does the original A350XWB LA/MSF loan agreement mandate that the parties agree to refinance?

c. Please comment on NERA's statement at paragraph 5 that Airbus would have had to pay an [***] of either [[HSBI]] or [[HSBI]], and there is no evidence that Airbus was willing to pay this fee.

Question 13 (EU)

At paragraph 8 of Exhibit USA-150-BCI, NERA states that "{i}t is unclear what [***] TradeRx is referring to and "{i}t is unclear why using [***] was problematic for KfW, given that financial institutions routinely administer numerous financial instruments with different interest rates".

a. Please explain what "[***]" TradeRx refers to?

b. Is there any reason why using the [***] arrangement under the original loan contract was problematic? Please explain.

c. Does Professor Klasen's IRR comparison factor in the [***]? If so, how?

Question 14 (US)

At paragraph 11 of Exhibit USA-26-BCI, NERA states that the 2018 amendment to the German A350XWB LA/MSF agreement did not improve the German government's financial position. How accurate is this statement considering that the amendment [***]? Please explain.

27. NERA's statement is accurate. The **[***]** amendment to the German A350 XWB LA/MSF contract provided for **[***]**.[34] Both NERA and the EU's experts, TradeRx, took these factors into account in performing their IRR calculations. The magnitude of the **[***]** – combined with the time value of money – more than offsets the **[***]**. Specifically, while the expected royalty payments are **[[HSBI]]**, the **[***]** are **[[HSBI]]**.

28. As a result, the IRR of the amended German A350 XWB LA/MSF contract (which NERA and TradeRx agree upon) is **[***]**. Thus, NERA correctly concluded that the **[***]** amendment to the German A350 XWB LA/MSF contract did not improve Germany's financial position.

Question 15 (US)

At paragraph 60 of Exhibit EU-11-BCI, TradeRx comments that, at the time of the 2018 amendment to the German A350XWB LA/MSF loan agreement, the project specific risk for the A350XWB programme was low for two reasons: first, Airbus has demonstrated it could reliably manufacture the A350XWB model from a technical standpoint; and second, the A350XWB is well established in its market segment as demonstrated by order volume. Based on this, TradeRx assessed residual commercial risk to be "fairly low". As a result, TradeRx reasons that it would be acceptable to consider only the corporate risk and not the specific project risk for the present exercises, but TradeRx indicates that it will use the [[HSBI]] risk premium. Why would it not be appropriate to consider changes to the project specific risk in determining whether under the modified terms of the German A350XWB LA/MSF loan agreement, a subsidy is no longer conferred?

29. This question assumes that the EU's framework of comparing the 2018 amendment with a contemporaneous benchmark is the correct analysis. As explained below, that is incorrect. Even assuming *arguendo* that the EU's framework were correct, it would not be appropriate to consider changes to the project-specific risk because those are the ***effect*** of the LA/MSF subsidy. Adjusting the benchmark to reflect those effects would distort the comparison.

[34] *See* German A350 XWB **[***]** Amendment, preamble, clauses 1-2 (Exhibit EU-9(BCI)).

30. TradeRx constructed the contemporaneous market benchmark based on the project-specific risk premium used by the first compliance panel, which reflected the market risk of the original A350 XWB LA/MSF at the time of its conclusion in **[***]**.[35] According to TradeRx, the project-specific risk premium in 2018 should be lower, and even nil, because Airbus has since gained technical manufacturing expertise and established that there was sufficient market demand in the large twin-aisle segment to support the A350 XWB.[36] However, these are exactly the two primary categories of risk (technical risk and market risk) borne by the LA/MSF lenders, as identified by the first compliance panel.[37]

31. Thus, the fact that these levels of risk are lower today is a ***result*** of A350 XWB LA/MSF, through the operation of its preferential terms, which first allowed Airbus to launch the aircraft when and as it did, allowing the company to demonstrate technical feasibility and market size, and ultimately making it a less risky investment opportunity in 2018. If, a contemporaneous market benchmark would involve a low-to-zero project-specific risk premium, that is because it is actually a contemporaneous reflection of the projected life, value, and trajectory of the benefit of the LA/MSF subsidy. In other words, such market benchmark would be based on current market conditions, as distorted by the subsidy.

32. Indeed, this was exactly the basis for the panel and Appellate Body in the original proceeding rejecting a project-specific risk premium proposed by the EU based on returns of "risk-sharing suppliers."[38] Agreeing with the panel, the Appellate Body stated,

> Because the rate of return of the risk-sharing suppliers is distorted by the LA/MSF received by Airbus, it cannot be used to derive a benchmark that reflects the terms of a comparable commercial loan that Airbus could have actually obtained on the market. The rate of return of the risk-sharing suppliers, and thus the project risk derived from it, will be lower than that demanded by a market lender in the absence of LA/MSF.[39]

33. The United States also maintains that a contemporaneous benchmark is not relevant to evaluating whether the EU has withdrawn the subsidy determined to exist. The proper approach, as explained in the U.S. written submissions and at the panel meeting, is to start with the *ex ante* expectations as to the life and trajectory of the benefit at the time it was granted, and then evaluate whether and, if so, how subsequent intervening events may have affected the *ex ante*

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[35] EU FWS, para. 112.

[36] Professor Klasen, "Market Consistency of the **[***]** Amendment to German MSF Agreement" (Oct. 8, 2018), para. 60 (Exhibit EU-11(BCI)).

[37] First Compliance Panel Report, paras. 6.468, 6.543; US Oral Statement para. 4.

[38] Original Appellate Body Report, para. 897.

[39] Original Appellate Body Report, para. 921.

benefit based on these expectations.[40] The U.S. approach of comparing the IRR of the LA/MSF contract as modified by the 2018 amendment with the IRR of the original subsidy achieves exactly that. It assesses how the *ex ante* expectations of repayment, as reflected in the IRR of the original LA/MSF, have changed because of intervening events – the amendments. A contemporaneous market benchmark in 2018 is unnecessary in this analysis.

34. Examining the market consistency of these amendments as standalone instruments – the EU's approach – demonstrates nothing about the original subsidy as determined by the original panel and Appellate Body, which is the core of a WTO Member's compliance obligations under Article 7.8. That said, a consideration of the consistency of the amendment with the behavior of contemporaneous commercial actors may be relevant to evaluate whether the amendment conferred a subsidy in 2018.

Question 16 (US)

> **Please comment on the European Union's argument at paragraphs 64 through 67 of its oral statement that KfW had no right to retain the loan on its original terms due to Airbus' right to make repayment and the fact that the distribution of contractual rights and obligations informed the negotiations regarding the amendment.**

35. The United States considers that the distribution of contractual rights and obligations doubtlessly informed the negotiations regarding the **[***]** amendment of the German A350 XWB contract. However, the EU's argument ignores a critical feature of the German A350 XWB contract: the **[***]**.

36. Prior to the **[***]** amendment, Airbus had two options: (1) continue to make **[***]** and levy payments on A350 XWB deliveries; or (2) exercise the right to early repayment by **[***]** and complying with the other prepayment formalities. Thus, contrary to the EU's argument, once Germany and Airbus began negotiating the **[***]** amendment to the A350 XWB LA/MSF contract, KfW's actual "Best Alternative to a Negotiated Agreement" (BATNA) depends on the size of the **[***]**.

37. The EU has not provided any evidence that entering into the **[***]** amendment was in fact more financially advantageous (*ex ante*) than allowing Airbus to immediately repay the contract or, in other words, a BATNA. NERA demonstrated that the **[***]** – was substantial, **[[HSBI]]**.[41] Indeed, the **[***]** is materially higher than the present value of the **[***]** under the **[***]** amendment.

38. Thus, even assuming *arguendo* that the EU is correct that KfW's only options were to enter into the **[***]** amendment or to receive early prepayment, the EU still fails to provide any

[40] US FWS, paras. 37-40; US Oral Statement, para. 17.

[41] Second NERA Report on A350 XWB, para. 5 (Exhibit USA-150(HSBI)).

evidence that a reasonable private creditor would have opted to enter into the **[***]** amendment rather than receiving full and immediate repayment, **[***]** under the terms of the original LA/MSF agreement.

39. In addition, the United States notes that, had Airbus contemplated this second option, the terms of the German A350 XWB contract would have required Airbus to: provide a **[***]**; provide a **[***]**; determine the amount of the **[***]**; and finally pay the principal loan, **[***]** and the settled **[***]**.[42] There is no evidence before the Panel that Airbus took any steps to do so.

Question 17 (US)

> **Does the United States agree with the European Union that KfW did not lose something that it would have received (i.e. [***]) based on the European Union's description of [***], at paragraph 68 of the European Union's oral statement? Please explain.**

40. The United States does not agree with the EU's assertion that KfW did not lose something under the **[***]** amendment of the German A350 XWB LA/MSF contract that it would have received under the terms of the original contract. The EU has still failed to explain what **[***]** applied **[***],** any details regarding the terms of **[***]**, or any reason why, as a legal matter, the **[***]** would affect the benefit conferred *on Airbus*.

41. **[***]**.[43] As the United States explained in response to Question 4, based on the limited information the EU has provided, it appears that taking account of the costs or revenues associated with KfW's **[***]** may improperly measure benefit according to the cost of the transaction to the government, rather than the terms paid to the recipient.[44]

42. Regardless, in order for the EU's position that KfW did not lose something it would have received to be valid, Airbus would need to compensate KfW for the change in expected **[***]** between the original and amended contract. It is possible that this could have been accomplished through a one-time payment, such as the **[***]** which the EU referenced in paragraph 68 of its Oral Statement.

43. The United States notes that the EU's so-called **[***]** may refer to the "{a}mounts due pursuant to para. 2.a) through 2.c)" described in paragraph 1 of the **[***]** amendment to the German A350 XWB LA/MSF contract.[45] Paragraph 1 of the **[***]** amendment also states that **[***]**.[46] The bracketed text that itemizes the **[***]** is illegible. However, it appears to be **[***]**.

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[42] German A350 XWB MSF Agreement (Exhibit EU-10(BCI)-ENG).

[43] Anatoli Kuprianov, **[***]** (1994) at 50-51 (Exhibit USA-156(BCI)).

[44] *Canada – Aircraft (AB)*, paras. 155, 157.

[45] *See* German A350 XWB **[***]** Amendment, clause 1 (Exhibit EU-9(BCI)).

[46] *See* German A350 XWB **[***]** Amendment, clause 1 (Exhibit EU-9(BCI)).

This is entirely backwards. Moreover, it is also possible, as the United States observed in its first submission, that this feature of the transaction also increased the pre-existing subsidy to Airbus, or conferred a new subsidy.[47]

1.2 UK A350XWB LA/MSF

Question 18 (US)

> **Does the United States accept that Airbus [***] (an amount less than the full available amount) under the [***]? Please respond in light of arguments and evidence submitted by the European Union, including: (i) excerpts from Airbus' accounting system contained in Exhibit EU-81-BCI; and (ii) the EU argument that access to total funding was "timebound" (up to 31 March 2017) under Article 4.4 of the UK A350XWB LA/MSF loan agreement.**

44. In its first written submission, the EU claims that on **[***]**, Airbus repaid a sum of **[***]** to the UK Government.[48] The EU asserts that this amount is equivalent to: (1) the principal amount drawn on UK A350 XWB LA/MSF; plus (2) interest accrued since **[***]**, less (3) **[***]**.[49]

45. Under the terms of the original UK A350 XWB LA/MSF contract, Airbus was entitled to draw up to **[***]** on the unsecured, success-dependent, levy-based, back-loaded terms and conditions that characterize LA/MSF to Airbus generally.[50] Airbus and the UK Government **[***]**.[51] With the **[***]**.[52]

46. Exhibit EU-81(BCI) to the EU's second written submission documents the cash flows under the A350 LA/MSF contract as follows:

Date	Cash Flow
[***	***]
[***	***]
[***	***]
[***	***]
[***	***]

[47] *See* US FWS, para. 99.

[48] EU FWS, para. 88.

[49] EU FWS, para. 88.

[50] *See* US FWS, para. 102.

[51] US FWS, para. 102.

[52] US FWS, para. 102.

[***	***]
[***	***]
[***	***]
[***	***]
[***	***]
[***	***]
[***	***]
[***	***]

47. The amounts in parentheses are what the EU terms "payment" and appear to be disbursements of LA/MSF principal. The other cash flows are what the EU terms "receipt" and appear to be Airbus repayments to the UK Government. Assuming this understanding is correct, Airbus drew down **[***]** from **[***]** and repaid **[***]** in **[***]**. Airbus then made an additional repayment of **[***]** in **[***]**, presumably for interest. Airbus then drew down A350 XWB LA/MSF again from **[***]**, in the amount of **[***]**. No further "receipts" are shown in Exhibit EU-81(BCI), and the EU has not provided a calculation of **[***]**.

48. The United States also notes that, under the terms of the original UK A350 XWB LA/MSF agreement, levy payments on deliveries were **[***]**. According to Professor Klasen's German A350 XWB Report, Airbus delivered **[***]** A350 XWBs by the end of **[***]**,[53] and, according to Airbus's own delivery data, seven were delivered after **[***]**.[54] Thus, Airbus should have made levy payments **[***]**, but these levy payments do not appear to be reflected as "receipts" in Exhibit EU-81(BCI).

49. Thus, the EU has failed to establish that the **[***]** repayment Airbus made on **[***]** amounts to **[***]** even on the subsidized terms of the LA/MSF contract.

Question 19 (Both parties)

> **The first compliance panel in this dispute explained that "it could be argued that the full repayment of a subsidized loan implies that a subsidized financial contribution has been provided to the recipient in its entirety, not removed or 'returned', as the European Union argues". How is this observation relevant to this dispute?**

[53] See Professor Klasen, "Market Consistency of the **[***]** Amendment to German MSF Agreement" (Oct. 8, 2018), para. 23 (Exhibit EU-1 l(BCI)).

[54] Airbus Orders & Deliveries Data (Nov. 2018) (Exhibit USA-49).

[2] Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1070.

50. This sentence forms part of the first compliance panel's explanation of why the EU was mistaken in arguing that repayment of a subsidy on its subsidized terms will end the existence of a subsidy. The Appellate Body stated in the original proceedings that "{w}e understand the participants to agree with the basic proposition that a subsidy has a life, which may come to an end, either through the removal of the financial contribution and/or the expiration of benefit."[55] The first compliance panel disagreed with the EU's view that a member State's "full repayment" under an LA/MSF contract "implies that the financial contributions provided to Airbus have been 'returned' and, therefore, consistent with the Appellate Body's statement, no subsidies continue to exist."[56] The statement quoted in the question was among several reasons the first compliance panel gave for concluding that "the European Union has misunderstood the totality of the Appellate Body's guidance on this point."[57]

51. The statement is relevant in this dispute because the EU has made the same argument. The EU's argument should again fail, for the reasons quoted in the question, for the reasons set out by the first compliance panel in its subsequent analysis, and for the reasons advanced by the United States in its submissions.

52. Having said that, the first compliance panel couched this statement in conditional terms, indicating that it was not a formal conclusion by the panel. Rather the panel cited the existence of this *potential* argument to illustrate that the EU's reading of the Appellate Body's finding was not necessarily correct. The first compliance panel ended its evaluation by finding that it did not need to make definitive findings on the extent to which actual repayment of a subsidy on its subsidized terms would terminate the subsidy.[58]

Question 20 (EU)

Please respond to the United States' argument at paragraph 32 of its oral statement that the fact that the UK A350XWB LA/MSF contract permits Airbus to repay the UK government at a particular level and time is, in fact, the subsidy because Airbus pays a less-than-market rate. Does this argument mean that repayment does not withdraw the subsidy?

Question 21 (Both parties)

If a WTO Member government provided a one-off cash grant to a recipient that constituted a specific subsidy, when would the life of that subsidy come to an end,

[55] Original Appellate Report, para. 709. As explained above, an analysis of whether a subsidy has been withdrawn should not look at the financial contribution alone, but rather must also consider the benefit.

[56] First Compliance Panel Report, para. 6.1071.

[57] First Compliance Panel Report, para. 6.1071.

[58] First Compliance Panel Report, para. 6.1074.

immediately after it has been provided or at some later point? How would a member withdraw that subsidy if it is found to cause adverse effects? Please explain.

53. It is not possible to address this question in the abstract. With respect to benefit, the Appellate Body explained in the original proceeding that:

> The ordinary meaning of Article 1.1, read in the light of Article 14 of the *SCM Agreement*, confirms, therefore, that a benefit analysis under Article 1.1(b) is forward-looking and focuses on future projections. The nature, amount, and projected use of the challenged subsidy may be relevant factors to consider in an assessment of the period over which the benefit from a financial contribution *might be expected* to flow. A panel may consider, for example, as part of its *ex ante* analysis of benefit, whether the subsidy is allocated to purchase inputs or fixed assets; the useful life of these inputs or assets; whether the subsidy is large or small; and the period of time over which the subsidy is expected to be used for future production.[59]

54. Thus, the life of a subsidy, including a grant, depends on the facts of the case. The length of the life of the subsidy posited by the question might differ depending on the recipient's industry or the projected use of the subsidy funds, or other relevant factors, such as how the enjoyment of the benefit materialized over time.

55. In any event, the parties and third parties at the panel meeting appeared to agree that the life of the subsidy conferred by that grant would not come to an end immediately after full disbursement. For purposes of responding to the remaining elements of this question, the United States will assume that the recipient used the subsidy to improve its production process, that the average useful life of assets in the recipient's industry is ten years, and that there are no other relevant considerations for determining the life of the subsidy. In that case, the life of the subsidy would likely come to an end ten years after the final disbursement of the grant.

56. The question then asks how a Member might withdraw a one-off cash grant that constituted a specific subsidy. As an initial matter, there is no one way a Member must withdraw a subsidy. Members have discretion to choose how they wish to achieve compliance.

57. Moreover, again, the facts of the particular case – including the amount, the benefit, the intended use, how the subsidy materialized over time – would be relevant. In addition, it would be necessary to know the point in time at which the granting Member sought to withdraw the subsidy.

58. At base, the Member would need to fully remove the benefit, as determined initially by comparison with a market benchmark. Article 14 of the SCM Agreement sets out a series of

[59] Original Appellate Report, para. 707 (emphasis in original; footnote omitted).

guidelines for determining whether different financial contributions confer a benefit. In each case, the comparator, or benchmark, is a market-determined price. On this basis, the Appellate Body correctly found in *Canada – Aircraft* that:

> In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.[60]

59. In the case of a grant, there is no direct benchmark because commercial actors do not simply gift money to companies. The analysis likely would look to a loan at a commercial interest rate, where the loan principal is equal to the amount of the grant. Thus, the benefit consists of the amount of the grant – which the recipient simply gets – plus the interest it is not charged for enjoyment of that amount over some appropriate period of time.

60. Whether, in Year 5, the entirety of the benefit remained, or only a portion of the benefit remained, would be another fact-specific inquiry that would differ depending on the case

Question 22 (US)

> **Please respond to the European Union's argument that the relevant question is not whether the [***], but whether early repayment of the UK A350XWB MSF loan constitutes a deviation from the normal course expected under the terms and conditions governing the operation of the loan.[3]**
>
> **[3] See European Union's second written submission, paras. 90-91.**

61. The cited paragraphs of the EU's second written submission address whether Airbus UK's triggering of the prepayment clause in the A350 XWB LA/MSF contract is an intervening event that brought the life of the subsidy to an end. The United States considers that, because the right to prepay is part of the package of rights and obligations that Airbus received from the UK at a subsidized rate, the possibility and potential effects of prepayment would have informed *ex ante* expectations as to the life of the subsidy. Therefore, Airbus's actual exercise of its right to prepay is not an intervening event that would affect the *ex ante* expected life of the subsidy.

62. The EU's argument confuses two distinct concepts – the LA/MSF parties' *ex ante* expectations as "the period over which the benefit from a financial contribution might be expected to flow" and their expectations as to the likelihood that certain events foreseen in the subsidy instrument will occur. If an event provided for in the subsidy instrument would affect the return, such as early repayment, its likelihood and effect on the return would be factored into both the subsidized rate and the benchmark rate a commercial entity would demand, along with a

[60] *Canada – Aircraft (AB)*, para. 157.

multitude of other factors affecting returns. By extension, the benefit derived from comparison of the two rates would also incorporate that event and its effect on the return. As such, it would inform those parties' expectations as to the magnitude of the subsidy and, along with other considerations, inform expectations as to how the subsidy would materialize over time. The eventual occurrence of such an event is accordingly part of those parties' expectations, even if it is a low probability event. Therefore, the occurrence of the event would not affect the life of the subsidy derived from the confluence of *ex ante* expectations.

63. The EU seeks to distinguish between events in "the normal course" and mere "possibilities." This approach errs in three ways. First, as an analytical matter, the life of a subsidy depends on *ex ante* expectations, and not on whether particular developments are "normal" or otherwise. To differentiate between the two is to deviate from the practices of commercial investors, who consider a wide range of eventualities and their effects on returns, especially with a financial package as large and risky as LA/MSF. The second error is that it is illusory to speak of "the normal course" with respect to a long-term contingent payment obligation like LA/MSF. Given the length of time over which payments are to be made, the volatility of large civil aircraft demand over that period, and the inherent uncertainty of projecting more than 20 years into the future, the only certainty was that events would not unfold as foreseen at the outset.

64. The third error is that the possibility of prepayment is not outside "the normal course" for long-term fixed-rate financing. The possibility that interest rates could decrease is very real. If big enough, a decrease creates an incentive to prepay, which would have a massive downward effect on returns to the financing entity. A commercial entity would either increase rates to compensate for that risk, or impose charges on exercise of any prepayment right so as to mitigate the effect on returns. Thus, prepayment is an integral part of the financial calculus of commercial long-term financing, and not some unforeseen eventuality that upsets expectations.

1.3 German, French, Spanish and UK A380 LA/MSF

Question 23 (EU)

> **Please comment on the United States' argument at paragraph 42 of Exhibit USA-8-BCI that "PwC incorrectly treats [***] as being equivalent to [***]. The PwC Report's methodology is incapable of evaluating the values of cash flows received at different points in time." Please also respond to the United States' comment at paragraph 20 of Exhibit USA-121-BCI that "{d}etermining a 'net-effect' by adding cash flows that occur [***] is not an accepted technique in financial valuation"?**

Question 24 (EU)

> **At paragraph 30 of Exhibit USA-121-BCI, NERA states the following:**
>
> **PwC also asserts that various facts related to Airbus's production levels and Emirates' [***] made it "[***] for Airbus to meet Emirates' demands, without a restructuring of the A380 MSF loans". However, PwC fails to specify**

what Emirates' "demands" were – let alone present any rigorous financial analysis of such demands from the perspective of Airbus.

a. Please comment on whether PwC fails to specify what Emirates' demands were and, if so, why was it unnecessary to do so.

b. Please comment on whether or not a "rigorous financial analysis" of such demands is necessary to the evaluation of the A380 amendments.

Question 25 (EU)

At paragraphs 32-33 of Exhibit USA-121-BCI, NERA comments that "PwC argues that its analysis 'does not depend on the magnitude of the positive values' associated with levy payments for deliveries of A380 – and therefore, according to PwC, even it if overstated the future revenues to the Airbus Governments from the continuation of the A380 program, this would not affect its analysis."

a. Please comment on NERA's statement that PwC fails to explain why this is the case.

b. Please comment on NERA's statement that PwC's comparison "is meaningless if the 'net advantages' are calculated improperly – as is the case if risks to the delivery forecast are not taken into account".

Question 26 (EU)

Please comment on NERA's statement at paragraph 25 of Exhibit USA-8-BCI that evidence does not indicate that [***], but instead show that Emirates wanted [[HSBI]].

Question 27 (EU)

Please comment on NERA's statement at paragraph 28 of Exhibit USA-8-BCI that "{a}nother sign of Airbus's beliefs about future demand for the A380 is the [***]".

Question 28 (EU)

The United States argues that Airbus' [***] (Exhibit EU-89 (HSBI)) reveals that the Airbus Governments [***].

a. Please comment on the United States' argument that a reasonable private creditor would have preferred full repayment to the 2018 Amendments.

b. Does this letter demonstrate that the member States evaluated the 2018 amendments on the basis of non-commercial considerations, i.e. [***]?

Question 29 (EU)

At footnote 142 in its first written submission, the European Union argues that it would be appropriate to view the amendment to the 2018 German A350XWB LA/MSF loan agreement in the alternative as an intervening event that brings the life of the original German loan agreement to an end.

a. Please explain your position that the German A350XWB LA/MSF agreement may be viewed as an intervening event while arguing that the United States mischaracterizes the 2018 A380 amendments as intervening events. (see paragraphs 218 and 219 of the European Union's second written submission).

b. Do these two views contradict each other? Please explain.

c. Does the European Union accept that the 2018 A380 amendments may be viewed as intervening events?

Question 30 (EU)

The United States submits that evidence of the absence of due diligence is relevant, because "evidence of reliance on non-commercial considerations indicates terms more favourable than those available from the market (as the market is presumed to operate on the basis of commercial considerations)."[4] Is there evidence that member State lenders conducted due diligence prior to entering into the 2018 A380 amendments? If so, please identify that evidence.

4 Panel Report, *Japan – DRAMs*, para. 7.276.

Question 31 (EU)

At paragraph 32 of its submission regarding the A380 programme wind-down, the European Union states that the [***] A380 LA/MSF amendment requires that repayment is made "[***]". At paragraph 37 of its oral statement, the European Union submits that Airbus' announcement of the wind-down of the A380 programme has given rise to a [***]. Could the European Union provide evidence confirming the precise date in which [***], or will be made. Please explain.

Question 32 (Both parties)

At paragraph 35 of its submission regarding the A380 programme wind-down, the European Union submits that the benefit of an LA/MSF subsidy would be fully amortized at the latest by the date on which the parties expected, *ex ante* at the time of conclusion of the loan agreement, full repayment of principal and interest, and any anticipated royalties, to occur. Subsequently, at paragraph 37, the European Union states that [***] lenders will receive their final repayments in relation to the respective A380 LA/MSF agreements in [***]. Will final repayments made in [***] under the [***] LA/MSF agreements achieve full repayment of principal and interest, and anticipated royalties? Please explain.

65. Under the subsidized terms of the **[***]** A380 LA/MSF agreements, full repayment will occur when **[***]**.[61] According to the EU, Airbus will make the last levy payments for the A380 in **[***]**. These projected final repayments do not equate to *full* repayment of **[***]** A380 LA/MSF.

[61] *See* French A380 LA/MSF Agreement, Article 6.2 (Exhibit EU-12(BCI)); German A380 LA/MSF Agreement, Clause 7.1 (Exhibit EU-14(BCI)).

66. Through 2018, Airbus has delivered 234 A380 aircraft, and, according to the EU's "Status of A380 orders and deliveries" (Exhibit EU-94(BCI)), there will be **[***]**. Thus, according to the EU, there will be **[***]** A380 deliveries in total, only approximately **[***]** of the number required to achieve full repayment of principal and interest, and *no* payment of **[***]**.

67. The table below shows the difference between the repayment that **[***]** will have received when Airbus delivers the **[***]** A380 in **[***]** and the repayment expected (according to PwC) under the 2018 Amendments of the A380 LA/MSF contracts:

[[HSBI]]

Question 33 (Both parties)

> **At paragraph 37 of its submission regarding the A380 programme wind-down, the European Union states Airbus will continue to make A380 deliveries to customers until [***]. How does this factor into the assessment of the life of the A380 LA/MSF subsidies?**

68. At the outset, it should be noted that, according to the EU's "Airbus Table on outstanding A380 deliveries" (Exhibit EU-94(BCI)), Airbus will continue to make A380 deliveries to customers into **[***]**.[62] The reference to **[***]** in paragraph 37 of the EU's submission regarding the A380 programme wind-down relates to **[***]**.[63]

69. As the United States explained in its second written submission, the first compliance panel and appellate reports accepted the "marketing life" methodology as an appropriate way to measure the *ex ante* life of LA/MSF subsidies.[64] Under the marketing life methodology, the *ex ante* life of the A380 LA/MSF subsidies under the original contracts were expected to continue through at least **[[HSBI]]**.[65] The 2018 Amendments (and in some cases, previous amendments) to the A380 LA/MSF contracts are intervening events that extended the lives of the A380 LA/MSF subsidies until at least **[[HSBI]]**.[66]

70. Airbus's announcement in February 2019 that it intends to "wind-down" the A380 program does not alter the *ex ante* life of the A380 LA/MSF subsidies. The United States also explained in its second written submission that Airbus' announced decision to "wind-down" the

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[62] Airbus Table on outstanding A380 deliveries (Exhibit EU-94(BCI)).

[63] *See* EU A380 Submission, para. 37.

[64] *See* First Compliance Panel Report, para. 6.878; Compliance Appellate Report, para. 5.388.

[65] A380 Business Case (Exhibit EU-78(HSBI)).

[66] *See* French A380 LNMSF Agreement (Exhibit EU-12(BCI)).

A380 program by **[***]** is not an intervening event,[67] and thus it should not factor into the Panel's assessment of the *ex ante* life of the A380 LA/MSF subsidies in any way.[68]

Question 34 (US)

> **Please comment concerning the European Union's suggestion that, similar to the panel findings in *EC – Biotech*, the Panel use the conditional language "provided that no other A380 is sold" in framing its findings concerning the A380.**

71. As explained in the U.S. response to Question 37, the evidence cited by the EU does not establish that Airbus will never again sell the A380 or make additional deliveries beyond those currently scheduled. Moreover, the EU's admission of currently scheduled future A380 deliveries supports a finding that it has failed to establish removal of the adverse effects, since those deliveries mean that serious prejudice will continue in the VLA market.

72. At the panel meeting, the EU raised the argument cited in this question – that if the Panel had any doubt as to the "death" of the A380, it could account for that doubt by making a contingent finding that the EU has removed the adverse effects of A380 LA/MSF in the VLA product market and, therefore, brought itself into compliance with its obligations with respect to the findings in the VLA market "provided that no other A380 is sold." It seems to envisage that – assuming, contrary to reality, that the EU had achieved not just compliance with respect to the VLA market, but full, substantive compliance with respect to all measures and product markets – if Airbus were to sell an A380, the EU would cease to be in compliance, and once again have an obligation under Article 7.8 of the SCM Agreement to withdraw the A380 LA/MSF subsidies or remove the adverse effects they cause.

73. There are two serious problems with this proposal. First, to make such a finding would be contrary to the Panel's terms of reference, which under DSU Article 7.1 are:

> To examine, in light of the relevant provisions in the {SCM Agreement}, the matter referred to the DSB by {the EU} in document {WT/DS316/39} and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that . . . agreement.[69]

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[67] *See* US FWS, paras. 89-91.

[68] The result would be the same under the "loan life" approach favored by the EU. Under the Appellate Body's framework for evaluating life of the subsidy, the "loan life" would necessarily be the "loan life" expected at the time of the subsidy, as modified by any "'intervening events' that occurred after the grant of the subsidy that may affect the projected value of the subsidy as determined under the *ex ante* analysis." Original Appellate Report, para. 709. As termination of the A380 program would not affect the *ex ante* projected value of the subsidy, it would not affect the life of the subsidy even under the "loan life" approach.

[69] WT/DS316/40/Corr.1 memorializes that:

74. For purposes of this question, the relevant claim in Document WT/DS316/39, the EU's request for panel establishment, is that certain measures "have resulted in the EU achieving full compliance, by . . . taking appropriate steps to remove {the remaining subsidies'} adverse effects."[70] In its more recent submissions, the EU has asserted that Airbus's "wind-down" of the A380 program means that the aircraft is "dead" and will not receive any new orders or result in additional deliveries beyond those already scheduled under currently extant orders. The EU argues that this factual assertion[71] has the legal consequence of removing any adverse effects in the VLA product market caused by LA/MSF granted for the A380 by France, Germany, Spain, and the UK.

75. The EU recognizes that, if Airbus were to sell more A380s, its assertion that the aircraft is "dead" would be untrue, and any findings of compliance based on that assertion would be invalid. It proposes to solve that problem with a conditional finding of compliance that would disappear in the event the underlying assertion of fact proved untrue. The problem with this approach is that the subsequent sale of the A380 would mean that the assertion that the program was "dead" would have been untrue *ab initio*, and the finding invalid from that point. The Panel would not have made findings that would assist the DSB or the parties in resolving the dispute. Subsequently reviving the finding of noncompliance would not cure that dereliction.

76. The second serious problem is that the contingent finding proposed by the EU presumes that whether "no other A380 is sold" is an objective criterion that at any given point will provide certainty as to whether the EU is or is not in compliance with its obligations. Especially in this contentious proceeding, it is easy to imagine uncertainty as to whether a future two-deck, four engine, 500+ seat aircraft – perhaps akin to the A380plus, but with a different name – is in fact "an A380" or "is sold." Thus, the contingent finding requested by the EU would not actually constitute a finding with respect to the matter charged to the Panel.

77. Finally, the United States considers that the EU's reference to the *EC – Biotech* panel's "contingent language" does not provide useful guidance in this situation. The United States assumes that the EU refers to that panel's recommendation that "the European Communities . . . bring the general *de facto* moratorium on approvals into conformity with its obligations under the *SPS Agreement*, if, and to the extent that, that measure has not already ceased to exist."[72] That panel adopted this particular recommendation in response to an interim review request from

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At its meeting on 27 August 2018, the Dispute Settlement Body (DSB) agreed, pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), to refer to the original Panel, if possible, the matter raised by the European Union and certain member States in document WT/DS316/39.

[70] WT/DS316/39, para. 9.

[71] Since this would be action or inaction by Airbus rather than by a WTO Member, it would not be a "measure" and thus could not be a "measure taken to comply."

[72] *EC – Biotech (Panel)*, paras. 8.16 and 8.36.

complaining parties to adopt a standard recommendation, and did not explain why it considered the contingent language appropriate or consistent with the DSU,[73] which mandates a particular recommendation in Article 19.1. In addition, the triggering event – cessation of the moratorium on biotech approvals – was wholly in the hands of the EU and its member States. Here, the triggering event – sale of another A380 – would be wholly in the hands of Airbus.

Question 35 (EU)

> **The United States argues that the European Union is wrong to argue that the A380 termination announcement is an "intervening event" that advances the end of the life of the A380 LA/MSF subsidies because, inter alia, the first compliance panel rejected the same argument regarding the termination of the A340 programme, stating that the fact that the A340 could terminate before full repayment was an inherent feature of the LA/MSF agreements.5 Are the first compliance panel's findings relevant? Please explain.**
>
> **[5] See United States' second written submission, paras. 88-91.**

Question 36 (EU)

> **According to the United States, the [***] A380 LA/MSF loan agreement requires that Airbus continue to make per-aircraft levy payments to the [***] until at least [***] "or such later date to which that date is extended in accordance with paragraphs 4.4 to 4.6". The referenced paragraph 4.4 provides a procedure for [***].**
>
> **a. What is the relevance of this to whether Airbus currently has an obligation to repay the outstanding principal and interest accrued under the [***] A380 LA/MSF contract?**
>
> **b. Is the United States correct that [***]?**

Question 37 (US)

> **Please comment on the European Union's argument at paragraphs 30 through 34 of its oral statement that it would not be possible for Airbus to modify its decision to terminate the A380 programme. Please address each of the European Union's arguments, including the [***], announcements by major A380 customers, and the loss of learning effects.**

78. The EU's arguments basically consist of two propositions. First, the EU effectively argues that there will be insufficient demand in the future to justify A380 production. Second, the EU argues that, even if demand materializes, it would be prohibitively costly for Airbus to reverse its announced intention to wind down the program. The first is speculative and differs

[73] *EC – Biotech (Panel)*, paras. 6.74, 6.79-6.82.

markedly from the EU's contentions before this Panel mere months ago. The second lacks evidentiary support of any kind.

79. The EU contends that the public announcement of the wind-down, and the anticipated completion of deliveries in 2021, makes new A380 purchases effectively impossible.[74] In support of this contention, the EU first notes the difficulties Airbus faced in securing A380 orders before the announcement. The EU then discusses recent A380 cancellations from various airlines, which according to the EU "confirm the view that there is no future interest or strategic fleet fit for the A380."[75] However, this is speculation about future demand.

80. The EU's pessimism regarding the A380's prospects warrants particular skepticism because it is so recent and so directly contrary to the EU's previous position. The A380 LA/MSF contract amendments, which the EU has placed before the Panel, were based in part on **[***]**.[76] This is an industry that deals in long timeframes – often decades. The EU submitted these documents with its first written submission in October 2018. The announcement of the anticipated wind-down occurred in February 2019 – just three months ago, and just four months after the EU submitted evidence **[***]**. In this industry, it is overly speculative to make determinations based on the most recent headline, particularly when recent evidence supports an alternative conclusion.

81. The EU separately attempts to establish that the steps taken to wind down the A380 program would make it prohibitively costly to produce the A380 even if demand materializes. The EU's discussion of the steps taken is limited such that, even if true, it would be insufficient. Moreover, the EU provides no evidence or even detailed reasoning to show that these steps would render reversal of the announcement prohibitively costly.

82. The EU cites three specific Airbus steps: **[***]**, communication with its **[***]**. The United States addresses each below.

83. First, the EU's evidence of **[***]**[77] discusses **[***]**.[78] The evidence indicates nothing with respect to the rest of Airbus's apparatus for producing the A380, the large majority of which is in France, Germany, and the UK. (It also makes clear that **[***]**.)[79]

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[74] EU Oral Statement, para. 32.

[75] EU Oral Statement, para. 32.

[76] *See* 2018 German A380 Amendment, Attachment 3 (Exhibit EU-20(BCI)). *See also* EU FWS, paras. 128, 132.

[77] EU Oral Statement, para. 31.

[78] *See* Email from **[***]** (Exhibit EU-100(BCI)).

[79] *See* Email from **[***]** (indicating the **[***]**) (Exhibit EU-100(BCI)).

84. Second, the EU provides **[***]**.[80] As an initial matter, these are **[***]**. Moreover, **[***]**. Neither the evidence nor the EU explains why this could not be halted, or that **[***]** if demand revives, as Airbus expected until relatively recently. Indeed, the evidence relied upon by the EU indicates that **[***]**.[81] **[***]**.

85. As an aside, it is worth noting that **[***]**.[82] This capacity represents indirect effects of A380 LA/MSF on other Airbus aircraft.

86. Third, the EU asserts that Airbus **[***]**.[83] However, **[***]**. The letter makes clear that **[***]**.[84] The **[***]**.[85] This does not establish some sort of irreversible step taken by Airbus. Rather, it evidences **[***]**.[86]

87. Thus, there are significant problems with what the evidence submitted by the EU actually establishes.

88. In any event, the EU concludes from these three contentions (*i.e.* assertions regarding **[***]**) that "{i}t would simply be **[***]**. However, this time, the EU cites no support and provides no evidence of any kind. As discussed above, the evidence submitted fails to establish that any actions Airbus expects to take in the future would be irreversible or even costly to reverse. The EU therefore offers no basis to conclude that reversal of the announcement would even be expensive, much less prohibitively costly.

89. The EU also argues that, because the manufacture of LCA involves significant learning curve effects, in the event of a future request to purchase A380s, the loss of learning effects resulting from the wind-down would translate into prohibitively high costs of production, and thus prohibitively high prices. None of this is supported with evidence or support of any kind.

90. As an initial matter, it is not clear what the EU even means by loss of learning effects. Airbus has already captured the learning advantages from the work thus far. If the EU's point is that Airbus would continue learning if it did not begin to wind-down production, and that it now will learn less than it otherwise would have if production rates stayed higher – both propositions that are not established or even supported – it is not clear how that would add costs to future production. Perhaps the marginal cost of the newly ordered aircraft would be more expensive

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[80] EU Oral Statement, para. 31.

[81] *See* **[***]**, slide 18 (p. 10) (Exhibit EU-101(BCI)).

[82] *See* **[***]**, slides 18-19 (pp. 10-11) (Exhibit EU-101(BCI)).

[83] EU Oral Statement, para. 31.

[84] *See* Letter from **[***]** (Exhibit EU-102(BCI)).

[85] *See* Letter from **[***]** (Exhibit EU-102(BCI)).

[86] *See* Letter from **[***]** (Exhibit EU-102(BCI)).

than if Airbus had produced many more aircraft in the interim, but that is just another way of restating the fact that costs decrease as a manufacturer travels down the learning curve. And it is irrelevant in this context.

91. Moreover, even assuming *arguendo* lost learning effects (whatever the EU means), the EU has provided no evidence to establish that this would lead to higher prices. And, of course, even if costs or prices would be higher, the EU has provided no evidence or reasoning to suggest that they would be prohibitively high.

92. In short, the EU's learning effects argument is unclear. And even if it were not, it is rank speculation with no evidentiary support.

93. Finally, the United States notes that, even if all of the EU's contentions were assumed *arguendo* to be established, this would still not mean the end of adverse effects in the VLA market. The undelivered aircraft from previous lost sales would mean that, according to the EU's theory, the EU had failed to establish that its subsidies no longer cause significant lost sales in the VLA market. Moreover, the deliveries that even the EU asserts will continue through 2021 mean the EU clearly has failed to establish that its subsidies no longer cause impedance in the VLA market. And, of course, none of this relates to the adverse effects that A380 LA/MSF causes through indirect effects in the twin-aisle market.

Question 38 (US)

> **In Exhibit USA-8-BCI, NERA describes the [***]. Specifically, NERA calculates a [***] under the amended agreement, as compared with a [***] under the original agreement, based on 2018 delivery schedules. Accepting the possibility that delivery schedules may change, does a finding that an [***] under an amended agreement is [***] than under the original agreement support the conclusion that the subsidy is withdrawn (under the view that a rational market lender would have been willing to accept the amendment)? Please explain.**

94. The comparison of IRRs of an original subsidy instrument and an amended subsidy instrument indicates only whether the amendment reduced or increased the rate of return to the financing entity and, thus, the cost of funds to the recipient. A determination as to whether the subsidy had been withdrawn would require a comparison of the IRR of the amended instrument with the rate of return under the benchmark originally used to determine the existence of the subsidy. That would then allow a conclusion as to whether the cost of funds to the recipient under the subsidy instrument was, after the amendment, consistent with what the recipient could have obtained from a commercial entity at the time of conferral. If the IRR (measured at date of initial grant) of the subsidy instrument as amended was equivalent to or greater than the IRR of the benchmark, the relevant Member could be found to have withdrawn the subsidy.

95. The United States emphasizes that the SCM Agreement requires that the benchmark in the comparison be the commercial transaction originally used to determine that a subsidy existed. Article 7.8 of the SCM Agreement provides that:

> 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***.

It is the subsidy "determined" in the adopted panel or appellate report that the Member must "withdraw." That subsidy exists because of the difference between the terms of the subsidy instrument and the original commercial benchmark. Thus, withdrawal of the subsidy occurs only when the Member negates that difference. A comparison with some other benchmark would not be relevant to the analysis.

Question 39 (US)

> **At paragraph 49 of its submission regarding the A380 programme wind-down, the European Union cites the first compliance panel's statement that "{t}he withdrawal of a *subsidized* Airbus LCA from the market … might … potentially diminish or, in some cases, bring about the end of, the 'product-creating' effects".[6] Please comment on this reference, in connection with the European Union's argument that any indirect effects from the A380 LA/MSF on the A350XWB now ceased to exist.**
>
> **[6] Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1530.**

96. The key to understanding the quoted excerpt from paragraph 6.1530 of the first compliance panel report – and exposing a fatal error in the EU's argument – is to review the very next two sentences in that paragraph:

> The termination of an LCA programme that would not have existed in the absence of the LA/MSF subsidies implies that other existing or future models of Airbus LCA would no longer benefit from the *additional* "learning", scope or financial effects that would have been generated by that programme had it continued. Thus, for example, the termination of the A300/A310 programmes by 2007 would have brought the *additional* indirect effects of those subsidies to an end, leaving Airbus' latest models of LCA to benefit from only those indirect effects generated in the past that continue to support their present-day market presence.[87]

The first compliance panel specifically and twice emphasized the word "additional" to make clear that indirect effects that already accrued would still remain.

97. And this is surely correct. If the A380 program ended in its entirety tomorrow, the learning and financial advantages reaped to this point unquestionably remain part of the causal chain between aggregated LA/MSF and the market presence of the A350 XWB. Airbus already

[87] First Compliance Panel Report, para. 6.1530 (emphasis original).

gained immense knowledge from the A380 program and has applied that knowledge to the A350 XWB. Indeed, the first compliance proceeding findings establish that A380 indirect effects were particularly important to the launch and development of the A350 XWB.[88] Even if new knowledge were not obtained, that would do nothing to diminish the immense knowledge already gained to this point. And Airbus's CEO recently made clear that Airbus would continue to apply lessons learned from the A380 program to the A350 and other Airbus LCA programs.[89]

Question 40 (US)

> **Please comment on whether the following argument at paragraph 55 of the European Union's oral statement affects the United States' position:**
>
> **The fact that the A380 wind-down was caused by Emirates cancelling a large number of its existing orders should make it plainly obvious that Emirates was not committed to incorporating additional A380s in its fleet without regard to its own interests. Yet, even after Emirates' cancellation and the consequent announcement of programme wind-down the US persists in its erroneous argument that a commercial lender would have expected that Airbus would have continued with the A380 programme, based on Emirates CEI's statement.**

98. At the outset, the United States notes that the U.S. first written submission discusses a range of evidence, including and in addition to the Emirates CEO's statement referenced in the Panel's question, showing that a reasonable private creditor would have doubted Airbus would terminate the A380 program by **[***]** in the absence of the 2018 amendments.[90]

99. In response, the EU argues that the Emirates CEO's statement was "no more than a general reiteration of support for the A380 programme,"[91] and that "Emirates was not committed to incorporating additional A380s in its fleet without regard to its own interests."[92] Of course the United States did not argue that Emirates was committed to incorporating additional A380s in its fleet "without regard to its own interests."[93] Rather, the United States simply noted that a commercial actor likely would have been aware of the incoming Emirates CEO's statement,

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[88] *See* First Compliance Appellate Report, paras. 5.637-5.638 ("{E}ven though the Panel considered the extent to which Airbus benefitted from the technological platform provided by all of its previous subsidized LCA programmes, it was of the view that the A350XWB significantly benefitted from the 'learning effects' of the A380 in particular.").

[89] *See Guillaume Faury, patron d'Airbus: Il ne faut jamais gâcher une bonne crise*, Le Monde (Apr. 16, 2019) (Exhibit USA-155); US Oral Statement, para. 68.

[90] *See* US FWS, paras. 64-67. *See also* US SWS, para. 67.

[91] EU SWS, para. 168.

[92] EU Oral Statement, para. 55.

[93] EU Oral Statement, para. 55.

which signaled an intention to take all outstanding A380 deliveries and a commitment to the A380 program as a whole.[94]

100. As the United States discussed in its prior submissions, a reasonable commercial actor would also likely have known that Airbus was confident about market demand for the A380, and expected it to revive in the mid-2020s, and that Airbus had the ability to continue to operate the A380 program, at a loss if necessary, in order to capture this future anticipated demand.[95] In addition, at the time of the amendments, Airbus told **[***]**.[96] All of this information would have caused a reasonable private creditor to expect that Airbus would continue the A380 program even absent the 2018 amendments.

101. Finally, the EU errs in arguing that *ex post* developments, such as Airbus's announcement of its intent to wind-down the A380 program, contradict the evidence that would have been available to a reasonable private creditor *ex ante*. That would be flatly contrary to the approach under Article 1.1(b) to evaluate benefit on an *ex ante* basis.[97] Moreover, the United States observes that, according to public reports, Emirates cancelled its order for 36 additional A380s after negotiations broke down with engine supplier Rolls-Royce Holdings Plc,[98] not because of a lack of commitment to the future of the A380 program.

Question 41 (US)

Please comment on the statement at paragraph 56 of the European Union's oral statement that the "reference to [***] in the letter was to [***]. Is this the correct understanding of the meaning of [***]?

102. The United States disagrees with the EU's assertion at paragraph 56 of its oral statement because it is not supported by the evidence before the Panel. The letter referenced in the Panel's question (Exhibit EU-89) is a letter dated **[***]** from Airbus to the **[***]**. The letter states that Airbus would **[***]**. It states further that **[***]**.

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[94] US FWS, para. 67.

[95] US SWS, para. 67. *See also* US FWS, paras. 64-65.

[96] *See* 2018 German A380 Amendment, Attachment 3 (Exhibit EU-20(BCI)); US SWS, para. 67, note 75.

[97] Original Appellate Report, para. 706 ("The market benchmark is predicated upon a projection as to the anticipated flow of returns that are expected to accrue as a result of the financial contribution. Consequently, the determination of benefit under Article 1.1(b) of the *SCM Agreement* is an *ex ante* analysis that does not depend on how the particular financial contribution actually performed after it was granted."). Even if program "wind-down" could be viewed as an "intervening event" affecting how the subsidy benefit actually materializes, moreover, it would not *shorten* the life of the subsidy.

[98] *Airbus's Emirates Deal to Save the A380 Jumbo Has Stalled*, Benjamin Katz, Bloomberg (Oct. 8, 2018) (Exhibit USA-157).

103. In response to the U.S. arguments regarding the relevance of this letter,[99] the EU submitted a Supplemental Declaration of **[***]** (Exhibit EU-103(BCI)). **[***]** states that, as part of the negotiations with the Airbus Governments:

> **[***]**[100]

104. There is no evidence before the Panel that the limited **[***]** referenced by **[***]** are the same as the **[***]** referenced in the **[***]** Airbus letter. **[***]** specifically did not so state in his Supplemental Declaration. Moreover, the phrase **[***]** immediately preceding the **[***]** suggests Airbus was *not* referring to a limited **[***]** in the **[***]** letter, contrary to the EU's argument in its oral statement.[101] The United States also notes that **[***]** of the **[***]** letter.

Question 42 (US)

> **Please comment on the statement at paragraph 57 of the European Union's oral statement that, "{i}f the US acknowledges that the [***] had reasons to anticipate these [***], it must also acknowledge that they had reasons to anticipate programme termination".**

105. The United States does not dispute that termination of the A380 program was a possibility in 2018. **[***]** and program termination are very likely overlapping propositions – making aircraft involves **[***]**, and **[***]** was one of the major policy bases for the Airbus governments to fund the A380 program in the first place. However, the possibility of program termination does not, by itself, indicate anything about whether actions to prevent the termination were based on commercial considerations.

106. It should be equally clear that **[***]** is not a consideration of commercial entities considering major financing packages. Thus, to the extent that **[***]** motivated the Airbus governments to agree to amend the A380 LA/MSF contracts, that would be a noncommercial rationale indicative of a subsidy. The evidence shows that this was the case.

107. For example, Section **[***]** of the German A380 LA/MSF contract, titled **[***]** states,

> **[***]**[102]

And the German government attached such great importance to this that Airbus was subject to a **[***]** for **[***]**[103] In other words, in **[***]**, the government lender would rather not **[***]** – a

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[99] *See* US SWS, paras. 62-64.

[100] Supplemental Declaration of **[***]**, para. 3 (Exhibit EU-103(BCI)).

[101] EU Oral Statement, para. 56.

[102] MSF Agreement for the A380, Germany, **[***]**, (Exhibit EU-14(BCI)) (emphasis added).

[103] MSF Agreement for the A380, Germany, **[***]**, **[***]** (Exhibit EU-14(BCI)).

policy goal – than to have Airbus **[***]**. This motivation is inconsistent with a commercial actor, whose intention would be to maximize its return on investments rather than a public policy goal such as **[***]**.

108. Tying this back to the A380 amendments, the **[***]** letter from Airbus to the **[***]** stated that "the **[***]**."[104] The letter **[***]** from the **[***]** by asking for **[***]**[105] The United States does not dispute that this statement indicates that the **[***]** were concerned that Airbus would terminate the program, and that this would result in **[***]**. To avoid these **[***]**, the United States understands that the government financiers provided the **[***]** requested by Airbus in the form of the 2018 amendments.

109. The United States observes that the EU attempts to attach some commercial reasons for the 2018 amendment based on assertions in the PwC report. However, as pointed out in the U.S. written submissions and NERA's analysis, the PwC report contains numerous factual errors that undermines the conclusion that the amendments were made on the basis of commercial considerations. Indeed, the only primary evidence that points to a reason for the Airbus governments' motivation behind the amendments are the language in the LA/MSF contracts and the **[***]** letter. And that reason, **[***]**, is not a commercial motive.

Question 43 (Both parties)

> **The European Union argues that the A380 member State lenders "did not have negotiating power" and thus could not have sought different terms than those contained in the 2018 amendments. Would it have been possible for lenders to have sought repayment, for instance, through additional levies on other aircraft such as the A350XWB or single-aisle models? Please explain.**

110. The evidence does not support the EU's assertion that the A380 member State lenders "did not have negotiating power" with respect to the 2018 amendments. As the United States has demonstrated, while Airbus faced a trough in demand for the A380 in 2018, it projected a bright future for the program in the mid-2020s.[106] The EU has itself noted that Airbus had committed resources to fund a package of improvements it referred to as the "A380plus,"[107] and explained that Airbus sought to "avoid" program termination by convincing Emirates to buy additional A380s.[108] The EU further explains that securing these sales depended on the member

[104] Second PwC Report (Exhibit EU-89(HSBI)).

[105] Second PwC Report (Exhibit EU-89(HSBI)).

[106] *Effects of the 2018 Amendments on Pre-Existing A380 LA/MSF*, NERA (Dec. 19, 2018), paras. 27-28 (Exhibit USA-8(HSBI)).

[107] EU FWS, para. 385.

[108] EU FWS, paras. 128-129.

States agreeing to "restructure" their LA/MSF financing.[109] Thus, France, Germany, Spain, and the UK had negotiating power because they had something that Airbus desperately wanted – the ability to modify the terms of LA/MSF in a way that would allow Airbus to make the sale to Emirates and reinvigorate the A380 program.

111. It would certainly have been possible for the member State lenders to seek repayment out of revenue from other aircraft. The most compelling evidence on this point comes from the fact that the UK required Airbus to **[***]**.[110] **[***]**. In addition, **[***]** made their amendments contingent on Airbus making **[***]** without regard to whether **[***]**.[111] Thus, the member States clearly had the wherewithal to seek – **[***]** – payment of Airbus's A380 LA/MSF obligations from the revenues of other aircraft.

Question 44 (Both parties)

At paragraph 43 of its oral statement, the European Union argues that "at an absolute minimum, the acceleration effects would come to an end before the end of the marketing life of the A380."

a. What was the expected marketing life of the A380 at the time of granting A380 LA/MSF?

b. What was the expected remaining marketing life of the A380 at the time of amendments to any of the original A380 LA/MSF agreements?

112. Before responding directly to the questions posed by the Panel, we first recall an important distinction. The Panel's questions ask about the ***expected*** marketing life of the A380. The ***expected*** marketing life has been discussed in connection with the *ex ante* "life of a subsidy." The "life" of a subsidy is distinct from product effects – whether they be product-creation effects or acceleration effects – which are part of the causal chain between existing subsidy and adverse effects.

113. The United States understands the EU's statement quoted in part in the chapeau of the question to relate to adverse effects, not the life of the subsidy. The first compliance panel discussed the ***actual*** marketing life in connection with adverse effects. Specifically, the compliance panel discussed the duration of direct effects – just one component of the product effects caused by LA/MSF – in relation to the actual marketing life of a program.[112] The

[109] EU FWS, para. 129.

[110] EU FWS, para. 149.

[111] EU FWS, paras. 146-147.

[112] *See* First Compliance Panel Report, paras. 6.1506-6.1507.

compliance panel noted that, where a subsidy did not enable the very existence of a product, its direct effects may not last for the entire marketing life of the relevant program.[113]

114. The EU statement quoted in the chapeau is wrong for several reasons. It treats the LA/MSF subsidies as having an acceleration effect of, at most, two years, contrary to adopted findings. It also ignores the indirect effects of A380 LA/MSF, and that subsidies can continue to cause adverse effects after the counterfactual launch date has arrived. We have made these rebuttal points in several other places. For present purposes, it is important to distinguish, however, between the expected marketing life of a program – which has been discussed in the context of an *ex ante* analysis of whether a benefit "exists" – and the actual life of a program – which may indicate the duration of direct product effects attributable to a subsidy.

115. The United States will address both parts of this question simultaneously. With respect to part (a) of the question, based on the A380 business case, the expected marketing life of the A380 at the time of granting of A380 LA/MSF was until at least **[[HSBI]]**.[114]

116. With respect to part (b), as the United States has explained in its prior submissions, the 2018 Amendments (and in some cases, previous amendments) to the A380 LA/MSF contracts further extended the marketing lives of the A380 LA/MSF subsidies until at least **[[HSBI]]**.[115] Thus, the expected remaining marketing life of the A380 at the time of the amendments in 2018 was at least **[[HSBI]]**.

1.4 Whether the Spanish A380 LA/MSF subsidy has been withdrawn through amortization

Question 45 (EU)

> **At paragraph 98 of its second written submission, the United States argues that the European Union is incorrect that A380 LA/MSF was not a product-creation subsidy. In support of this, the United States emphasizes a statement by the first compliance panel that "{t}he original panel also found that the A380 business cases suggested, *'but by no means demonstrates*', that as a stand-alone proposition, the A380 might have been economically viable even without the A380 LA/MSF".[7] To what extent is this observation relevant to the application of the Marketing Life approach to evaluate the amortization of A380 LA/MSF?**
>
> **[7] Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1057, fn 2597. (emphasis added)**

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[113] *See* First Compliance Panel Report, para. 6.1507.

[114] *See* A380 Business Case (Exhibit EU-78(HSBI)) (projecting **[[HSBI]]**).

[115] *See* US FWS, paras. 48-49 (citing 2018 German A380 Amendment, Attachments 1, 3 (Exhibit EU-20(BCI)) (showing an **[***]**); 2018 Spanish A380 Amendment (Exhibit EU-23(BCI)) (showing **[***]**); 2018 French A380 Amendment, Articles 1, 2 7.1 (Exhibit EU-2l(BCI)) (extending the expiration date and providing for royalties until **[***]**); 2018 UK A380 Amendment, Schedule 3 (Exhibit EU-22(BCI)).

Question 46 (EU)

TradeRx states in footnote 1 of Exhibit EU-24-BCI that "intervening events can result in the benefit of a subsidy ceasing to exist at a point other than the one calculated on an *ex ante* basis". This implies that an intervening event can also extend the existence of a benefit beyond was anticipated in an *ex ante* analysis. In light of this, what is the relevance of the United States' observation at paragraph 99 of its second written submission that the *ex ante* life of Spanish A380 LA/MSF ended by the end of [***] *after* the Spanish 2018 amendment was negotiated and finalized?

Question 47 (EU)

At footnote 135 of its second written submission, the United States comments that the European Union "acknowledges that the 'quantum of unamortised benefit at any given point in time' is 'legally irrelevant'".[8] Please comment on the United States' argument that the European Union therefore would "agree with the United States that {the Trade Rx} unamortized benefit analysis, and the particular methodology underpinning this analysis, is irrelevant".

[8] European Union's second written submission, para. 131. (emphasis removed)

Question 48 (EU)

TradeRx argues in paragraph 12 of Exhibit EU-85-BCI that "suitable adjustments would need to be made to amortise a benefit over only the period of the expected Marketing Life that is attributable to the subsidy at issue, i.e. the period of acceleration." To the extent that the European Union is correct that A380 LA/MSF had an accelerating effect on the launch of the A380 of two years or less, this would lead to the conclusion that A380 LA/MSF amortized in two years or less under the Marketing Life approach. This would differ significantly from TradeRx's assessment that A380 LA/MSF amortized over much longer periods under the "Loan Life" Approach (see Exhibit EU-24-BCI, paragraphs 8-9).

a. How should the Panel take into account the large discrepancy that arises between these two approaches under the European Union's argument that the "Marketing Life" approach may only amortize over the period of acceleration resulting from A380 LA/MSF? In your response please take into account the Appellate Body's observation that "the allocation of a subsidy over the anticipated marketing life of an aircraft programme could be one way to assess the duration of a subsidy over time"[9].

b. Please comment on the United States' statement at footnote 131 to paragraph 97 of its second written submission in which the United States argues that the EU's focus on whether A380 LA/MSF is a product-creation subsidy improperly mixes the *ex ante* analysis of a life of the subsidy, with the *ex post* adverse effects analysis.

[9] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1241.

Question 49 (EU)

Please comment on the United States' argument at paragraph 24 of its oral statement that the European Union errs in tying the "life" of the subsidy to the

projected delivery schedule under the original LA/MSF contracts because "{n}othing in the contracts obligated Airbus to repay the stated sums in the indicated years".

Question 50 (US)

Given that the United States argues that there are at least two intervening events ([***]) that prolonged the *ex ante* life of the Spanish A380 LA/MSF subsidy, what is the relevance of the statement that "there is no evidence that either of these events was anticipated at the time that the original Spanish A380 LA/MSF agreement was concluded"?[10] How do the [***] serve to extend the *ex ante* life of the Spanish A380 LA/MSF, under *each* of the Loan Life and Marketing Life approaches.

[10] United States' second written submission, para. 93.

117. Based on Article 1.1 of the SCM Agreement, the magnitude of a subsidy and its duration are based on the expectations of the parties at the time of conferral. Further, a benefit exists for purposes of Article 1.2 of the SCM Agreement if the government confers the financial contribution on terms more favorable than the recipient would have obtained in a commercial transaction. Since a commercial actor would take account of all known factors affecting the value of the transactions, the benchmark and determination as to benefit will reflect all of those factors. This confluence of information would in turn determine the *ex ante* expected life of the subsidy.

118. This is the approach described by the Appellate Body in *EC – Large Civil Aircraft* when it found that:

> In order properly to assess a complaint under Article 5 that a subsidy causes adverse effects, a panel must take into account that a subsidy provided accrues and diminishes over time, and will have a finite life. . . . Separately, where it is so argued, a panel must assess whether there are "intervening events" that occurred after the grant of the subsidy that may affect the projected value of the subsidy as determined under the *ex ante* analysis.[116]

The eventualities known at the time of conferral of a subsidy will inform the *ex ante* projected value and life of the subsidy. Therefore, if those eventualities occur, it would be redundant to treat them as intervening events and evaluate how they affect the value or life of the subsidy.

119. Thus, the fact that the **[***]** were not anticipated at the time the original Spanish A380 contract was concluded is what potentially makes them "intervening events" that could affect the value or life of the subsidy.

120. The EU has not submitted a copy of the **[***]**, so it is difficult to evaluate precisely how it affected the life of the subsidy under the marketing life approach. However, as the First PwC

[116] *EC – Large Civil Aircraft (AB)*, para. 709.

A380 Report includes a table projecting levies in accordance with the **[***]** through **[[HSBI]]**, it reflects the understanding of the parties as of the date of the **[***]** that the marketing life of the A380 was at least **[[HSBI]]** years. Thus, the parties appear to have **[***]**. As the original Spanish A380 LA/MSF contract did not foresee this eventuality, it cannot have affected *ex ante* expectations as to the marketing life of the program, making the **[***]** an intervening event. The United States considers that this event extended the life of the subsidy by modifying the terms to reflect new expectations regarding the marketing life of the A380.

121. The **[***]** reflected yet another set of expectations as to the life of the A380 program. On the one hand, Airbus was concerned that the lack of orders in the short term might necessitate termination of the A380. On the other hand, the company was investing in incremental improvements to the aircraft and considered that new demand would materialize in the 2020s. On this basis, the subsidizing governments agreed to **[***]**.[117] The United States considers that this event extended the life of the subsidy by modifying the terms to reflect new expectations regarding the marketing life of the A380.

122. The loan life methodology is particularly inapt for determining the life of subsidized LA/MSF. To begin, it is much more uncertain. Like marketing life, the time that LA/MSF remains outstanding will depend on how long the aircraft remains viable in the market. But there is a further level of uncertainty in that full repayment also depends on how many aircraft are sold and when they are delivered. An aircraft program that meets expectations as to market life may not result in full repayment of LA/MSF if there are not enough sales. It is also noteworthy that the evaluation of the A380 business case included a sensitivity analysis, including a so-called "Realistic Worst Case."[118] This evidence shows that Airbus recognized that its projected delivery schedule, which is the determining factor for expected loan repayment calculations, was subject to a high level of uncertainty.

123. Although the Spanish A380 LA/MSF contract includes an expected delivery schedule and levy amounts based on that schedule, the United States does not consider that this reflects the parties' *ex ante* expectations as to the "loan life" of the instrument. As noted, the parties recognized that delivery dates would be subject to volatility. Calculation of the loan life would require information on the parties' views as to the variability of the schedule and the effects of variability on the time needed for full repayment. The United States does not have that information.

124. That said, *ceteris paribus*, the **[***]** appear to represent new projections as to the delivery schedules for the A380 and, thus, repayment. **[***]**. In the case of the **[***]**, the parties also

[117] *See* EU FWS, paras. 146-149.

[118] Original Panel Report, para. 7.1922

[***]. The United States considers that these events extended the life of the subsidy even under the loan life approach by **[***]**.

Question 51 (US)

> **What difference would it make to the outcome of the Panel's examination of the amortization of the Spanish LA/MSF, if the TradeRx Amortization Report does indeed depreciate the benefit of the Spanish A380 LA/MSF in a "straight line over the time period when repayments occur"?**

125. As United States explained in its first written submission, TradeRx's so-called "unamortised benefit" analysis is meaningless and has no legal or factual basis.[119] It purports to establish the percentage of each subsidy's benefit "amortized" at a particular point in time based on Professor Klasen's (own) assumption that the benefit of LA/MSF depreciates over the time period when repayments occur.[120]

126. Although it appeared that TradeRx's first Amortization Report depreciated the benefit in a straight line over the time period when repayments occur,[121] TradeRx clarified in its supplemental report that the benefit was amortized in proportion to the *ex ante* anticipated cash flows under each LA/MSF agreement.[122]

127. Regardless of the amortization approach, the EU still fails to identify any legal or factual authority that would justify this analysis. Accordingly, Professor Klasen and TradeRx's "unamortised benefit" analysis and any conclusions drawn from it should be disregarded.

Question 52 (US)

> **At paragraph 19 of Exhibit EU-85-BCI, TradeRx states that "the TradeRx Amortisation Report included all [***] in its cashflow calculations". Please comment on this statement in relation to the United States' comment that TradeRx ignored Article 7.3 of the French A380 protocole, Article 10.1 of the German A380 LA/MSF agreement and Schedule 3 of the UK A380 LA/MSF agreement.**

128. The TradeRx Amortization Report is based on an assumption from the A380 business case that at least **[[HSBI]]** A380s would be delivered between **[[HSBI]]**.[123] The A380 LA/MSF

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[119] *See* US FWS, para. 85.

[120] *See* US FWS, para. 85.

[121] *See* Professor Klasen, "Expected Life of MSF Subsidies for the A380 and A350XWB Programmes" (Oct. 8, 2018), para. 9 (Exhibit EU-24(BCI)).

[122] *See* TradeRx, "Analysis addressing the US comments on TradeRx's Amoritisation Report: Supplemental Amortisation Report" (Jan. 26, 2019), para. 15 (Exhibit EU-85(BCI)).

[123] *See* A380 Business Case (Exhibit EU-78(HSBI)).

contracts anticipate full repayment **[***]**.[124] Accordingly, the TradeRx Amortization Report only takes into account **[***]** for deliveries of the **[***]** aircraft, anticipated to occur in **[***]**.[125]

129. As the United States noted in its first written submission, it is not necessary for the Panel to address Professor Klasen's arguments regarding the end-dates for the *ex ante* lives of subsidies other than Spanish LA/MSF for the A380. However, if the Panel does assess the *ex ante* lives of the other A380 subsidies, not only the A380 business case and its underlying assumptions, but also the terms of the A380 LA/MSF contracts themselves should be taken into account.

130. The clauses of the A380 LA/MSF contracts that the United States noted in its first written submission – namely, Article 7.3 of the French A380 protocole, Article 10.1 of the German A380 LA/MSF agreement and Schedule 3 of the UK A380 LA/MSF agreement – indicate that the parties expected **[***]**:

- **[***]**.[126]
- **[***]**.[127] According to the notional delivery schedule included in the A380 business case, delivery of the **[[HSBI]]** aircraft was expected to occur in **[[HSBI]]**, meaning that Germany could have expected to **[***]**.[128]
- **[***]**.[129] Thus, based on the notional delivery schedule in the A380 business case, France also could have expected to **[***]** assumed in the TradeRx Report.

2 The European Union's claims regarding the removal of Adverse Effects

Question 53 (Both parties)

Canada proposes a counterfactual approach that compares the actual market situation to a situation that would exist if the European Union would have withdrawn the subsidies by the date on which the responding Member asserts full compliance. The United States argues that it is impossible to reconcile Canada's proposed counterfactual with Article 7.8 or prior guidance in this dispute because it assumes that any time a subsidy is withdrawn the adverse effects it is causing will cease. Is this at odds with the Appellate Body's observation that adverse effects of a subsidy

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[124] *See* French A380 LA/MSF Agreement, Article 6.2 (Exhibit EU-12(BCI)); German A380 LA/MSF Agreement, Clause 7.1 (Exhibit EU-14(BCI)).

[125] *See* Professor Klasen, "Expected Life of MSF Subsidies for the A380 and A350XWB Programmes" (Oct. 8, 2018), para. 39 (Exhibit EU-24(BCI)).

[126] UK A380 LA/MSF Contract, Schedule 3 (Exhibit EU-16(BCI)).

[127] German A380 LA/MSF Contract, Art. 10.1 (Exhibit EU-14(BCI)).

[128] *See* A380 Business Case (Exhibit EU-78(HSBI)).

[129] French A380 LA/MSF Contract, Art. 7.3 (Exhibit EU-13(BCI)).

might persist after its expiration, even when a subsidy might no longer exist?[11] Please comment.

[11] United States' second written submission, paras. 170-171.

131. Yes, Canada's proposed approach is at odds with the Appellate Body's observation. As the Panel's meeting with the parties and third parties further reinforced, Canada's proposed counterfactual reasons that, if the market effects actually observed would obtain even if the subsidy had been withdrawn through some hypothetical action, then one can conclude that the observed market effects are not being caused by the subsidy. The implicit premise in this approach is that every manner of withdrawing a subsidy must also remove the adverse effects. This is the basis for thinking that, if a subsidy is hypothetically withdrawn in the counterfactual, the observed market effects should change (*i.e.* no longer obtain).

132. However, previous guidance from appellate reports contradicts the premise of Canada's proposed counterfactual. The Appellate Body has stated that adverse effects may very well continue after a subsidy "expires" when viewed through an *ex ante* analysis.[130] It has also noted that withdrawal for purposes of Article 7.8 does not mean withdraw so as to remove the adverse effects.[131]

Question 54 (Both parties)

Brazil has argued that the amended A380 LA/MSF agreements are key to explaining the current market presence and competitiveness of the A380, since the programme would have terminated without the amendments. Following Airbus' announcement that it will terminate the A380 programme, will any outstanding A380 LA/MSF be withdrawn at the moment of termination?

133. To the extent that the Panel is asking whether, as a matter of fact, the A380 program termination involves some payment by Airbus to the LA/MSF providers, the EU has submitted no evidence to that effect. To the extent the question asks whether the program termination, in and of itself, would result in the termination of the subsidy, the United States does not see how that could be the case. The possibility of early termination of the underlying aircraft program is one of the risks that the subsidy was granted to cover. It cannot by itself affect the *ex ante* analysis of the life of the subsidy benefit.

Question 55 (Both parties)

Brazil argues that the element of timing only pertains to the adverse effects and not to the subsidies, and therefore adverse effects in the post-implementation period may result from subsidies existing before or after the end of the implementation

[130] *See* Original Appellate Report, para. 712 ("{W}e do not exclude that, under certain circumstances, a past subsidy that no longer exists may be found to cause or have caused adverse effects that continue to be present during the reference period.").

[131] *See* First Compliance Appellate Report, para. 5.371.

period. Please comment on Brazil's argument that the European Union's proposed counterfactual is only capable of showing whether a subsidy granted after the implementation period is causing adverse effects since it disregards any effects of subsidization at the end of the implementation period.

134. Although perhaps not comprehensive, Brazil's argument makes an important point. As described in response to Question 53, the EU's counterfactual (which the United States understands to be the same as Canada's proposed counterfactual) seeks to show that the subsidies after a certain point in time are no longer causing adverse effects. The United States has already demonstrated in response to Question 53 why it is insufficient even to show that.

135. However, even if it were true that adverse effects in the present period were not being caused by contemporaneous subsidies, that would be insufficient to demonstrate compliance under Article 7.8. As Brazil notes, a subsidy may cause adverse effects that are not contemporaneous. Where a subsidy continues to "exist," present adverse effects attributable to subsidization at an earlier point in time would defeat any attempt to establish compliance through removal of the adverse effects.

Question 56 (EU)

When were the last major changes in design made to the A380 models sold in 2018 and 2019? Please provide information regarding what the major changes made were and the dates these changes were made, in the period since the aircraft launched.

Question 57 (EU)

When were the last major changes in design made to the A350XWB models sold in 2018 and 2019? Please provide information regarding what the major changes made were and the dates these changes were made, in the period since the aircraft launched.

Question 58 (US)

Please provide sales and delivery data from the Ascend database for orders and deliveries of the A380 between 2000 to the present. Please provide the data in electronic format (e.g. MS excel) and to the extent this data has already been provided for the A350XWB, please also provide it in the same format.

136. The United States provides the requested information in Exhibit USA-158.[132]

Question 59 (Both parties)

To the extent that Airbus only would have been able to develop an inferior version of the A380, absent the A380 LA/MSF subsidies, would a finding that the A380 would

[132] Updated Ascend Data (Exhibit USA-158).

have been launched some time before 2011-2013 be sufficient to find that the A380 LA/MSF did not cause adverse effects during or after that period. Please explain.

137. In the abstract, a subsidy that results in a superior product can, of course, cause adverse effects. However, at the Panel's meeting with the parties, both the EU and the United States agreed that the compliance proceeding findings did not include a finding that Airbus would have an inferior A380 product in the counterfactual.

138. As the United States has made clear, the adopted findings from the first compliance proceeding cannot be squared with any "find{ing} that the A380 LA/MSF did not cause adverse effects during {the 2011-2013} period."[133]

139. Furthermore, the United States has explained why the occurrence of the counterfactual launch date does not necessarily establish compliance after that point even within the VLA market. This includes the possibility of significant lost sales due to less attractive sales campaign offers, such as having worse delivery positions to offer as a result of the past acceleration effects, as well as displacement and/or impedance, which is based on deliveries that inevitably lag product launch by several years.[134]

140. Moreover, A380 LA/MSF, as part of the aggregated subsidies, was found to cause adverse effects in the twin-aisle market. Reaching the counterfactual A380 launch date certainly would not be sufficient to find that A380 LA/MSF no longer caused adverse effects in the twin-aisle market.

141. In any event, for the sake of completeness, the United States assumes *arguendo* that the first compliance proceeding findings were based on a finding that Airbus would have launched an inferior A380 in the absence of subsidies. In that case, the EU would have failed to meet its burden of showing that the existing subsidies no longer cause adverse effects. In the first compliance period, there was no in-depth analysis of individual sales campaigns. Therefore, even if one assumes that the product effect was one of an inferior product, the product effect, along with the conditions of competition and the data trends for the purposes of impedance, were sufficient to establish significant lost sales and impedance in every sales campaign and geographic market raised by the United States. And that was true when the United States bore the burden of the complaining party in demonstrating that the EU had failed to achieve compliance by the end of the RPT.

142. Here, the EU would have the burden of establishing that, even though an inferior A380 led to significant lost sales and impedance in every VLA sales campaign and geographic market raised by the United States in the 2011-2013 period, something has changed such that it no longer is causing these adverse effects. The EU has not even made any arguments to that effect.

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[133] *See, e.g.*, US SWS, paras. 144-147.

[134] *See* US FWS, paras. 217-219; US SWS, paras. 246-255.

Accordingly, even if the first compliance proceeding findings were understood to have been based on the counterfactual launch of an inferior A380, the EU has failed to establish that it has achieved full, substantive compliance.

Question 60 (Both parties)

> **What is the relevance of the findings in the recently released Appellate Body Report in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, in which the Appellate Body concluded that a panel must evaluate the extent to which subsidies contributed not only to the launch of an LCA, but also its development and production up to the point of delivery to customers[12]? Based on these findings, is it enough to determine the counterfactual launch date of the A380 and A350XWB to determine whether any of the non-withdrawn subsidies at issue continue to cause adverse effects after 2018?**
>
> **[12] See Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.405. ("The key issue before us in these compliance proceedings is whether the Panel properly addressed the counterfactual question by limiting its analysis of the acceleration effects of the pre-2007 aeronautics R&D subsidies to the timing of the 787's launch *or* whether a proper application of that counterfactual question also required consideration of the acceleration effects of the pre-2007 aeronautics R&D subsidies on the timing of first delivery of the 787.") See also para. 5.408 ("{T}o the extent that acceleration effects from the pre-2007 aeronautics R&D subsidies are found to exist in the post-implementation period, then assessing whether any of the forms of serious prejudice under Article 6.3 at issue was the effects of these subsidies may involve evaluating evidence related to events occurring *after* an aircraft's launch").**

143. In light of the *US – Large Civil Aircraft* compliance appellate report, determining the counterfactual launch date of the A380 and A350XWB is clearly insufficient by itself to establish that the EU has demonstrated that it has taken appropriate steps to remove the adverse effects. However, this does not mean that the Panel must necessarily assess counterfactual delivery timing under all circumstances. The EU has claimed that it has removed the adverse effects, and it therefore bears the burden of establishing that claim. Because the EU clearly has failed to demonstrate counterfactual A380 and A350 XWB launch dates at any point during or prior to the present period, its adverse effects removal claim necessarily fails before the question of counterfactual delivery timing is reached.

144. The *US – Large Civil Aircraft* compliance appellate report emphasized that the counterfactual question and the particular conditions of the industry at issue are significant determinants of the scope of the counterfactual analysis.[135] The industry in that dispute is the same as the industry here, and while the counterfactual questions in the two disputes are not identical, they bear important similarities. In that dispute, "the Panel's inquiry focused on the issue of whether the acceleration effects of the pre-2007 aeronautics R&D subsidies that were found to exist by the original panel *still exist* in the post-implementation period and, if so, whether such acceleration effects cause serious prejudice to the interests of the European Union

[135] *US – Large Civil Aircraft (21.5) (AB)*, paras. 5.399, 5.405-5.408.

in the post-implementation period."[136] To answer that question, the *US – Large Civil Aircraft* compliance appellate report found that the features of the LCA market required a counterfactual analysis that encompassed possible subsidy effects on delivery timing as well as launch timing:

> {I}n the LCA market, the market phenomena of price suppression and lost sales are not limited to what occurs at the time of an LCA order and, therefore, such phenomena may continue up to the point of LCA delivery. Indeed, the terms of a sale, and the extent to which those terms may be modified until the point of delivery, may have a bearing on the nature and scope of adverse effects caused by a subsidy. Thus, depending on the nature and scope of the transaction at issue, establishing the existence of certain forms of serious prejudice in the LCA industry may require examining events subsequent to the point of order, potentially including events taking place up to the point of delivery. Consequently, in the context of the LCA market, determining whether the forms of serious prejudice under Article 6.3 at issue in this dispute still exist in the post-implementation period requires assessing whether any acceleration effects from the pre-2007 aeronautics R&D subsidies also had an impact on the timing of first delivery of the 787 in the post-implementation period.[137]

145. Here, the counterfactual question is whether the EU has demonstrated that the product effects of LA/MSF subsidies found to exist in the December 2011-2013 post-implementation period no longer exist in the present period, such that those subsidies no longer cause serious prejudice. The EU has not demonstrated that, absent existing LA/MSF, Airbus would have even launched the A380 or A350 XWB at any point since 2013 (or before then, as foreclosed by the findings in the first compliance proceeding). That is a sufficient basis to reject the EU's claim.

146. However, assuming *arguendo* that the EU did prove counterfactual launch dates that might be consistent with a cessation of serious prejudice, the *US – Large Civil Aircraft* compliance appellate report indicates that it would still be necessary to assess whether delayed delivery availability would result in continued adverse effects. For example, if the EU somehow demonstrated a counterfactual A380 launch between 2013 and the present, it would be necessary to analyze issues such as whether Airbus could have made the A380 deliveries it actually made in various country markets, such that no displacement or impedance is occurring. It would then

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[136] *US – Large Civil Aircraft (21.5) (AB)*, para. 5.399 (emphasis added).

[137] *US – Large Civil Aircraft (21.5) (AB)*, para. 5.408. *See also ibid.*, para. 5.411 ("Moreover, if the pre-2007 aeronautics R&D subsidies had an impact on stages of the 787's development – either before or after its launch – that affected the timing of first delivery of the 787 in relation to the end of the implementation period, then assessing the timing of this aircraft's first delivery would have been particularly appropriate for determining whether the acceleration effects still exist in the post-implementation period and could be attributed to the pre-2007 aeronautics R&D subsidies. If there were no such acceleration effects that affected the timing of first delivery of the 787, then the Panel should have reasoned why that is the case, rather than excluding consideration of this issue ab initio.").

be necessary to assess how that counterfactual launch and development would have affected counterfactual Airbus's ability (if any) to launch, develop, promise deliveries, and make deliveries for the A350 XWB and A330neo since 2013.

147. As part of this analysis, the Panel would need to account for an array of subsidiary issues, such as the possible effects of the A380's post-2013 launch and development in postponing the point at which Airbus would have sufficient learning, financial capacity, and engineering resources to undertake the A350 XWB program, and the subsequent effects on promised and actual A350 XWB deliveries that could have prevented Airbus from making the sales and deliveries that it actually made in the present period. It is implausible that such analyses would reach the conclusion that counterfactual Airbus could have managed to launch, develop, and deliver the A380, A350 XWB, and the A330neo in the five-plus years since 2013, such that it would have achieved the sales and deliveries that it actually achieved and continues to enjoy in the present period.

Question 61 (EU)

The European Union argues that where the principal amounts are lower because they have not been fully drawn, the monetary consequence of the LCA programme risks assumed by the lenders are correspondingly reduced.[13]

a. Please discuss the relevance of the monetary consequence of the LA/MSF, given the adopted findings in this dispute regarding the nature of the causal mechanism through which the LA/MSF operate.

b. How does the decision not to fully draw down funds affect the initial impact of LA/MSF which enabled Airbus to proceed with the launch of the A380 and A350XWB?

[13] European Union's second written submission, para. 342.

Question 62 (Both parties)

How should the Panel evaluate the reduced magnitude of A380 and A350XWB LA/MSF subsidies resulting from the reduced benefit (as a consequence of the alleged partial amortization of the majority of LA/MSF subsidies) in light of the nature of the causal mechanism through which the LA/MSF operate?

148. Here the subsidies enabled the very existence of products. Therefore, reducing the magnitude of the subsidies in later years does nothing to lessen the adverse effects caused by the continued market presence of the subsidized product, or caused by other products that the subsidies enabled through indirect effects.

149. Where a subsidy operates through a price effects causal mechanism, the magnitude of the subsidy may often dictate the magnitude of the price effect. In such a scenario, lessening the magnitude of a subsidy may then lessen the price effect of that subsidy. However, that is not the case with the LA/MSF subsidies at issue here.

Question 63 (US)

The European Union asserts, in paragraphs 314-316 and 387-389 of its first written submission, that the total magnitude of expenditure on allegedly unsubsidized investments for development and support of the A380 and A350XWB programmes is significant ([[HSBI]]). What is the relevance of the magnitude of expenditure in attenuating the link between the subsidies and the market presence of the aircraft, especially in light of the United States' estimation that the combined value of LA/MSF is USD 9 billion in paragraph 1 of its second written submission?

150. The magnitude of the EU's allegedly unsubsidized investments has very limited relevance to the Panel's assessment of the causal link because the existing subsidies have been found to enable Airbus to offer the A380 and the A350 XWB in the post-implementation period. Even where that magnitude could be characterized as large, that by itself could at most show that such investments are but one genuine and substantial cause of an Airbus model's market presence and current competitiveness. Such a showing would not sever the causal link.

151. First, there can be more than one genuine and substantial cause of a market phenomenon, and subsidies need not be the sole cause, or even the sole substantial cause.[138] With respect to the specific issue of relative magnitudes between subsidies and non-subsidy factors, A380 LA/MSF was found to be a genuine and substantial cause of the A380's market presence even where that LA/MSF funding accounted for only one-third of total A380 development costs.[139] Similarly, the *US – Large Civil Aircraft* compliance appellate report found that a tax subsidy was a genuine and substantial cause of lost sales even where the maximum per-aircraft subsidy amount was a fraction of the total aircraft price and was insufficient to cover the difference between the winning and losing bids.[140] Accordingly, even if Airbus's allegedly non-subsidized investments were considered relatively large, that would be insufficient to establish that LA/MSF subsidies were no longer a genuine and substantial cause of serious prejudice.

152. Second, it is important to consider the relationship between the LA/MSF subsidies' effects and those of the allegedly non-subsidized investments. Existing LA/MSF subsidies have been found to enable Airbus to offer the A380 and A350 XWB in the post-implementation period. If, as the EU alleges, Airbus's non-subsidized investments are large and important in enabling Airbus to compete for sales in the present period, that would not show those subsidies to be unrelated to the current sales and competitiveness of the product. Rather, it would merely show that Airbus took advantage of the position afforded by LA/MSF – *i.e.*, the ability to offer a product – by improving that product. This is essentially the same situation as the first

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[138] *US – Large Civil Aircraft (AB)*, para. 914; US SWS, para. 205.

[139] *See* First Compliance Appellate Report, paras. paras. 5.607, 5.726, note 1682; Original Panel Report, para. 7.1881 ("The extent of this risk-shifting varies with the proportion of the development costs being financed, which has decreased from 100 percent for the first Airbus LCA, the A300, in 1969, to 33 percent for the most recently financed aircraft, the A380, in 2000.").

[140] *See US – Large Civil Aircraft (21.5) (AB)*, paras. 5.520-5.525.

compliance appellate report's findings that the A380's advantageous product characteristics were not "unrelated to the effects of the subsidies" and did not dilute the causal link.[141] As the United States has explained previously, if Airbus could not offer customers the A380 or A350 XWB absent existing LA/MSF, other factors that are contingent on the model's existence cannot sever the causal link, regardless of whether those factors are product characteristics or improvements to those characteristics, and regardless of whether such improvements result from supposedly "large" investments.[142]

Question 64 (EU)

The Appellate Body has stated that "the mere presence of other causes that contribute to a particular market effect does not, in itself, preclude the subsidy from being found to be a "genuine and substantial" cause of that effect" and "in order to find that the subsidy is a genuine and substantial cause, a panel need not determine it to be the *sole* cause of that effect, or even that it is the *only* substantial cause of that effect."[14] In light of these statements, please explain how the allegedly unsubsidized, post-launch investments actually act to attenuate the link between the LA/MSF and the present adverse effects?

[14] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 914.

Question 65 (EU)

How much of Airbus' investment in "continuing support" and "continuing development" of the A380 and A350XWB can be considered "routine expenses for aircraft producers", as was argued by the United States?[15] To the extent that a portion of the allegedly unsubsidized investments in the A380 and A350XWB *are* "routine expenses for aircraft producers", how can this portion attenuate the link between the causal link between the subsidies and any alleged present adverse effects?

[15] United States' second written submission, para. 213.

Question 66 (EU)

Please comment on the United States' argument at paragraph 13 of its oral statement that it is the European Union that argued that Airbus made certain unsubsidized investments and that the European Union bears the burden of proof that such investments exist and are indeed unsubsidized. Has the European Union provided evidence of these investments?

[141] First Compliance Appellate Report, para. 5.729.

[142] US SWS, para. 207.

Question 67 (Both parties)

May the Panel consider the United States' argument that the "financial effects" of LA/MSF stemming from sales of a subsidized aircraft model could enable both the pre-launch and post-launch developments of another aircraft model?[16]

[16] United States' second written submission, para. 234.

153. Yes. As the first compliance panel recalled, "{t}he financial effects of LA/MSF result from not only the impact of the 'learning' and scope effects on the cost of financing new models of LCA, but also the revenues generated from sales and deliveries of LCA that would not exist in the absence of LA/MSF, as well as the below-market interest rates charged on the repayment of LA/MSF."[143]

154. Of course, if the EU fails to establish that one or more "new models of LCA" would have launched in the counterfactual absent the subsidies, then there would be no occasion to consider the subsidies' post-launch effects on such models. But, in the event the EU were able to establish the counterfactual existence of a new LCA model, nothing prevents the Panel from considering how, for example, cash generated from sales of an aircraft that itself would not exist in the counterfactual would impact post-launch developments of another aircraft. This is particularly relevant in the case of the A330neo.

Question 68 (EU)

Please respond to the following US arguments:

a. any reliance on the Wessels Report must take into account the conservative assumptions that were made in assessing Airbus' financial condition and credit rating in the absence of LA/MSF; and

b. the European Union's adaptation of the Wessels Report is flawed because it did not consider whether Airbus had the technological capacity and other pre-requisites for undertaking any such projects, or whether either the A380 or A350XWB would have had an attractive business case to justify the project.[17]

[17] United States' second written submission, paras. 237-238.

Question 69 (EU)

What is the relevance, if any, to the Panel's assessment, of whether the launch of the A380 would have been economically viable at a later point in time in light of changes to market conditions?

[143] First Compliance Panel Report, para. 6.1511.

Question 70 (Both parties)

What is the evidence that the European Union has submitted in this proceeding to establish that the A380 would have launched two years later in 2002 and the A350XWB would have launched two years later in 2008? How does the evidence that the European Union has submitted compare to the type of evidence relied on by panels or the Appellate Body in preceding stages of this dispute in assessing whether Airbus would have been able to launch a particular LCA or not?

155. The "evidence" submitted by the EU is scant and a far cry from the extensive array of evidence supporting the adopted findings concerning launch timing. The EU has submitted two documents. First, it submitted the Wessels Report from the first compliance proceeding, which as the United States has demonstrated is incapable of supporting the EU's assertions regarding the counterfactual launch timing of the A380 or A350 XWB.[144] Second, the EU submitted the Airbus Counterfactual Launch Statement, which purports to adopt Professor Wessels' methodology and concludes that, absent LA/MSF, Airbus could have funded and launched the A380 and A350 XWB *at the exact same time* that it actually did,[145] in direct contravention of the adopted compliance findings that Airbus would have been unable to offer the A380 or A350 XWB in the December 2011-2013 post-implementation period.[146]

156. In effect, the EU is asking the Panel to decide the counterfactual launch timing questions based on its own (mistaken) adaptation of the Wessels Report, regardless of that report's narrow and highly conservative focus on Airbus's counterfactual credit rating, regardless of the prior findings, and regardless of the many factors that would need to be assessed before one could conclude whether a counterfactual Airbus would have launched the A380 and A350 XWB at particular points in time. This is woefully inadequate in light of the counterfactual launch analyses reflected in the prior reports, which engaged in objective, comprehensive assessments of extensive bodies of relevant evidence. Nor is it consistent with the fact that compliance proceedings are based on and flow from the earlier proceedings.

157. The original panel relied on the following types of evidence:

- Evidence concerning the conditions of competition in the LCA industry;[147]

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[144] US SWS, paras. 235-245.

[145] *See* Airbus, Assessment of Counterfactual Launch Dates for the A380 and A350XWB without MSF, para. 18 (finding that "absent the assumption of massive debt in years preceding 2001, Airbus met Professor Wessels' condition for the launch of a new aircraft programme (i.e., a counterfactual credit rating absent MSF loans of BBB-, or better) *in the years in which the A380 and the A350 XWB were actually launched*") (emphasis added) (Exhibit EU-92(BCI/HSBI)).

[146] *See* US SWS, para. 230.

[147] *See* Original Panel Report, para. 7.1936.

- Evidence concerning the nature and amount of LA/MSF subsidies, including their structure, design, and operation and the proportion of development costs financed by LA/MSF;[148]

- The Dorman Report, which demonstrated how LA/MSF makes Airbus more likely to launch a given LCA program;[149]

- Public statements and official documents concerning the important role that LA/MSF played in enabling the launches of specific Airbus LCA programs, from the A300 through the A380; [150]

- Evidence concerning the Airbus entities' ability to fund LCA program development costs absent LA/MSF;[151]

- Evidence concerning the costs and risks of particular Airbus LCA programs, such as the A380;[152]

- Business cases for the A330-200, A340-500/600, and A380, including information in those business cases concerning program viability.[153]

After examining particular categories of evidence individually, the original panel then analyzed all the evidence in a careful, integrated manner with respect to each Airbus LCA program at issue, including by accounting for the indirect effects of LA/MSF provided to prior LCA programs.[154] The original appellate report subsequently upheld the original panel's LA/MSF product effects causation analysis.[155]

158. The first compliance panel also relied on an extensive array of evidence in assessing the effects of LA/MSF on the launch of the A350 XWB:

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[148] *See* Original Panel Report, paras. 7.1881, 7.1935.

[149] *See* Original Panel Report, paras. 7.1912, 7.1934.

[150] *See* Original Panel Report, paras. 7.1920, 7.1933.

[151] *See* Original Panel Report, paras. 7.1942, 7.1947.

[152] *See* Original Panel Report, paras. 7.1943, 7.1947.

[153] *See* Original Panel Report, paras. 7.1921, 7.1934.

[154] *See* Original Panel Report, para. 7.1932-7.1949.

[155] *See* Original Appellate Report, paras. 1264-1265, 1414(p)-(q).

- Evidence concerning the particular circumstances of the A350 XWB's origins, including the competitive market situation at the time the program was launched and subsequently developed;[156]

- Evidence concerning the A350 XWB's pre-launch development progress;[157]

- Evidence, such as investor presentations, analyst reports, news articles, and statements of Airbus and government officials, concerning the financial position of Airbus/EADS prior to the A350 XWB's launch, including the significant financial strains imposed by problems with the A380 and A400M and Airbus's attempt to mitigate those strains by obtaining EU member State financial assistance for the A350 XWB;[158]

- The A350 XWB business case;[159]

- Evidence concerning developments after the A350 XWB's launch, including the program's developmental status over time, the financial position of Airbus/EADS, and LA/MSF negotiations; [160]

- Government appraisals of the A350 XWB program, which discussed the importance of financial assistance for the A350 XWB;[161]

- European Commission State Aid decisions discussing the challenges of obtaining financing in the aerospace sector and the risks of the A350 XWB program overall and with respect to specific development projects;[162]

- Evidence concerning the nature of A350 XWB LA/MSF and the timing and extent of its provision and disbursements;[163]

- Evidence concerning the viability of the A350 XWB program absent A350 XWB LA/MSF, in terms of the attractiveness of the project to Airbus given the alternative internal and external funding sources that might have been available, the program's base-

[156] *See* First Compliance Panel Report, paras. 6.1542-6.1546.

[157] *See* First Compliance Panel Report, paras. 6.1547-6.1549.

[158] *See* First Compliance Panel Report, paras. 6.1550-6.1566.

[159] *See* First Compliance Panel Report, paras. 6.1568-6.1572.

[160] *See* First Compliance Panel Report, paras. 6.1574-6.1598.

[161] *See* First Compliance Panel Report, paras. 6.1599-6.1612.

[162] *See* First Compliance Panel Report, paras. 6.1613-6.1623.

[163] *See* First Compliance Panel Report, paras. 6.1625-6.1635.

case forecast net present value ("NPV"), strategic considerations not reflected in the base-case NPV, and program risks;[164]

- Evidence, such as news articles, Airbus presentations, and Airbus and Boeing expert reports, concerning indirect effects of prior LA/MSF on the A350 XWB program, such as management know-how, technologies, and financial effects generated by the subsidy-enabled A380 program.[165]

Though it modified the first compliance panel's findings to isolate the product effects of A380 and A350 XWB LA/MSF on the A350 XWB program, the compliance appellate report relied extensively on the panel's assessment of the aforementioned evidence in finding that Airbus would have been unable to offer the A350 XWB in the December 2011-2013 post-implementation period.[166]

159. As is clear from the foregoing review of the evidence underlying the prior findings, a proper counterfactual launch assessment absent LA/MSF subsidies is supported by a wide array of very specific evidence concerning key issues such as the costs and risk of the LCA program at issue; the conditions under which it was actually launched; the possible availability of alternative, non-LA/MSF funding sources at the relevant times; the counterfactual viability of the program given available funding sources on market terms; and the indirect learning and financial effects of prior LA/MSF.

160. The EU has not submitted evidence remotely sufficient to address these issues, let alone in a way that would be consistent with the adopted findings that Airbus would have been unable to offer the A380 and the A350 XWB in the December 2011-2013 post-implementation period. For example, there is no evidence that Airbus in the period since 2013 would have found it attractive to launch the A380 using only market-based funding. As such, the EU has not demonstrated an essential, if on its own insufficient, element of its claim to have removed adverse effects – that counterfactual Airbus, though unable to offer the A380 and A350 XWB through 2013, was somehow able subsequently to launch the A380, generate the knowledge and learning effects from the A380 to benefit the A350 XWB, and then launch the A350 XWB before the present period.

161. Even if the EU were to provide credible evidence to support such findings, it would still be necessary to examine whether those later counterfactual launches would nonetheless result in serious prejudice through their effects on counterfactual deliveries and delivery availability.

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[164] *See* First Compliance Panel Report, paras. 6.1637-6.1638.

[165] *See* First Compliance Panel Report, paras. 6.1726-6.1775.

[166] *See* First Compliance Appellate Report, paras. 5.629-5.639, 5.643-5.647.

Question 71 (EU)

The United States argues that the European Union's arguments concerning the removal of adverse effects focus exclusively on the first phase of the causation analysis, i.e. whether the subsidies cause product effects with respect to Airbus aircraft. According to the United States, the European Union does not attempt to show that, if the subsidies do cause product effects, those effects to not lead to adverse effects in the form of market phenomena under Article 6.3 of the SCM Agreement.[18]

a. Does the European Union dispute that, to the extent any product effects continue, they result in adverse effects in the form of the market phenomena of lost sales and displacement and/or impedance?

b. If so, which party bears the burden to establish that any non-withdrawn subsidies continue to result in adverse effects in the form of particular Article 6.3 market phenomena?

c. Does the data submitted by the United States in paragraphs 259 through 282 establish the existence of displacement, impedance, lost sales (or threat thereof) in the specific alleged instances, in the VLA and/or twin-aisle LCA product markets?

[18] United States' second written submission, para. 127.

Question 72 (EU)

The United States argues that, even if it were true that A380 LA/MSF no longer caused adverse effects in the VLA market due to programme termination, the indirect effects of the A380 LA/MSF would still need to be aggregated with the direct effects of A350XWB LA/MSF in analysing whether the subsidies cause adverse effects in the twin-aisle market. Please address this argument in relation to the European Union's argument that the announcement to terminate the A380 programme provides an independent basis[19] for determining that both the A380 and A350XWB LA/MSF no longer cause adverse effects in the twin-aisle market.

[19] European Union's A380 supplemental submission, para. 5.

Question 73 (US)

Please comment on the European Union's argument at paragraph 27 of its oral statement that outstanding deliveries in the post-implementation period in the form of a small number of final A380 deliveries is not sufficient to establish the continued existence of significant lost sales and impedance.

162. The EU is incorrect. As an initial matter, displacement and impedance under Articles 6.3(a) and (b) of the SCM Agreement does not require a finding that the displacement or impedance is "significant," in contrast to the requirement in Article 6.3(c). Moreover, in this industry, where sales are relatively infrequent and are split by two producers in a duopoly, market share is determined by a relatively small number of deliveries in whole number terms. Accordingly, a change in relatively few deliveries – even a single delivery – can have a substantial impact on relative market shares. Indeed, the compliance appellate report found

impedance in the Australian VLA market based on a single A380 delivery in one year, and no U.S. LCA VLA deliveries in that market.[167]

163. Moreover, the salient consideration in the impedance findings in the first compliance proceeding was that the A380 was taking deliveries and market share that, absent LA/MSF, the U.S. LCA industry would have captured.[168] Thus, the EU misses the point when it argues that A380 deliveries will not confer "incumbency, commonality, or other similar advantages."[169] And, in any event, the EU cites no support for this proposition. When Emirates cancelled A380 deliveries, it simultaneously announced that it had signed an agreement with Airbus to purchase 30 A350-900s and 40 A330neos in a deal reportedly worth US $21.4 billion.[170] This demonstrates that Airbus likely will continue to enjoy incumbency advantages. Likewise, there are still commonality advantages to a customer ordering a different model aircraft from the same producer, although obviously not as strong as they would be for the exact same model.[171]

164. However, the critical point remains that Airbus has continued to make A380 deliveries in VLA country markets since the December 2011-2013 period examined in the first compliance proceeding, including 75 deliveries in the UAE VLA market alone.[172] Those deliveries are in addition to the 14 forthcoming deliveries the EU references in paragraph 27 of its oral statement, and the EU provides no basis to treat them as anything other than indicia of continued serious prejudice.

165. With respect to lost sales, the EU itself states that 14 LCA associated with a lost sales finding from the first compliance period are outstanding and will be delivered in future years. It is true that lost sales under Article 6.3(c) must be "significant," but it is also true that 14 lost VLA orders is "significant" by any measure. The first compliance findings included significant lost sales involving just four lost orders with respect to Transaero. Moreover, an order for 14 747-8Is would represent the second-largest order in the history of the 747-8I program (after the 20 orders placed by Lufthansa in 2006), and would represent a dramatic boost to the program, which currently has only four orders in its backlog (alongside 17 scheduled 747-8F freighter deliveries).[173] Accordingly, the EU has failed in its attempts to minimize the continuing serious prejudice resulting from LA/MSF to the A380.

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[167] First Compliance Appellate Report, para. 5.732, Table 13.

[168] *See* First Compliance Appellate Report, paras. 5.740-5.741.

[169] *See* EU Oral Statement, para. 27.

[170] *See Emirates signs deal for 40 A330-900s, 30 A350-900s*, Press Release, Emirates Airlines (Feb. 14, 2019) (Exhibit USA-147).

[171] *See* Original Panel Report, paras. 7.1665, 7.1821, 7.1845, 7.1981.

[172] *See* US SWS, para. 262.

[173] Updated Ascend Data (Exhibit USA-158).

Question 74 (US)

Please comment on the European Union's argument at paragraph 79 of its oral statement that it is not necessary to identify the counterfactual date of actual first delivery to determine the duration of the adverse effects, and that in any event, the United States offers no evidence for its assumption that the time to first delivery would have been longer than it actually was.

166. The EU's argument is directly contrary to the *US – Large Civil Aircraft* compliance appellate report. As discussed in the U.S. response to Question 60, that report recognized that, in the context of the LCA industry, the market phenomenon of lost sales is "not limited to what occurs at the time of an LCA order and, therefore, such phenomen{on} may continue up to the point of LCA delivery."[174] It also recognized that delivery availability can be a significant factor in the outcome of sales campaigns.[175] Accordingly, that report reversed certain of the compliance panel's causation findings for failing to consider subsidy effects on delivery timing.[176]

167. Here, the EU contends that the adverse effects have "timed out" because, absent existing LA/MSF subsidies, Airbus would have launched the A380 and A350 XWB one to two years after their actual launch dates in 2000 and 2006, respectively. The United States has already explained why that EU argument is directly contrary to the adopted compliance findings and therefore invalid. In any event, the EU has not attempted to show that launch delays would not result in serious prejudice through subsequent Airbus delivery delays and impaired delivery availability.[177] Indeed, the EU itself has attempted (erroneously) to characterize the compliance findings of serious prejudice as based on the less attractive delivery positions that Airbus would have been able to offer in sales campaigns absent LA/MSF.[178] Thus, the EU itself has acknowledged the importance of delivery positions in a potential counterfactual analysis, even as it has refused to address the issue in attempting to establish its claim.

168. Thus, assuming *arguendo* that the EU had somehow established counterfactual A380 and A350 XWB launch dates consistent with the adopted findings, it would still be necessary to

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[174] *US – Large Civil Aircraft (21.5) (AB)*, para. 5.408. *See also ibid.*, para. 5.411 ("Moreover, if the pre-2007 aeronautics R&D subsidies had an impact on stages of the 787's development – either before or after its launch – that affected the timing of first delivery of the 787 in relation to the end of the implementation period, then assessing the timing of this aircraft's first delivery would have been particularly appropriate for determining whether the acceleration effects still exist in the post-implementation period and could be attributed to the pre-2007 aeronautics R&D subsidies. If there were no such acceleration effects that affected the timing of first delivery of the 787, then the Panel should have reasoned why that is the case, rather than excluding consideration of this issue ab initio.").

[175] *US – Large Civil Aircraft (21.5) (AB)*, para. 5.407.

[176] *US – Large Civil Aircraft (21.5) (AB)*, para. 5.416.

[177] *See* EU SWS, para. 459; US SWS, para. 252.

[178] EU SWS, para. 436; US SWS, paras. 253-254.

assess counterfactual delivery timing. Of course, this is likely to be an academic concern: given the EU's inability to put forward viable launch timing arguments, its adverse effects removal claim fails even before delivery timing issues are reached.

169. The EU is also incorrect to criticize the United States for offering "no evidence that the time to first delivery would have been longer than it actually was."[179] The United States has not made any specific arguments that seek to elongate the time period between launch and first delivery. Absent evidence and argument to the contrary, the reasonable presumption would be that the actual time period between launch and first delivery would have obtained in any later time period. The United States demonstrated the erroneous nature of the EU's argument that the time between launch and first delivery would have been *shorter*.[180]

170. However, the United States is effectively deprived of any opportunity to assess a post-launch timeline in a later period by the EU's failure to put forward any alleged counterfactual launch theory that is consistent with the adopted findings from the first compliance proceeding. Of course, the EU bears the burden of substantiating a counterfactual in which, absent LA/MSF and using commercial funding sources, Airbus would have launched and delivered the A380 in such a way as to prevent the continuation of serious prejudice in the VLA markets; *and* generated from the A380 program the learning and financial effects that were found to materially benefit the A350 XWB program; *and* launched and delivered the A350 XWB in such a way as to prevent the continuation of serious prejudice in the twin-aisle markets. It is the EU's burden to show that its subsidies no longer cause adverse effects.[181] If the EU had put forward an analysis of a counterfactual scenario that included an alleged launch after 2013, it would have to show that such a launch would have been viable and profitable *at that time*. Depending on the scenario advocated by the EU, the United States may very well have comments on how such a scenario may have played out. But, again, the EU has not even put forward such a theory, so there is nothing specific in that respect for the United States to analyze.

Question 75 (US)

> **Please comment on the European Union's argument at paragraph 78 of its oral statement that the compliance panel found that the complete absence of the A350XWB would have entailed more severe negative consequences for Airbus and a delayed launch was more viable.**

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[179] EU Oral Statement, para. 79.

[180] US FWS, paras. 223-224; US SWS, para. 251. *See also* First Compliance Appellate Report, para. 5.637 (observing that "the Panel found that Airbus gained managerial know-how from its previous subsidized LCA programmes. In this regard, the Panel referred to, *inter alia*, evidence that 'Airbus would change its design and testing processes to avoid problems it had encountered on the A380.'") (quoting First Compliance Panel Report, para. 6.1754).

[181] *See* US SWS, paras. 130-134.

171. As an initial matter, the EU's argument at paragraph 78 of its oral statement makes a notable concession and then, in the next breath, mischaracterizes U.S. arguments before the first compliance panel. Specifically, the EU admits that Professor Wessels' report did not consider the viability of a counterfactual business case for the A350 XWB (or the A380).[182] This is a critical concession because it confirms that the Wessels Report is insufficient to establish the EU's assertions regarding counterfactual launch timing for the A350 XWB or A380.[183]

172. The EU attempts to distract the Panel from this hole in its case by asserting that the Wessels Report did not address business case viability "because the US accepted, and indeed argued for, the proposition that the aircraft would have been launched *with a delay*."[184] This is false. Indeed, the United States specifically emphasized to the first compliance panel in this dispute the contrast between the product-creation effects alleged (and then found) in this dispute, and the acceleration effects in *US – Large Civil Aircraft*:

> Finally, the United States notes that the EU cites findings in *US – Large Civil Aircraft* as support for its contention that investments in the A320 and A330 "preclude any *substantial* causal connection" between subsidies to those aircraft and "any alleged presently arising adverse effects." The EU's reliance on *US – Large Civil Aircraft* is misplaced. In that dispute, the only effect of the subsidy was found to be an acceleration of Boeing's knowledge accumulation that enabled it to launch an all-new aircraft with a certain suite of technologies earlier than that it would otherwise have been prepared to launch. In this case, by contrast, LA/MSF was found to enable the launch of aircraft that would not otherwise have been launched at all.[185]

As the United States has noted previously, the compliance panel in *US – Large Civil Aircraft* observed the same distinction.[186]

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[182] EU Oral Statement, para. 78 ("It is indeed true that Professor Wessels did not consider the viability of a delayed launch.").

[183] As the first compliance panel recognized, a thorough, fact-based inquiry into the economic viability of an Airbus LCA program – including the program's attractiveness as an investment of firm resources – can be an important part of the counterfactual analysis of LA/MSF's product effects. *See* First Compliance Panel Report, para. 6.1637 ("We consider that this assessment can be appropriately made with reference to the following question: In the absence of the impact of A350XWB LA/MSF, was the A350XWB programme sufficiently attractive for Airbus to pursue at the relevant times in the light of the alternative funding sources that were expected to be available on market terms? We consider that a convenient shorthand formulation of this question is to ask whether the A350XWB programme was "viable" in the absence of A350XWB LA/MSF.").

[184] EU Oral Statement, para. 78.

[185] Excerpts from U.S. Submissions to First Compliance Panel, U.S. Second Written Submission, para. 525 (Exhibit USA-171) (internal citations omitted).

[186] *See* US SWS, para. 138 (citing *United States – Large Civil Aircraft (21.5) (Panel)*, note 2849).

173. Consistent with this distinction, the United States argued strenuously and repeatedly (and successfully) in the first compliance proceeding that the A350 XWB ***would not exist*** absent LA/MSF. It did not argue that the A350 XWB would have been launched with a delay:

- "*The United States argues* that the evidence discussed above in this section demonstrates that, leading up to the A350XWB's launch, Airbus and EADS had come to understand that their financial position moving forward would eventually deteriorate to the point where *they would ultimately be unable to fully fund the A350XWB programme in the absence of member State financial assistance*."[187]

- "*Because Airbus would have been unable to proceed with the A350 XWB absent LA/MSF*, the EU's assertions about the viability, or attractiveness, of the project are beside the point. However rosy the A350's baseline sales projections might be, willingness must not be confused with ability; ***wanting*** to market an aircraft means little without the ***means*** to do so."[188]

- "The LA/MSF for the A350 XWB has the same design, structure, and operation as prior LA/MSF provided to Airbus LCA, and a comparable magnitude as well. The effect of LA/MSF to prior Airbus LCA and to the A350 XWB has been to cause Airbus to launch the A350 XWB in a manner that would have been ***impossible without the subsidies***."[189]

- "In the case of the A350 XWB, ***the program likely would not exist without launch aid*** to prior Airbus LCA models, because in such a scenario, Airbus' product offering and revenues would be significantly smaller or, most likely, nonexistent."[190]

- "Building on the financial and technology/knowledge effects of LA/MSF for prior Airbus LCA programs, LA/MSF for the A350 XWB, with the same nature and a similar magnitude as earlier LA/MSF, contributed in a genuine and substantial way to Airbus's ability to develop and sell the A350 XWB. In fact, the available evidence shows again and again that ***Airbus needed new LA/MSF to develop the A350 XWB***."[191]

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[187] First Compliance Panel Report, para. 6.1560.

[188] First Compliance Panel Report, note 2910 (quoting U.S. Confidential Opening Statement at the Meeting of the First Compliance Panel) (non-bold italics added; bold italics original).

[189] Excerpts from U.S. Submissions to First Compliance Panel, U.S. First Written Submission, para. 361 (Exhibit USA-171) (emphasis added).

[190] Excerpts from U.S. Submissions to First Compliance Panel, U.S. First Written Submission, para. 374 (Exhibit USA-171) (emphasis added).

[191] Excerpts from U.S. Submissions to First Compliance Panel, U.S. First Written Submission, para. 379 (Exhibit USA-171) (emphasis added).

- "As a matter of logic, ***it would be impossible for a nonexistent or a much weaker Airbus to launch the A350 XWB in 2006, or at any time thereafter***."[192]

- "The U.S. causation demonstration remains unrebutted: without LA/MSF, the A350 XWB would not be in the market, and, as a consequence, the U.S. LCA industry's sales would have enjoyed higher sales, and would not be threatened with displacement and impedance."[193]

- "In its first written submission the United States demonstrated that a genuine and substantial relationship exists between LA/MSF to prior Airbus LCA and the launch and market presence of the A350 XWB. ***The EU never even attempts to demonstrate that Airbus could have launched the A350 XWB in the absence of some or all of the pre-A380 XWB LA/MSF. Thus, the EU appears to have conceded that Airbus could not have funded the A350 XWB absent that prior LA/MSF. Indeed, the decisive financial effects of pre-A380 XWB LA/MSF on Airbus's ability to undertake the A350 XWB program are confirmed by Professor Wessels' quantitative analysis***, as discussed in Section VI.D.4.d below."[194]

- "In sum, the EU argument boils down to the proposition that Airbus would be in a position to launch (and sell) the A350 XWB absent the LA/MSF that enabled it to undertake all of its prior commercial aircraft programs. The facts, as set forth above, demonstrate that despite the 'new' technologies and processes that it is implementing on the A350 XWB program, Airbus's ability to achieve its technical goals (and convince the market that it will do so) is genuinely and substantially related to the specific technologies and experience – most notably, from the recent A380 program – ***that Airbus would not have absent LA/MSF***."[195]

- "Because Airbus would have been incapable of funding the A350 XWB program in the absence of LA/MSF, the viability of the A350 XWB business case without LA/MSF is largely academic. As demonstrated above, even if the A350 XWB business case were

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[192] Excerpts from U.S. Submissions to First Compliance Panel, U.S. Second Written Submission, para. 395 (Exhibit USA-171) (citations omitted; emphasis added).

[193] Excerpts from U.S. Submissions to First Compliance Panel, U.S. Second Written Submission, para. 551 (Exhibit USA-171).

[194] Excerpts from U.S. Submissions to First Compliance Panel, U.S. Second Written Submission, para. 552 (Exhibit USA-171) (citations omitted).

[195] Excerpts from U.S. Submissions to First Compliance Panel, U.S. Second Written Submission, para. 586 (Exhibit USA-171) (citations omitted; emphasis added).

viable in the absence of LA/MSF, a proposition the United States rejects, Airbus would not have had the funds to undertake the project."[196]

174. Thus, the United States never made the "delayed launch" argument that the EU ascribes to it, nor did such a non-existent U.S. argument shape the topics covered in the Wessels Report. In fact, the Wessels Report was limited to a highly conservative assessment of Airbus's counterfactual credit rating, because, in the U.S. view, it was sufficient on its own, highly conservative terms, to demonstrate Airbus's inability to fund, and therefore launch and bring to market, a new LCA development program absent LA/MSF. Such a demonstration, if accepted, would have been sufficient to demonstrate continued LA/MSF product effects regarding the A380 and A350 XWB. But the converse is not true: even if the EU could demonstrate Airbus's counterfactual ability to fund the A380 or A350 XWB absent LA/MSF – which, to be clear, it has not done – that by itself does not establish that Airbus could have and would have undertaken such programs in a manner, and in such timeframes, that would sever the causal link.

175. Moreover, the EU errs in arguing that the first compliance panel "found that a delayed launch was more viable than not launching the A350XWB."[197] The EU's argument references the following statement by the first compliance panel: "We recall that the Business Case outlined severe strategic disadvantages and costs to Airbus that were assumed to accrue in the absence of the A350XWB programme, and less severe but still apparently significant costs for Airbus in the event of a **[***]** in the programme."[198]

176. Airbus developed the business case in the lead up to the actual launch date in 2006 and therefore based it on the circumstances as understood at that time. It cannot be assumed that such an analysis would be equally positive many years later. Even if the Airbus company as it actually existed in the 2006-2010 period perceived significant costs to not launching the A350 XWB, that says very little about how a counterfactual Airbus in the period since 2013 could have and would have behaved. That counterfactual Airbus would enter the post-2013 period without the A380 or the A350 XWB in its product line, without the indirect learning and financial effects of A380 LA/MSF that materially benefitted the A350 XWB program, and without the effects of A350 XWB LA/MSF that enabled Airbus to avoid compromises to the program. Moreover, Airbus's perception of the market has changed.

177. The EU also ignores that the entire discussion it cites to occurred in the context of analyzing the effects of A350 XWB LA/MSF *in isolation*. In that context, the compliance panel

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[196] Excerpts from U.S. Submissions to First Compliance Panel, U.S. Second Written Submission, para. 645 (Exhibit USA-171).

[197] EU Oral Statement, para. 78.

[198] First Compliance Panel Report, para. 6.1705.

concluded that, notwithstanding Airbus's strategic considerations regarding the A350 XWB program,

> the evidence demonstrates that pursuing the programme in the absence of A350XWB LA/MSF would have been a more complicated, more costly and riskier endeavour. On this basis, we find that, in the absence of A350XWB LA/MSF, whether we measure its impact from the time of launch or from the First Contract Date, the Airbus company that actually existed in the 2006 to 2010 period would have been able to launch and bring to market the A350XWB or an A350XWB-type aircraft. However, in our view, without A350XWB LA/MSF, the Airbus company that actually existed could have pursued such a programme only by a narrow margin, with a high likelihood that it would, to some degree, have had to make certain compromises with respect to the pace of the programme and/or the features of the aircraft.[199]

Thus, even when isolating the product effects of A350 XWB LA/MSF on the A350 XWB, the compliance panel emphasized that the high likelihood that the program would have been compromised in the absence of those subsidies and that it was only viable *at that time and under those conditions* by a narrow margin.

178. While it is useful to understand the direct effects of A350 XWB LS/MSF in isolation, the ultimate analysis requires assessing the effects of aggregated existing LA/MSF. In this regard, the adopted findings establish that the A380 LA/MSF had significant indirect learning and financial effects on Airbus's ability to launch the A350 XWB. The compliance appellate report recounted numerous compliance panel findings of learning benefits from the A380 program and found that "even though the Panel considered the extent to which Airbus benefitted from the technological platform provided by all of its previous subsidized LCA programmes, it was of the view that the A350XWB significantly benefitted from the 'learning effects' of the A380 in particular."[200] Likewise, it found that certain "findings by the Panel indicate that A380 LA/MSF had 'financial effects' on Airbus' ability to launch the A350XWB as and when it did."[201] And, of course, the compliance appellate report confirmed adverse effects on the basis that Airbus would not have been able to offer the A380 or the A350 XWB in the December 2011-2013 period.[202] The EU's argument fails to account for the fact that the proper analysis ultimately is based on an analysis of aggregated LA/MSF, not A350 XWB LA/MSF in isolation.

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[199] First Compliance Panel Report, para. 6.1717.

[200] First Compliance Appellate Report, para. 6.637.

[201] First Compliance Appellate Report, para. 6.638.

[202] First Compliance Appellate Report, paras. 5.726, 5.734.

Question 76 (US)

Please comment on the European Union's argument at paragraph 90 of its oral statement that the United States has not demonstrated that any research funded by the R&TD measures bears any relation to Airbus' targeted post-launch investments in the A380 and A350XWB.

179. The EU is incorrect. The R&TD measures are indeed related in important ways to the post-launch investments cited by the EU.

180. First, the R&TD measures, working in concert with LA/MSF, helped to give Airbus the very aircraft programs, technologies, and production processes that served as the basis for the cited post-launch investments. For example, EU Framework projects such as APRICOS, TANGO, and ALCAS generated critical knowledge for Airbus to use in determining the designs and production systems for the composite structures used in the A380 and A350 XWB.[203] Accordingly, when the EU refers to improvements to jigs, tools, and production processes for the A350 XWB program,[204] it is relying to a significant degree on Airbus's use of knowledge generated by subsidized R&TD research programs.

181. Second, the EU touts the wingtip device and wing aerodynamic improvements Airbus made for the A380plus,[205] yet it ignores the debt such advances owe to research conducted under the subsidized R&TD projects focused on aerodynamics and computational fluid dynamics ("CFD")-based aircraft design. Airbus itself has recognized that its work on wingtip devices under the 5th Framework M-DAW project "proved valuable in the development of a new {wingtip} concept."[206]

182. Third, it is undisputed that an LCA producer must continually invest in research and innovation to remain competitive. By funneling significant amounts of money to Airbus's research into LCA technologies and production processes, the R&TD programs lower Airbus's total costs for research, innovation, and process improvements. The fact that the EU credits a multitude of Third, Fourth, and Fifth Framework projects for the creation of multiple specific A380 features is powerful evidence that later Framework efforts would likely help Airbus to improve those features.[207] The United States has shown that Eighth Framework funding *overlaps* the continuing investment that the EU has cited as a measure taken to comply both in time and in the topic areas covered. And, the EU has itself argued that this type of spending

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[203] *See* US FWS, paras. 261-272.

[204] *See* EU FWS, para. 315.

[205] EU FWS, para. 385.

[206] *The Modelling and Design of Advanced Wing tip devices*, Alan Mann, Airbus presentation (2006) at 7 (Exhibit USA-76). *See also* US FWS, para. 257.

[207] US FWS, para. 122.

makes the existing A350 XWB and A380 more competitive.[208] Thus, research funded through the Framework programs complements and supplements the effects of the original LA/MSF for those aircraft by maintaining and enhancing the market presence of the aircraft that the older financing enabled.[209]

183. Finally, the United States must once again correct the EU's misleading attempt to downplay the commercial relevance of the R&TD programs by asserting that they are limited to "early-stage research."[210] As the United States recalled in its second submission,[211] the Eighth Framework includes projects explicitly aimed at "R&TD with near-term applications,"[212] such as the LPA element under Clean Sky 2 that seeks to mature technology to TRL 6 on the nine-stage TRL scale, which is well past "early stage."

3 Research and technological development (R&TD)

Question 77 (US)

> **The United States refers to "ongoing EU research and technological development … subsidies that complement and supplement the adverse effects of existing LA/MSF and regional subsidies".[20] In light of this, could the United States clarify exactly which R&TD measures it is challenging as "ongoing … subsidies that complement and supplement the adverse effects of existing LA/MSF." In this connection, please provide a list of the specific R&TD measures the United States is challenging in this dispute.**
>
> **[20] United States' first written submission, para. 116. (emphasis added)**

184. The list of R&TD measures that the United States is challenging appears in the U.S. second written submission, paragraph 299, note 396. Paragraphs 118 and 126 of the U.S. first written submission also refer to these programs.

185. The United States referred to these measures as ongoing subsidies in the sense that EU funding of aeronautics research through each Framework Program builds on research conducted and results obtained under prior Framework Programs. In particular, the Eighth Framework Program's Large Passenger Aircraft element explicitly aims to take technologies developed under the Clean Sky Program (a Seventh Framework effort) and mature them to levels where Airbus can readily deploy them in commercial aircraft.[213]

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[208] EU FWS, paras. 311, 315-317, 381, and 386-387.

[209] *See* US SWS, para. 358.

[210] EU Oral Statement, para. 90.

[211] US SWS, para. 354.

[212] US FWS, para. 255, *quoted in* EU SWS, para. 544.

[213] US SWS, paras. 350, 354, and 357.

Question 78 (US)

The Appellate Body has stated that there may be situations where the fact that the alleged "closely connected" measure was taken a considerable time before the adoption of the recommendations and rulings of the DSB will be sufficient to sever the connection between that measure and a Member's implementation obligations[21] since "{a}s a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute".[22] In this dispute, why should the Second through Sixth Framework Programmes not be considered to fall within this scenario? Please explain.

[21] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 225, see also Panel Report, *Colombia – Textiles (Article 21.5 – Panama)*, para. 7.58.

[22] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 70. (original emphasis)

186. The cited reports all stand for the proposition that the timing of an undeclared measure taken to comply is a relevant factor in evaluating whether a measure is sufficiently closely connected to the recommendations and rulings of the DSB and declared measures taken to comply to be within the scope of a compliance proceeding.[214] However, it is clear that these reports consider that "the *timing* of a measure cannot be determinative of whether it bears a sufficiently close nexus with a Member's implementation of the recommendations and rulings of the DSB so as to fall within the scope of an Article 21.5 proceeding."[215] Where sufficiently strong links exist between an undeclared measure taken to comply and declared measures taken to comply and the recommendations and rulings of the DSB, differences in timing will not preclude consideration of the undeclared measure by a compliance panel.[216]

187. The Second through Sixth Framework Programs have such links to the EU's declared measures taken to comply and the recommendations and rulings of the DSB. Paragraphs 343 through 345 of the U.S. second written submission lay out the factors that panels have typically

[214] *US – Zeroing (EC) (21.5) (AB)*, para. 225 ("We consider that the timing of a measure remains a relevant factor in determining whether they are sufficiently closely connected to a Member's implementation of the recommendations and rulings of the DSB."); *US – Lumber CVDs IV (21.5) (AB)*, paras. 75 ("{The panel} found that the loan fell within the scope of its terms of reference because, *inter alia*, the loan at issue was 'inextricably linked' to the measure that Australia itself stated it had taken to comply, 'in view of both its timing and its nature.'") and 77 ("there are additional criteria, identified above, that should be applied by a panel to determine whether or not it may also examine other measures."); *Colombia – Textiles (21.5) (Panel)*, para. 7.58 ("The *timing* of a measure is a relevant factor in determining whether it is sufficiently closely connected to a Member's implementation of the recommendations and rulings of the DSB.").

[215] *US – Zeroing (EC) (21.5) (AB)*, para. 224.

[216] *US – Zeroing (EC) (21.5) (AB)*, para. 234 ("the fact that the likelihood-of-dumping determinations in the sunset reviews listed above pre-date the adoption of the recommendations and rulings of the DSB is not sufficient to sever the pervasive links that we have found to exist, in terms of *nature* and *effects*, between such sunset reviews, the recommendations and rulings of the DSB, and the declared measures taken to comply.").

used in this evaluation, including those grouped under the "close nexus test," and we incorporate them by reference.

188. The U.S. first written submission identified numerous examples of subsidized R&TD activity that supported Airbus's development and launch of the A380 and A350 XWB. In particular:

- Airbus itself admitted that the research under the Fifth Framework's TANGO[217] Program from 2000 to 2005 "contributed to the A380 and ultimately to the A350, like the composite centre wing-box and some fuselage sections and shells that were also manufactured in Carbon Fibre Reinforced Plastic."[218]

- An EU study recognized that the ALCAS[219] Program, a follow-on to TANGO, "made Airbus confident enough to design the fuselage of the new A-350 in composite material structures."[220]

- The EU's Advisory Council for Aviation Research and Innovation in Europe (chaired by Airbus CEO Thomas Enders) identified numerous ways in which specific Framework Program efforts contributed to specific features of the A380.[221] These include:

    - Contributions to high Reynolds number low drag wing design through ECARP (FP3), EUROLIFT (FP5), AWIATOR (FP5), and CWAKE (FP5);[222]

    - Contributions to the new four post landing gear fairing through ELGAR (FP4);[223] and

[217] TANGO Project, CORDIS website (Exhibit USA-27). US FWS, para. 120.

[218] *The Future of Aeronautics, a European Perspective*, Charles Champion, Executive Vice President, Head of Engineering Airbus, Innovation for Sustainable Aviation in a Global Environment (2012) (Exhibit USA-29) *quoted in* US FWS, para. 121.

[219] ALCAS Project, CORDIS website (Exhibit USA-31). US FWS, para. 123.

[220] US FWS, para. 124.

[221] US FWS, para. 277.

[222] US FWS, para. 277; Original Panel Report, Section VII.E.10, Annexes I.2, I.3, and I.4 (European Computational Aerodynamics Research Project ("ECARP"), European High Lift Program ("EUROLIFT"), Aircraft Wing Advanced Technology Operations ("AWIATOR"), and Wake Vortex Characterization and Control ("C-WAKE")).

[223] US FWS, para. 277; Original Panel Report, Section VII.E.10, Annex I.3 (European Landing Gear Advanced Research ("ELGAR")).

- New low-weight fuselage structure through ADPRIMAS (FP4) and TANGO.[224]

189. The original panel and appellate reports found that LA/MSF for the A380 caused adverse effects to the United States by enabling Airbus to launch the A380. By funding development of the technologies Airbus used on the A380, the Third, Fourth, and Fifth Framework Programs gave Airbus the technical know-how it needed to make the decision to launch an aircraft incorporating those technologies, and to successfully deploy LA/MSF funds once received. The promise of continued funding through the Fifth Framework, which was ongoing at the time of the launch decision, would have enhanced the company's certainty in its ability to mature technologies to the point of commercialization. Funding through the Sixth Framework Program, which began in 2003, would have had a similar effect. Thus, the R&TD subsidies through the Second through Sixth Framework Programs were integrally linked to the A380 LA/MSF subsidies that were subject to the recommendations and rulings of the DSB.

190. The EU has highlighted allegedly nonsubsidized investments in the A380 aircraft program as one of the measures that brought it into compliance with the recommendations and rulings of the DSB. It identified:

- "the cost of overcoming significant delays in the production of the A380;"[225]
- the commitment of "resources to develop the A380plus," including enhancements to winglets and wing aerodyamics, higher maximum takeoff weight, and increased range;[226] and
- "incremental improvements to the A380 from a technological perspective."[227]

Pre-launch R&TD funding under the Second through Fifth Framework Programs would have advanced these efforts by providing the know-how Airbus needed to mitigate production delays, the basic technologies to be improved, and by the increased knowledge in relevant technological areas that the company needed to realize the improvements. It is noteworthy that the evidence cited above highlights improvements in wing aerodynamics and takeoff weight as areas funded through the Third, Fourth, and Fifth Framework Programs. Post-launch funding under the Fifth and Sixth Frameworks, which overlapped with preceding efforts, would have similarly provided the knowledge to make the improvements that the EU touts as "unsubsidized" enhancements.

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[224] US FWS, para. 277; Original Panel Report, Section VII.E.10, Annex I.3 (Advanced Concepts for Primary Metallic Aircraft Structures ("ADPRIMAS")).

[225] EU FWS, para. 384.

[226] EU FWS, para. 385.

[227] EU FWS, paras. 388-389.

191. The first compliance panel's findings on the learning effects of pre-A350 XWB LA/MSF point to linkages between the Second through Sixth Framework Programs and LA/MSF for the A350 XWB. In particular, that panel considered that Airbus's experience with composite materials, certain structural features (including aerodynamic wing design and high-lift systems), and on-board systems developed for previous aircraft were of benefit to the launch of the A350 XWB.[228] By enabling technologies that Airbus transferred from the A380 to the A350, the Second through Sixth Frameworks had effects analogous to the "indirect effects" of LA/MSF – another area of congruity.

192. This evidence indicates close linkages among research funded through the Second through Sixth Framework Programs, LA/MSF for the A380 and A350 XWB, and the allegedly nonsubsidized investments Airbus made in ongoing improvements to its products. The fact that these expenditures predate the recommendations and rulings of the DSB does not sever or weaken those linkages.

Question 79 (Both parties)

> **Are there any relevant aeronautics-related projects funded under the Seventh or earlier Framework Programmes, or the member State measures referred to by the United States,[23] which are still operating today? Please explain.**
>
> **[23] United States' first written submission, para. 118.**

193. The United States provides in response to this question publicly available information regarding the R&TD subsidy programs that appear to still be operational. However, the EU and its member States are in a position to provide complete information regarding their R&TD subsidy programs.

194. According to the EU Commission's website for the 7th Framework Programme (which is no longer being updated), the 7th Framework Programme "was the European Union's Research and Innovation funding programme for 2007-2013. The current programme is Horizon 2020 but there are many projects funded under FP7 which are still running."[229] One example is AFLoNext – "'2nd Generation Active Wing' – Active Flow – Loads & Noise control on next generation wing" – a project with an overall budget of over €37 million funded under the Seventh Framework Programme.[230]

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[228] First Compliance Panel Report, paras. 6.1756-6.1758. The panel points to the aerodynamic design and high-lift system of the A380 wing as being of particular use in the A350 XWB. *Ibid.*, para. 6.1757.

[229] *See* Seventh Framework Programme (FP7), European Commission website (last accessed May 20, 2019) (Exhibit USA-159).

[230] AFLoNext Project, CORDIS website (Exhibit USA-160).

195. According to the CORDIS website (last updated May 22, 2017),[231] the AFLoNext project was scheduled to run from June 1, 2013 to May 31, 2018.[232] Airbus is identified as the coordinator and a participant in this project.[233] The project's objective is "proving and maturing highly promising flow control technologies for novel aircraft configurations to achieve a quantum leap in improving aircraft's performance and thus reducing the environmental footprint."[234] Specifically, AFLoNext aims to "prove the engineering feasibility of the HLFC technology for drag reduction on fin in flight test and on wing by means of large scale testing as well as for vibrations mitigation technologies for reduced aircraft weight and for noise mitigation technologies," based on six Technology Streams:[235]

- Hybrid Laminar Flow technology applied on fin and wing for friction drag reduction.
- Flow control technologies applied on outer wing for performance increased.
- Technologies for local flow separation control applied in wing/pylon junction to improve the performance and loads situation mainly during take-off and landing.
- Technologies to control the flow conditions on wing trailing edges thereby improving the performance and loads situation in the whole operational domain.
- Technologies to mitigate airframe noise during landing generated on flap and undercarriage and through mutual interaction.
- Technologies to mitigate/control vibrations in the undercarriage area during take-off and landing.

196. A number of EU member State R&TD programs also continue to be operational today. Germany continues to support civil aviation R&TD projects through the second and third call for applications for the fifth iteration of its civil aviation research program (LuFo V), covering 2015-2019 and 2018-2022, respectively.[236] Germany has also announced the sixth iteration of its civil aviation research program (LuFo VI), to fund R&TD projects from 2020-2024.[237]

197. The UK's Aerospace Technology Institute also continues to fund Airbus's strategic programme called "Wing of the Future," which includes the following projects designed to

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[231] CORDIS, or the "Community Research and Development Information Service," is the European Commission's primary source of results from the projects funded by the EU's Framework Programmes for research and innovation (FP1 to Horizon 2020). *See* About CORDIS website, https://cordis.europa.eu/about/en (Exhibit USA-161).

[232] AFLoNext Project, CORDIS website (Exhibit USA-160).

[233] AFLoNext Project, CORDIS website (Exhibit USA-160).

[234] AFLoNext Project, CORDIS website (Exhibit USA-160).

[235] AFLoNext Project, CORDIS website (Exhibit USA-160).

[236] LuFo V, DLR website (Exhibit USA-162).

[237] LuFo VI, DLR website (Exhibit USA-163).

integrate previously developed technologies into an overall wing configuration at TRL 6 by 2021:

- Wing Design, Manufacture and Assembly (WDMA) - £8,654,357 from 2014-2017[238]
- Agile Wing Integration (AWI) - £8,459,446 from 2014-2018[239]
- Wing Lean Innovative Future Technology (Wing LIFT) - £8,247,913 from 2017-2020[240]
- Wing Innovative Feeder Demonstrators (IFeD) - £10,646,657 from 2017-2021[241]
- Wing Hybrid Enablers for Product Development (HyEnD) - £11,119,962 from 2017-2021[242]
- Wing Integrated Assembly Demonstrator (WIreD) - £10,041,054 from 2017-2021[243]
- Wing Innovative Components (Ice) - £9,678,499 from 2017-2021.[244]

Question 80 (US)

> **The Appellate Body has stated that "an implementing Member cannot be required to withdraw a subsidy that has ceased to exist" and that there is no basis "under Article 7.8 of the SCM Agreement to require that an implementing Member "take appropriate steps to remove the adverse effects" of subsidies that no longer exist."[24] In light of these statements, would a ruling on potentially expired R&TD subsidies contribute to securing a positive resolution to the dispute? To what extent can the Panel consider any of the challenged R&TD measures to have expired?**
>
> [24] **Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.383.**

198. In past proceedings, it has typically been the party responding to claims of subsidization that has asserted that the subsidies have expired. The United States notes that in the original proceeding, the EU proposed that, based on its understanding of U.S. domestic laws and regulations governing the calculation and allocation of subsidy amounts in countervailing duty

[238] Wing Design, Manufacture and Assembly (WDMA) Project, UK Research and Innovation website (Exhibit USA-164).

[239] Agile Wing Integration (AWI) Project, UK Research and Innovation website (Exhibit USA-165).

[240] Wing Lean Innovative Future Technology (Wing LIFT) Project, UK Research and Innovation website (Exhibit USA-166).

[241] Wing Innovative Feeder Demonstrators (IFeD) Project, UK Research and Innovation website (Exhibit USA-167).

[242] Wing Hybrid Enablers for Product Development (HyEnD) Project, UK Research and Innovation website (Exhibit USA-168).

[243] Wing Integrated Assembly Demonstrator (WIreD) Project, UK Research and Innovation website (Exhibit USA-169).

[244] Wing Innovative Components (Ice) Project, UK Research and Innovation website (Exhibit USA-170).

investigations, the the R&TD subsidies be "allocated" over 18 years, beginning with the year of receipt.[245]

Question 81 (EU)

> **The European Union recalls that in *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body stated that "{a} complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not."[25] What is the legal basis for the European Union's subsequent claim that "the same rationale applies with respect to the current proceedings", considering that the question in this case arises in the context of subsequent *compliance* proceedings? How does the fact that the second compliance proceedings are part of a continuum of events serve to challenge the United States' counter-arguments in paragraphs 336-339 of its second written submission?**
>
> **[25] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211.**

Question 82 (Both parties)

> **What is the significance of the use of the word "ordinarily" in the Appellate Body's statement in *US – Upland Cotton (Article 21.5 – Brazil)*?**

199. "Ordinarily" qualifies the Appellate Body's statement regarding a complaining Member's ability to raise a claim in an Article 21.5 proceeding that it could have pursued in the original proceeding. It appears to indicate that the Appellate Body considered that the statement is usually accurate, but in some cases is not. As the Appellate Body did not explain its basis for either proposition, it is difficult to derive further significance.

200. Immediately after the sentence containing "ordinarily," the Appellate Body addresses the situation in which a responding Member seeks to circumvent its compliance obligation by replacing the measure found to be WTO-inconsistent with a different WTO-inconsistent measure not covered by the original findings. The Appellate Body's use of "ordinarily" may indicate that, where a Member uses a measure not subject to a finding of inconsistency in the original proceeding to circumvent its compliance obligation, the complaining Member may challenge that measure in a compliance proceeding.

Question 83 (EU)

> **Please comment on the United States' argument that there are potential systemic consequences which may result if the Panel finds that the United States is precluded from bringing a claim in the second compliance proceeding that it did not bring in the first.[26]**
>
> **[26] See United States' second written submission, paras. 336-339.**

[245] Original Panel Report, para. 7.1963.

Question 84 (EU)

Please respond to the United States' substantive claims in its second written submission relating to its argument that the Eighth Framework Programme is an "undeclared measure taken to comply". In particular, please focus on the following:

a. The arguments put forward by the United States that the R&TD measures do not fund only early-stage research, and that there is a necessary overlap between these measures and LA/MSF in terms of their subject matter[27];

b. The specific evidence presented by the United States that indicates that technology or production processes funded by R&TD subsidies contributed to Airbus' ability to launch and bring to the market particular LCA models[28]; and

c. Additionally, where the United States has referred to projects or alleged technology or production processes funded by R&TD measures *other* than under the Eighth Framework Programme (such as the TANGO and ALCAS projects), please respond to these arguments and evidence specifically, where relevant.

[27] United States' second written submission, paras. 350-356.

[28] Including in relation to aircraft design and aerodynamics and the use of composite materials in large aerostructures. United States' first written submission, paras. 256-275.

Question 85 (US)

What is the relevance of the European Union's argument at paragraphs 105-110 of its oral statement that the United States did not appeal and was satisfied with the original Panel's factual finding that "{t}he R&TD subsidies enabled Airbus to develop features and aspects of its LCA on a schedule that it would otherwise have been unable to accomplish"?

201. As the EU notes, the original panel found that "{t}he R&D subsidies enabled Airbus to develop features and aspects of its LCA on a schedule that it would otherwise have been unable to accomplish."[246] This finding led the panel to conclude that those subsidies "complemented and supplemented the impact of LA/MSF,"[247] and that it was therefore appropriate to "aggregate" the LA/MSF, the R&TD subsidies, and other measures that "complemented and supplemented" LA/MSF.[248] These intermediate findings led the panel to find, as the United States requested, that the R&TD subsidies caused adverse effects and were, therefore, inconsistent with Articles 5 and 6.3 of the SCM Agreement.[249] The panel accordingly

[246] Original Panel Report, para. 7.1959.

[247] Original Panel Report, para. 7.1959.

[248] Original Panel Report, para. 7.1961. Although the panel used the term "aggregate," the Appellate Body subsequently characterized this analysis as "cumulation." *US – Large Civil Aircraft (AB)*, para. 1282.

[249] Original Panel Report, para. 8.2.

recommended that the EU withdraw the R&TD subsidies or take appropriate steps to remove their adverse effects.[250]

202. In the cited paragraphs of its oral statement, the EU appears to argue that the United States should have appealed the original panel's finding in favor of the United States so as to obtain a more explicit finding linking the R&TD subsidies to specific features on Airbus aircraft. The EU cites nothing in the DSU that requires such action. Indeed, it is hard to see how a party appealing a finding in its favor would assist in achieving the aim of the dispute settlement system, as set out in DSU Article 7, "to secure a positive solution to the dispute." The United States considered that the panel report achieved that positive solution. To have asked the Appellate Body to reach the same result, but for more detailed reasons, would have done nothing to add to the positive solution. Such action would also have added to the burden that the Appellate Body (and the parties) faced in the already extensive *EC – Large Civil Aircraft* appeal.

203. The EU asserts in particular that the United States should have argued that the original panel erred when it found "that the R&TD subsidies enabled Airbus to develop features and aspects of its LCA on a schedule that it would otherwise have been unable to accomplish."[251] However, the EU did not argue, and the Appellate Body did not find, that this finding was in error. Rather, the Appellate Body concluded that this "general" factual finding, which it did not reverse or otherwise question as such, was *insufficient by itself* to support the ultimate conclusion that the R&TD subsidies complemented and supplemented the product-creating effects of LA/MSF.[252] Thus, a U.S. appeal of that finding would have been unwarranted.

204. The EU also notes that the Appellate Body "does not even mention the term 'completion of the analysis.'"[253] Although correct, this observation has no relevance by itself. As the compliance panel in *US – Large Civil Aircraft* explained, in allowing the EU to challenge measures raised, but not found to be WTO-inconsistent, in the original proceeding:

> the issue is in which circumstances a complaining party may, in a compliance proceeding, pursue claims against original measures that it had pursued in the original proceedings. The answer depends on the way in which the claim against the particular original measure was resolved in the original proceeding. More specifically, as we have explained in paragraph 7.35 above, a panel should consider whether the original measure was "unsuccessfully" challenged on the

[250] Original Panel Report, para. 8.7.

[251] EU oral statement, para. 106.

[252] Original Appellate Report, para. 1407.

[253] EU oral statement, para. 109.

> merits in the original proceeding, such that it cannot be raised again without compromising the finality of the DSB recommendations and rulings.[254]

In the instance of the R&TD measures, there was no finding on the merits. Rather, the Appellate Body found that the panel failed to conduct the proper analysis or cite sufficient evidence to support its "complement and supplement" conclusion.[255] It made no finding as to whether the R&TD subsidies met the proper standard of providing a "competitive advantage" as "reflected either in technologies incorporated in models of LCA actually launched by Airbus, or in technologies that make the production process of those LCA more efficient."[256]

205. It is also worth noting that the *US – Large Civil Aircraft* panel specifically addressed "the failure of the European Union to request completion of the analysis" with respect to one of four Washington state tax measures that it challenged in that proceeding.[257] The panel nonetheless concluded that "the European Union is not precluded from reasserting claims in respect of the four original Washington tax measures in this compliance proceeding."[258]

Question 86 (EU)

> **The European Union in its oral statement reiterated its position with regard to the element of timing in the "close nexus test" (i.e. that since the A380 and A350WB were launched before the Eighth Framework Programme began, in 2014, it is physically impossible for the Eighth Framework Programme to be a measure taken to comply). How does this position square with the Appellate Body's statement that "{a}s a whole, Article 21 deals with events subsequent to the DSB's adoption of recommendations and rulings in a particular dispute", implying that the fact that measures are taken subsequent to the DSB's recommendations and rulings will likely not serve as an obstacle to finding a close nexus in respect of timing? In answering, please also refer to the United States' arguments in paragraph 358 of its second written submission.**

[254] *US – Large Civil Aircraft (21.5) (Panel)*, para. 7.41.

[255] Original Appellate Report, para. 1407.

[256] Original Appellate Report, para. 1407.

[257] *US – Large Civil Aircraft (21.5) (Panel)*, para. 7.48.

[258] *US – Large Civil Aircraft (21.5) (Panel)*, para. 7.53.