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)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SUBSTANTIVE MEETING OF THE PANEL

May 7, 2019

INTRODUCTION

1. "Those who cannot remember the past are condemned to repeat it." That is the original form of a quotation from the philosopher George Santayana that we have all heard rendered in various ways. It is particularly applicable in the fifteenth year of this dispute, both because the European Union ("EU") insists that we forget or ignore findings from past proceedings on the nature and effects of its LA/MSF subsidies, and because the United States seeks to prevent the continuation of those effects. At this stage, it should be clear that only maintaining the existing findings that LA/MSF for the A380 and A350 XWB are subsidies and cause adverse effects will convince the EU to end WTO-inconsistent conduct that stretches back to the beginning of the WTO.

2. The U.S. oral statement today will consist of four parts. We will first recall the key findings from prior proceedings as to the operation of LA/MSF and its effects on Airbus and the U.S. large civil aircraft industry. Second, we will note findings as to the burden of proof in a proceeding brought by an original responding party under Article 21.5 of the DSU – what we will call a "reverse Article 21.5 proceeding." Third, we will explain why none of the supposed compliance measures cited by the EU have withdrawn the LA/MSF subsidies for purposes of Article 7.8 of the SCM Agreement. Fourth, and finally, we will demonstrate that the EU has failed to make a *prima facie* case that it has taken appropriate steps to remove the adverse effects that its LA/MSF subsidies have been found to cause in the post-implementation period.

I. KEY FINDINGS FROM FORMER PROCEEDINGS

3. LA/MSF is a unique type of financing, in which certain European governments give Airbus money to develop an aircraft family in exchange for a promise to pay back a portion of the funds each time the company sells one of the subsidized aircraft. The per-plane repayments are backloaded and success-dependent, in that they are small or nonexistent for initial sales, and become gradually greater for the later sales. The financing is unsecured, so that Airbus is required to repay the government's contribution only if it successfully sells enough aircraft to repay principal plus interest. If it does not, the government does not receive repayment, and Airbus is relieved of a significant portion of the cost of its failure.

4. This is obviously a risky proposition for a lender. Past panels have identified two primary categories of risk. There is technical risk, which arises from the possibility that the manufacturer cannot achieve the technological innovations it promised to initial purchasers of the new aircraft family, and can even go so far as to prevent certification for use to transport passengers.[1] Then there is market risk, which arises from the possibility that demand for the aircraft will not be as strong as expected, either in terms of the number of aircraft ordered or the schedule of deliveries.[2] It is important to keep in mind that technology risk is highest in the early years, before certification, and market risk continues through an aircraft program's life. Thus,

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[1] First Compliance Panel Report, para. 6.462.

[2] First Compliance Panel Report, para. 6.543.

the risk is concentrated up front, while the recompense to the government lenders for bearing that risk, which is part of the interest (if any) Airbus pays, comes primarily in later years.

5. Throughout the years, the EU has touted the original panel's finding that "we see nothing inherent in the LA/MSF contracts which, in and of itself, renders them a form of financing that by definition will always involve below-market interest rates."[3] However, what is more relevant for this proceeding is the fact that, while panels and the Appellate Body have evaluated more than 20 LA/MSF contracts, they have never found even one to be consistent with market terms. This is true even though panels have consistently taken the conservative approach of using benchmark rates they considered to be "understated", and calculations that "overstated" rates paid to government lenders for LA/MSF.[4]

6. Panel and appellate reports have been clear and consistent as to the effect of LA/MSF on aircraft development. The original panel, in a finding quoted and accepted by the Appellate Body, stated that *as a general rule*:

> All else being equal, we consider that the provision of LA/MSF, which makes a project more profitable if successful and limits downside risk if unsuccessful, makes it more likely that any given aircraft will be launched.[5]

The original panel cautioned that this was not by itself "conclusive" as to whether a particular aircraft would be launched. But its evaluation of the remaining evidence led it to conclude, as summarized by the Appellate Body, that there were:

> four distinct scenarios as to what the LCA industry would have looked like in the absence of the challenged subsidies. In scenarios 1 and 2, Airbus would not have entered the market without subsidies, and Boeing would have been a monopolist (scenario 1) or would have competed with another US LCA manufacturer (scenario 2). However, the Panel did not rule out entry into the market by a non-subsidized Airbus, either in competition only with Boeing (scenario 3) or with Boeing and another US LCA manufacturer (scenario 4). Yet, in order to fully understand the Panel's assessment, it is important to recognize that the Panel ascribed different probabilities to these scenarios. The Panel described the first two scenarios as "plausible". By contrast, the Panel described the third and fourth scenarios as being "unlikely".

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[3] Original Panel Report, para. 7.531.

[4] Compliance Panel Report, para. 6.633 ("we find that the (likely understated) rate of return that a market lender would require for lending on similar terms and conditions to the A350XWB LA/MSF contract is in each case *higher* than the (likely overstated) IRR calculated by the European Union as representing the rates of return that the member States expected and accepted.") (emphasis in original).

[5] Original Panel Report, para. 7.1910, *quoted in* Original Appellate Report, para. 1251.

7. In addressing the EU's critique of the original panel's analysis of the third and fourth scenarios, the Appellate Body returned to this point. It emphasized that "{t}he fact is that the Panel found that scenarios 1 and 2, in which Airbus would not have entered the market, were the most likely scenarios in the absence of the challenged subsidies. *We cannot ignore this*."[6]

8. In the first compliance proceeding, the appellate report stated that because, in its view, the subsidies conferred by pre-A380 LA/MSF had expired, their adverse effects would not be aggregated with those of LA/MSF for the A380 or A350 XWB. Nonetheless, the compliance appellate report disagreed with the EU's argument that it was erroneous to take account of the earlier provisions of LA/MSF:

> {T}he expired subsidies are relevant for our review of the Panel's findings not to determine whether they cause "adverse effects", but only as part of a matrix of analysis that seeks to understand the effects of the subsidies existing in the post-implementation period. This is particularly the case given that, as further discussed below, the subsidies at issue in these compliance proceedings operate along the same causal pathway as the subsidies that were found to have caused adverse effects in the original proceedings.[7]

In other words, we've seen (and the WTO has found) what LA/MSF has done and is doing, and given the EU's insistence on continuing the unabated provision of LA/MSF for each new Airbus program, there is no reason to doubt that the massive adverse effects LA/MSF causes will continue as well.

9. The compliance appellate report, as in the original proceeding, upheld the finding that "Airbus could not have launched the A380 as and when it did by relying exclusively on its own financial resources and outside financing."[8] And it similarly found that "without the aggregated 'product effects' of the existing LA/MSF subsidies for the A380 and A350 XWB programmes, Airbus would not have been able to launch the A350XWB as and when it did."[9]

10. This history is not flattering to the EU. It has, through the use of its LA/MSF subsidies, caused massive adverse effects for decades to the United States. It is perhaps understandable that the EU asks you to forget this history. But the Panel's terms of reference call on it to evaluate whether the EU has withdrawn *these subsidies* or removed the adverse effects *of these subsidies*. It is impossible to conduct such an analysis properly without taking account of the prior findings as to how these subsidies operate and the effects they have.

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[6] Original Appellate Report, para. 1266 (emphasis added).

[7] Compliance Appellate Report, para. 5.556; *accord* Compliance Appellate Report, paras. 5.372, 5.410, and 6.19, note 2123.

[8] Compliance Appellate Report, para. 5.609.

[9] Compliance Appellate Report, para. 5.639.

II. BURDEN OF PROOF

11. It is critical in this process to keep in mind the burden of proof that the EU bears in this proceeding. The panel in the reverse Article 21.5 proceeding in *Colombia – Textiles (21.5)* explained:

> These compliance proceedings create a special situation due to the fact that Colombia, as the respondent in the original proceedings, initiated its own proceedings under Article 21.5 of the DSU, claiming that its measure declared as taken to comply had corrected the inconsistencies found in the original proceedings. Therefore the burden of establishing a *prima facie* case for the claimed consistency rests with Colombia.[10]

The panel explained further that in this "special situation":

> the original respondent has an onus to show that its implementing measure has cured the defects identified in the DSB's recommendations and rulings and that, to this end, the original respondent must give a clear description of its implementing measure and an adequate explanation regarding how this measure rectifies the inconsistencies found in the original proceedings, so as to place the panel in a position to make an objective assessment of the matter and, in the absence of rebuttal, to rule in favour of the original respondent.[11]

12. That panel stated further that even if the original complaining party made no effort to refute an element of the original respondent's claim, "it is for the Panel to satisfy itself that Colombia has discharged the burden of showing that Decree No. 1744/2016 is consistent with Article II:1(b) of the GATT 1994 and with Article II:1(a) of the GATT 1994."[12] The EU has claimed that it "has taken appropriate steps to bring its measures fully into conformity with its WTO obligations."[13] The Appellate Body has made clear that "{t}he requirements in Article 21.5 to examine whether compliance measures exist and whether the measures taken to comply are consistent with the covered agreements also suggest that substantive compliance is required, rather than formal removal of the inconsistent measure."[14] Therefore, the burden in this proceeding is for the EU to make a *prima facie* case that it has come fully into conformity with its WTO obligations, either by withdrawing the subsidies found to exist or removing the adverse effects of those subsidies.

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[10] *Colombia – Textiles (21.5) (Panel)*, para. 7.140.

[11] *Colombia – Textiles (21.5) (Panel)*, para. 7.141.

[12] *Colombia – Textiles (21.5) (Panel)*, para. 7.142.

[13] EU Request for Establishment of a Panel, WT/DS316/39, Annex A, para. 2 (3 August 2018).

[14] *US – Continued Suspension (AB)*, para. 308.

13. The U.S. written submissions have held the EU to this burden and identified numerous instances where lack of evidence or argumentation has left it without a *prima facie* case as to its claims that it has complied completely with its WTO obligations. For example, the EU has argued that Airbus's allegedly "unsubsidized investments" in technology development break the causal link between EU subsidies and the adverse effects. The U.S. first written submission showed that the EU failed to demonstrate that the investments were in fact unsubsidized. In its second written submission, the EU appears to assert that, by making this argument, the United States assumed the burden of proving that these investments were subsidized.[15] The EU is in error. It is the EU that argued that Airbus made certain investments, and that they were unsubsidized. Therefore, the EU bears the burden of proof that such investments exist, and that they are unsubsidized.

III. THE EU HAS FAILED TO WITHDRAW THE SUBSIDIES DETERMINED TO EXIST

14. We now move on to the EU's allegations that it withdrew certain subsidies, which is the first element of its asserted *prima facie* case that it "has taken appropriate steps to bring its measures fully into conformity with its WTO obligations."[16] Our written submissions address these arguments in detail, so we will limit ourselves here to highlighting a few of the key issues.

15. We will begin, as is proper with any WTO obligation, with the terms of the relevant agreement text, which we all agree is the EU's obligation under Article 7.8 of the SCM Agreement that "{w}here a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects . . . the Member granting or maintaining such subsidy . . . shall withdraw the subsidy." We also do not understand the EU to dispute that the ordinary meaning of withdraw includes to "draw back," "remove," "take back or away," and "cease to do, refrain from doing."[17]

16. However, the EU seeks to go a step further in equating "withdraw" with "full repayment"[18] or "replacement."[19] As neither the terms of the agreement nor the ordinary meaning of those terms use "repayment" or "replacement," those words are not properly part of the interpretation of the SCM Agreement. As such, they inject imprecision into the analysis by inviting an inquiry into whether a particular act "repays" or "replaces" a subsidy without regard as to whether that act "withdraws" the subsidy in the sense of drawing back, removing, taking back, *et cetera*. To be clear, it is possible that an act colloquially characterized as "repaying" or "replacing" a subsidy also "withdraws the subsidy" for purposes of the SCM Agreement. But it is also possible that such an act does not achieve "withdrawal." It is the facts that matter, and

[15] EU SWS, para. 63.

[16] EU Request for Establishment of a Panel, WT/DS316/39, Annex A, para. 2 (3 August 2018).

[17] First Compliance Appellate Report, para. 5.366.

[18] EU FWS, para. 64.

[19] EU FWS, para. 70.

whether that act achieves compliance by withdrawing the subsidy. An intermediate characterization can do little to advance the analysis, and much to confuse it.

17. That is the essence of the analytical approach laid out by the Appellate Body in the original proceeding. The analysis begins with the *ex ante* expectations of the granting government and subsidy recipient. It then examines "intervening events" – without regard as to their characterization – to evaluate whether they "affect the projected value of the subsidy as determined under the *ex ante* analysis."[20] In fact, it is difficult to conceive of how a panel could evaluate a Member's claims to have "withdrawn the subsidy" without fully analyzing the subsidy as "determined" in "the adopted panel or Appellate Body report" and how it is allegedly affected by the declared measure taken to comply.

18. However, the EU seeks just such a flawed analysis when it argues that if it can characterize a measure as having "repaid" or "replaced" LA/MSF financing, the United States and the Panel are precluded from evaluating whether or how that measure actually changed the benefit "determined" in the "adopted panel or Appellate Body report." We are supposedly restricted to examining the alleged measure taken to comply in isolation from the subsidy that it allegedly repaid or replaced. There is simply no basis for this approach in the SCM Agreement or the DSU, and the EU cites none.

19. We will now make a few key points regarding the EU's assertions that it withdrew the subsidies conferred through LA/MSF provided by all four member States with respect to the A380, and provided by Germany and the UK with respect to the A350 XWB.

A. Alleged withdrawal of A380 LA/MSF subsidies through amendment

20. In addressing the EU's assertions that it took steps to withdraw the subsidy conferred by A380 LA/MSF, it is important to keep in mind that the assertions raise two separate questions. The first is what the steps taken by the EU – the declared measures taken to comply – actually did. The second question is whether, as required under Article 7.8 of the SCM Agreement, the EU has withdrawn the subsidy determined to exist. These questions overlap to some extent, but it is important to keep them analytically distinct. Some examples illustrate this point. In the first compliance proceeding, the panel found – and the EU did not contest – that the "steps" identified by the EU did nothing to affect the subsidy determined to exist. The Appellate Body found that the EU need take no further compliance action because of its view that the "lives" of certain subsidies had ended. In another example, the EU's actions with respect to the Bremen runway extension achieved withdrawal because they actually modified the original measure so as to remove the subsidy. In a third example, LA/MSF for the A350 XWB did not affect previous subsidies, but was found to confer a new subsidy.

[20] Original Appellate Report, para. 21.

21. These examples underscore the importance of addressing both questions – analyzing what the alleged measures taken to comply actually do, and whether the subsidy determined to exist has been withdrawn. A compliance panel needs to remain open to the possibilities that the subsidy has ceased on its own, that the new measure has withdrawn the subsidy, or that the new measure introduced a new subsidy or exacerbated the preexisting subsidy.

22. The United States has addressed each of these possibilities. The subsidy was determined to exist because Airbus derived a benefit from paying the governments less for financing than it would have paid a commercial lender. For nearly two decades, these terms have allowed Airbus to pay lower interest rates and retire the principal faster than would have been the case under a commercial loan. The United States has shown that nothing has happened to diminish this benefit. Indeed, we have also shown specifically that the 2018 amendments – the declared measures taken to comply – actually increased the benefit and prolonged the "lives" of A380 LA/MSF subsidies by granting a more favorable interest rate and a longer period for repayment.

23. The EU ignores this question, and seeks to answer a different one – whether commercial entities that had provided financing to Airbus on the same terms as the LA/MSF packages would have agreed to the 2018 amendments. From the outset, that is clearly the wrong question because – as WTO dispute settlement has twice affirmed – *private entities would never have provided funding on those terms*. In any event, the United States demonstrated that the economic analysis underpinning the EU assertions was fundamentally flawed. In particular, it assumed both that the amendment was certain to succeed, and that failure to amend the terms of LA/MSF would have the worst possible outcome for Airbus. That is not how a commercial entity would approach a financial transaction of this magnitude. Therefore, by any test, the EU has failed to carry its burden of proof with respect to withdrawal of the A380 LA/MSF subsidies.

B. Alleged withdrawal of the Spanish A380 LA/MSF subsidy due to the allegedly expected end of the period of repayment

24. The EU has also raised an additional argument that the "life" of the subsidy conferred by Spanish LA/MSF for the A380 has already ended through "amortization" of the benefit.[21] There are two primary flaws with this argument. The first is that the EU errs in tying the "life" of the subsidy to the projected delivery schedule under the original LA/MSF contracts.[22] Nothing in the contracts obligated Airbus to repay the stated sums in the indicated years. As under other LA/MSF contracts, the obligation was to make levy payments throughout the life of the program until Airbus repaid all of the principal plus accrued interest. The schedule was a projection as to how the revenue flow might look, but the *expectation* was that Airbus would remain liable throughout the expected life of the program. Other provisions that are BCI confirm this

[21] EU FWS, para. 178.

[22] Klasen Report, para. 9.

expectation. Thus, the *ex ante* expectation of the parties to the LA/MSF contracts was that of a financial obligation from the known start of the program to its expected end.

25. The second flaw is that the EU incorrectly applies its own "loan life" standard. Assuming *arguendo* that loan life were the proper measure, the Appellate Body's guidance on the issue calls for addressing intervening events raised by the parties. Twice before the last levy-paying delivery on Airbus's initial projected delivery schedule, the LA/MSF parties revised payment amounts and the payment "calendar" based on revised *expectations*. A "loan life" calculation, like the EU's, that is based on the expectations tied to the original Spanish schedule would have to take account of those revised expectations, which the EU has not done. Thus, even under its own, incorrect, approach, the EU has failed to demonstrate that the "life" of the subsidy has ended.

C. Alleged withdrawal of German A350 XWB LA/MSF subsidies through amendment

26. As explained earlier, an amendment to an LA/MSF package does not automatically make the subsidy disappear. The EU's burden of proof is to demonstrate that the subsidy found to exist from an *ex ante* perspective has ceased either on its own terms or because of some *ex post* action. Instead, when it comes to the German A350 XWB LA/MSF package, the EU assesses the market consistency of the amendment as a standalone instrument, separate from the original LA/MSF. The EU asserts that the amendment was market consistent at the time when it was signed, and concludes that it therefore replaces and withdraws the original subsidy. However, the EU does not indicate any way in which the amendment lessened either the interest rate differential that gave rise to the subsidy or the *ex ante* expectations as to the "life" and trajectory of that benefit. Therefore, the EU has failed to meet its burden of proof with respect to withdrawal of the subsidy.

27. As with the A380 LA/MSF, the EU focuses instead on the question of how a commercial actor would have behaved if it had provided financing to Airbus on the same subsidized terms as KfW did. As noted above, this is not the proper analysis. But the United States has shown that, even in this incorrect framework, the EU has failed to support its assertions. In particular, taking account of all of the relevant risk factors, the financial payoff of keeping the original loan was higher than the financial payoff of the amendment. Thus, a commercial lender in the position of KfW would have opted to keep the original arrangement rather than amend the loan.

28. The EU attempts to discredit this conclusion by arguing that KfW did not face a choice between retaining the original terms and renegotiating them because Airbus had the option of prepaying the principal early. There is no evidence that this was a realistic possibility – Airbus never triggered the contractual prepayment provision or complied with any of its detailed formal requirements. Additionally, early repayment of this particular launch aid not only requires the repayment of the outstanding principal and accrued interest, but also an early redemption charge. The United States has shown that this payment would be quite large. If the EU were correct that prepayment was the alternative to the amendment – and it is not – that would only reveal another flaw in its argument. In that case, the analysis of the commercial consistency of the amendment

would require a comparison that the EU did not conduct between the IRR of the amendment and the IRR of activating the repayment provision.

29. Therefore, with respect to the German A350XWB launch aid, the EU has failed to use the correct legal analysis, failed to provide facts to support its speculation, and ultimately failed to meet its burden of proof as to withdrawal of the subsidy.

D. Alleged withdrawal of the UK A350 XWB LA/MSF subsidies through repayment

30. Finally, we come to the EU's assertion that the UK A350 XWB subsidy was withdrawn when Airbus repaid outstanding principal and accrued interest. Once again, the EU has failed entirely to address the subsidy determined to exist, and has accordingly failed to provide valid support for its claim.

31. As in any evaluation of an allegation of withdrawal of a subsidy, it is critical to keep in mind exactly what is being withdrawn – the subsidy. In the case of UK LA/MSF for the A350 XWB, the subsidy arose because the UK government gave Airbus a rather large sum of money and allowed repayment on terms more favorable than the company could have obtained from a commercial financier. Specifically, the first compliance panel calculated the IRR of LA/MSF in a way likely to overstate the rate, and estimated a benchmark in a manner likely to understate the rate. This means that, throughout the life of the financing, Airbus paid less to the UK government than it would have paid a commercial entity offering comparable terms at a market rate.

32. The fact that the UK A350 XWB LA/MSF contract permits Airbus to repay the UK government at a particular level and at a particular time, and thereby discharge a portion of what it owes, *is* the subsidy. That is because Airbus pays a less-than-market rate. The same is true of any right to prepay that the company exercises under that contract. The idea that Airbus's exercise of its subsidized rights somehow cancels that same subsidy is fundamentally inconsistent with the findings that UK LA/MSF for the A350 XWB is a subsidy.

IV. THE EU HAS FAILED TO MEET ITS BURDEN OF DEMONSTRATING IT HAS TAKEN APPROPRIATE STEPS TO REMOVE THE ADVERSE EFFECTS

33. Shortly after the DSB adopted the first compliance findings that A380 and A350 XWB LA/MSF causes present adverse effects,[23] the EU began this second compliance proceeding, asserting that those adverse effects have ended.[24] From the timing, it was reasonable to suspect that the EU's assertion was a contrivance, not a real change from its years of refusal to bring its measures into compliance. The EU's written submissions only confirm the suspicion.

[23] WT/DS316/35 (May 25, 2018).

[24] WT/DS316/39 (Aug. 3, 2018).

34. The EU has not taken any genuine compliance action nor has it presented any change in market conditions that removed the adverse effects. The first compliance proceeding resulted in findings that, absent existing LA/MSF, Airbus could not have offered the A380 or A350 XWB from the end of the RPT through at least the end of 2013. Thus, the central question posed by the EU's claims of compliance is – what has changed that would mean Airbus would be able to both offer and deliver those models in the present period in the absence of LA/MSF? Absent such a change, sales and market share lost to those models would continue to be the result of EU subsidies, and continue to be serious prejudice for purposes of Articles 5 and 6.3. The EU has nowhere presented even a semblance of argumentation or evidence on this central question.

35. Because the EU does not even purport to address that question, it has failed (as the Member that initiated these compliance panel proceedings) to make out a *prima facie* case that it has taken appropriate steps to remove the adverse effects under Article 7.8 of the SCM Agreement. There is thus no *prima facie* case for the United States to rebut. However, the United States has nonetheless gone further to demonstrate the errors in each aspect of the EU's adverse effects case. The United States will not repeat those arguments at length here. However, we will highlight some of the most notable flaws in the EU's arguments.

A. LA/MSF Product Effects Have Never Been Found to Be Mere Acceleration Effects.

36. First, it is essential to recall accurately the prior adverse effects findings that serve as a starting point for the analysis. In this regard, the EU mischaracterizes those findings. An essential premise of the EU's compliance theory is that the compliance panel and appellate reports found the sole effect of LA/MSF to be the acceleration of the launch and first delivery of the A380 and A350 XWB by a few years.[25] The EU relies on the use of the phrase "as and when" in these reports to suggest that the findings were limited to the exact point in time when Airbus launched each of the various LCA families and nothing more.[26] This is clearly inaccurate.

37. U.S. submissions and the adopted findings throughout this dispute – from the original panel proceedings onward – have used the phrase "as and when" to mean that, absent the subsidies, the relevant Airbus LCA *would not exist* as of the time of the relevant proceedings.[27]

38. Moreover, the causal pathway from the product effects of LA/MSF to the adverse effects previously found to exist makes clear that the EU's interpretation of the phrase "as and when" is incorrect. To recall, the causal pathway previously found to exist was that, because in the

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[25] *See, e.g.*, EU SWS, para. 433 ("To recall, the adopted findings indicate that these subsidies enabled Airbus to launch the aircraft 'as and when' it did, and more specifically, 'a *few years in advance of what would have been the case without LA/MSF*.'" (internal citation omitted, emphasis original)).

[26] *See* EU SWS, para. 285 ("they enabled Airbus to launch these aircraft 'as and when it did', meaning that they accelerated the launch of the aircraft").

[27] *See* US SWS, paras. 136-139.

counterfactual the relevant Airbus aircraft would not be available for offer or delivery, *i.e., would not exist* at that time, the U.S. LCA industry would have captured all of the relevant sales and deliveries identified by the United States.[28] The EU itself conceded that the adverse effects findings were based on the non-existence of Airbus LCA in the market:

> Where the ***market presence of a model*** of aircraft, ***at the time of a sales campaign***, was attributable to the direct effects and indirect effects from subsidies, ***this served as the basis*** for findings of significant lost sales, on the notion that, ***absent the subsidies***, the ***Airbus product would not have competed*** in the sales campaign, and Boeing would instead have won the sale. Similarly, these ***findings relating to the market presence of Airbus' models*** also served as the eventual basis for findings of other forms of volume effects (and specifically, impedance).[29]

39. Thus, the "as and when" compliance findings establish that Airbus could not have offered or delivered the A380 or the A350 XWB at least through the end of 2013. Of course, this is an insurmountable problem for the EU's causation arguments in the current proceeding, as we will discuss momentarily. The EU did not attempt to address this problem in its first written submission. But in its second written submission, the EU presented a novel interpretation of the adopted findings, which in its view makes those findings compatible with its counterfactual launch timing arguments.

40. Specifically, the EU argues that, absent LA/MSF, launch of the A380 and A350 XWB would merely have been *delayed*, resulting in a corresponding delay in the delivery positions that Airbus would have been able to offer in sales campaigns in the 2011-2013 period, thereby making Airbus's offers less attractive to customers. Although neither the compliance panel nor appellate reports said any of this, the EU asserts that this line of reasoning was the basis for the findings of lost sales or impedance in the first compliance proceeding.

41. The problem for the EU is that this was not the conclusion of the four panel and appellate reports in this dispute. Rather, the findings throughout this dispute were that LA/MSF subsidies cause significant lost sales and displacement or impedance because, absent the subsidies, the relevant Airbus LCA *would not exist*. Neither compliance report states or even suggests that Airbus would have been able to offer the A380 or the A350 XWB in the December 2011-2013 sales campaigns at issue, but with less attractive delivery positions.

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[28] *See* First Compliance Appellate Report, paras. 5.709, 5.726, 5.734; First Compliance Panel Report, paras. 6.1528-6.1534, 6.1776-6.1778.

[29] EU FWS, para. 41 (emphasis added) (footnotes omitted).

42. Indeed, the compliance panel in *US – Large Civil Aircraft* specifically contrasted the acceleration effects in that dispute with the product effects found in the original and compliance proceedings in this dispute. Specifically, the compliance panel there stated:

> The findings of the panel in the original proceeding regarding the nature and effects of the aeronautics R&D subsidies (i.e. ***an acceleration effect*** providing a time to market advantage) ***can be contrasted*** with certain of the findings in *EC and certain member States - Large Civil Aircraft* regarding the nature and effects of certain of the subsidies at issue in that dispute. In *EC and certain member States - Large Civil Aircraft*, the panel concluded, among other things, that Airbus would have been unable to bring to market the LCA that it launched but for certain of the subsidies in question. In other words, certain of the subsidies in question in that dispute ***enabled the creation and market presence of products that would not otherwise exist***.[30]

43. Thus, there can simply be no reasonable disagreement about the fact that the product effects in this dispute were the very existence in the market of the relevant Airbus LCA models, ***not*** mere acceleration effects.

B. The EU's Compliance Theory and Alleged Attenuation Factors Are Fundamentally Inconsistent with DSB-Adopted Findings.

44. Second, a correct understanding of the prior findings shows that the EU's adverse effects arguments in this proceeding have failed. The EU focuses on four factors that it asserts attenuate or dilute the "genuine and substantial" causal link between existing LA/MSF and post-implementation-period adverse effects, namely: (1) the "timing out" of LA/MSF effects; (2) the less-than-full drawdown of French A380 and French and UK A350 XWB LA/MSF; (3) the so-called "amortization" of LA/MSF; and (4) non-subsidized investments in the A380 and A350 XWB. None of these factors attenuates the genuine and substantial causal link between existing LA/MSF and the product effects previously found to exist in this dispute. Only one – the "timing out" argument – is even notionally related to the causal mechanism by which LA/MSF subsidies result in adverse effects, but it fails because it is fundamentally inconsistent with the adopted findings.

45. The EU's "timing out" arguments are based on the proposition that, absent LA/MSF, Airbus would have launched the A380 soon after its actual launch in 2000 and the A350XWB soon after its actual launch in 2006. Therefore, according to the EU, Airbus would have been able to offer both the A380 and A350 XWB no later than 2008, well before the expiry of the reasonable period of time to comply ("RPT") in December 2011. Yet, as just discussed, the first compliance proceeding has already determined that Airbus would not have been able to offer

[30] *United States – Large Civil Aircraft (21.5) (Panel)*, note 2849 (citing Original Panel Report, paras. 7.1949, 7.1984; Original Appellate Report, paras. 1261, 1264-1270, 1300; First Compliance Panel Report, paras. 6.1464-6.1477) (emphasis added).

either model from the end of the RPT at least through the end of 2013. Accordingly, the EU's theory that it achieved full compliance no later than 2008 is simply irreconcilable with the DSB-adopted reports finding the EU to not be in compliance in the post-implementation period. As long as the EU continues to rely on a theory that "proves" compliance prior to 2008, its adverse effects case necessarily fails in its entirety.

46. The problems with the EU's theory do not end there. The EU's calculation of counterfactual launch dates is based not on objective evidence but on a flawed reading of an expert report by Professor Wessels that was submitted in the first compliance proceeding. The EU purports to use Airbus's counterfactual credit rating to "prove" counterfactual launch dates. But the Wessels Report did *not* conclude that absent A380 and A350XWB LA/MSF, Airbus could have, or would have, launched the A380 soon after its actual launch in 2000 and the A350XWB soon after its actual launch in 2006. Nor does the Wessels Report support calculating counterfactual launch dates based on Airbus's counterfactual credit rating, as the EU attempts to do. In fact, the first compliance panel found "compelling" the U.S. argument that "it is not possible to determine a credit rating for Airbus (or by extension, EADS) in the absence of LA/MSF."[31]

47. It remains that the EU has yet to establish Airbus's counterfactual financial capacity to launch the A380 and A350 XWB at any time, including the legally relevant timeframe after 2013. Even if the EU could do so, that would still be insufficient because the launch of a new LCA program requires much more than just financial capacity. Other prerequisites include a viable business case and sufficient technological and industrial know-how.

48. The ability to fund a project means little if, absent LA/MSF, the project would not be economically attractive, or if the necessary technologies and expertise are lacking. The EU has not even attempted to address these issues in the relevant timeframe – *i.e.*, after 2013.

49. Moreover, there is ample reason to doubt that such an attempt could succeed, considering the actual challenges faced by the A380 in recent years, the time required for learning on the A380 program and subsequent knowledge spill-overs to the A350 XWB, and the tight counterfactual timeframe in which all of this – launch, post-launch development, spillovers, orders, and deliveries – would need to occur in order to potentially avoid serious prejudice in the present period.

50. Indeed, even if the EU's counterfactual launch dates were correct – which they are not – the EU is also wrong to argue that adverse effects "time out" as of the moment of counterfactual launch. Displacement and impedance are a function of LCA *deliveries*, which typically begin several years *after* launch. Indirect effects of LA/MSF may also persist beyond launch and impact the development, design, sales, and deliveries of other aircraft. Under the EU's new alternative causation theory, the less attractive delivery positions that Airbus would have been

[31] First Compliance Panel Report, paras. 6.627-6.628. *See also* US SWS, para. 236.

able to offer absent LA/MSF also mean that the subsidies would continue to be a genuine and substantial cause of adverse effects post-launch.

51. The three other attenuation factors the EU cites are no more persuasive. In fact, they are completely unrelated to the causal mechanism previously found to exist, and thus even further removed from any plausible compliance theory. The "less than full drawdown" of certain LA/MSF financing may slightly reduce the total value of the financial contribution and resulting benefit. But it does not change the fact that, absent the provision of LA/MSF, the A380 and A350 XWB would not have been launched and been available in the market today. Similarly the supposed "amortization" of LA/MSF over time does not alter or in any way diminish its fundamental product-creating effects, and the EU fails to provide any reasoning that would indicate otherwise.

52. The EU's last attenuation factor is certain allegedly "non-subsidized investments" in the A380 and A350 XWB. This is simply a repackaging of failed arguments from the first compliance proceeding. Investments in improvements to the A380 and A350 XWB are dependent upon the very existence of these aircraft programs or, in other words, the product-creating effects of LA/MSF. Thus, these investments do nothing to attenuate the causal mechanism previously found to exist. The EU fails, moreover, to demonstrate that the cited investments are indeed unsubsidized.

C. The EU's Failure to Make a *Prima Facie* Case is Confirmed by Evidence of Continued Adverse Effects.

53. Third, the EU's arguments concerning removal of the adverse effects focus almost exclusively on the first link in the causal chain – whether the subsidies cause product effects. With one arguable exception, the EU does not contest the second link in the causal chain by arguing that, even though product effects on Airbus continue, those product effects nevertheless do not result in adverse effects to the interests of the United States in the form of the market phenomena in Article 6.3 of the SCM Agreement. (The arguable exception is the EU's recent argument regarding the announcement of the "wind-down" of the A380 program, which we will discuss momentarily.)

54. Therefore, if the EU fails to show that existing LA/MSF subsidies no longer cause product effects, it has failed to meet its burden of showing that it has taken appropriate steps to remove the adverse effects for purposes of Article 7.8. It is not the United States' burden to prove adverse effects anew.

55. Nevertheless, both out of an abundance of caution in light of the EU's erroneous attempts to shift the burden in this proceeding, and to emphasize the enormous real-world consequences these pernicious subsidies have, the United States has provided evidence of continued adverse effects in its second submission. This evidence clearly demonstrates that the A380 and A350 XWB continue to capture market share and sales at the expense of U.S. LCA.

56. The United States has also presented evidence of adverse effects regarding other Airbus models and other Airbus subsidies. The United States has shown that existing LA/MSF has indirect product effects enabling the market presence of the A330neo, Airbus's other current twin-aisle offering beside the A350 XWB. All the EU can offer in response is a misplaced assertion that indirect effects of a given tranche of LA/MSF can only be felt by subsequent Airbus LCA programs, which is beside the point anyway because it ignores that the A330neo *was* launched after the A380 and A350 XWB.

57. Moreover, deliveries associated with lost sales found during the first compliance proceeding remain outstanding. Specifically, the outstanding deliveries include:

- 14 A380s ordered by Emirates in 2013;[32]
- 10 A350 XWBs ordered by Cathay Pacific in 2012;[33]
- 27 A350 XWBs ordered by Singapore International Airlines in 2013;[34] and
- 10 A350 XWBs ordered by United Airlines in 2010.[35]

58. These 61 outstanding deliveries account for more than half of the firm orders found to constitute significant lost sales in the first compliance proceeding. Under the EU's theory in other proceedings in this dispute and in *US – Large Civil Aircraft*, these outstanding deliveries conclusively prove that the EU has not achieved full compliance.[36]

59. The United States has also shown the important role of R&TD subsidies in enabling the technologies used in the A380 and A350 XWB programs. For example, an EU study found that the results of the EU TANGO and ALCAS projects "made Airbus confident enough to design the fuselage of the new A-350 in composite material structures."[37] The EU has not even disputed these facts, confining itself to meritless jurisdictional arguments that the United States has refuted.

60. In sum, once the EU's false launch timing arguments are disposed of, there can be no question that the U.S. LCA industry continues to suffer serious prejudice as a result of LA/MSF and R&TD subsidies to the A380, A350 XWB, and A330neo. In addition, deliveries associated

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[32] *See* EU SWS Supp., para. 55.

[33] Additional Ascend Data regarding A350 XWB Lost Sales (Exhibit USA-154).

[34] Additional Ascend Data regarding A350 XWB Lost Sales (Exhibit USA-154).

[35] *See* Ascend data, Exhibit USA-138.

[36] *See US – Large Civil Aircraft (AB)*, para. 6.10.

[37] *Methodology for Framework Programmes' Impact assessment in Transport: Final Report*, MEFISTO (April 2010) (Exhibit USA-32) at 21.

with campaigns already found to represent significant lost sales remain outstanding, meaning the EU has failed to achieve the full compliance according to the EU's own approach.[38]

D. The EU Fails to Show that the Recent Cancellation of A380 Orders by Emirates Means that It Has Removed the Adverse Effects of Existing LA/MSF.

61. Fourth, and finally, the United States will briefly address the EU's arguments that recent developments related to the A380 program mean that the direct effects of A380 LA/MSF have come to an end.

62. The EU previously made arguments that seemed to treat the A380 announcement of an intended wind-down as if it were a measure taken to comply, but avoided actually referring to it as a measure. In paragraph 13 of its oral statement, the EU now explicitly calls it a measure. To the extent the EU is arguing that this is a measure taken to comply, this is a measure that was not in existence when this Panel was established and therefore is outside the Panel's terms of reference. What is so striking is that this is a so-called reverse 21.5 proceeding, meaning the EU, although originally the responding party, is the complaining party here. In other words, the EU controlled the timing of this proceeding.

63. In any event, as the United States explained in its second written submission, the EU provides no evidence or rationale to support its conclusory statements that the direct effects of A380 LA/MSF or the marketing life of the A380 have come to an end. To the contrary, the EU's projections show A380 deliveries continuing through the present period until 2022—that is, with deliveries still occurring in 2021 meaning that adverse effects in the form of displacement and/or impedance related to A380 deliveries will persist at least until 2022 based on the EU's representations.

64. And the EU again argues today that A380 deliveries will end by 2022. In other words, ignoring other flaws in the EU's argument, the EU is effectively arguing that adverse effects in the VLA market ***will*** end by 2022 – that is, that (according to the EU) it ***will*** achieve compliance by 2022. But again, the EU chose to bring this reverse compliance proceeding asserting full, substantive compliance in 2018.

65. Moreover, it is entirely speculative for the EU to assert that Boeing will lose no more sales to the A380 due to the "wind-down" of the program. This is a prediction of the future, not a fact, as the EU incorrectly suggests.

66. The EU is also incorrect that "any indirect effects from the A380 MSF loans on the A350XWB have now ceased to exist, by virtue of the wind-down of the A380 programme."[39] First, the termination of an LCA program does not mean – as the EU mistakenly thinks – that

[38] *See* EU FWS, paras. 232-233

[39] EU A380 Submission, para. 47.

other existing or future Airbus LCA no longer benefit from the learning, scope or financial effects generated in the past. Indeed, as the EU itself highlights, "the first compliance panel found {that} the A380 was a very significant intermediate step, in terms of its learning effects, for Airbus future work with composites,"[40] such as on the A350 XWB and A330neo.

67. Second, the EU is incorrect that A380 LA/MSF contributed only to the *launch* of the A350 XWB, and nothing more.[41] As the United States explained in its second written submission, the first compliance panel made a number of specific findings on how the indirect effects of A380 LA/MSF – including learning effects from post-launch development – contributed to the adverse effects *vis-à-vis* the A350 XWB. Thus, the EU is incorrect that the indirect effects of A380 LA/MSF can no longer be aggregated with the direct effects of A350 XWB LA/MSF in analyzing whether the subsidies cause adverse effects in the twin-aisle market.

68. Indeed, Airbus itself disagrees with the EU. Airbus's new CEO, Guillaume Faury, recently observed:

> The A380 is a success, because ***Airbus would not be what it is today if the A380 had not existed. It has enabled us to succeed with the A350 and become a particularly credible player on the long-haul market***. There is one expression I like: "never waste a good crisis". There have been difficulties with the A380 program, and ***Airbus has learned from these difficulties***.[42]

CONCLUSION

69. For these reasons, the EU has failed to establish that it has complied with its WTO obligations. We look forward to responding to your questions.

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[40] EU SWS, para. 454 (citing First Compliance Panel Report, paras. 6.1747-6.1748, 6.1756).

[41] *See* EU A380 Submission, para. 51.

[42] *Guillaume Faury, patron d'Airbus: Il ne faut jamais gâcher une bonne crise*, Le Monde (Apr. 16, 2019) ("L'A380 est un succès, car Airbus ne serait pas ce qu'il est aujourd'hui s'il n'y avait pas eu cet appareil. Il nous a permis de réussir l'A350 et de devenir un acteur particulièrement crédible sur le long-courrier. Il y a une expression que j'aime bien: il ne faut jamais gâcher une bonne crise. Il y a eu des difficultés avec le programme A380, et Airbus a appris de ces difficultés.") (emphasis added) (Exhibit USA-155).