

*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*

**(DS316)**

**EXECUTIVE SUMMARY OF THE  
FIRST WRITTEN SUBMISSION OF THE UNITED STATES**

June 19, 2012

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<i>EC – Large Civil Aircraft (AB)</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011
<i>EC – Large Civil Aircraft (Panel)</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R
<i>US – Softwood Lumber CVDs (21.5) (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357

1. Last year, the World Trade Organization (“WTO”) ruled that the European Union (“EU”) and certain member States had subsidized the development of every single Airbus<sup>1</sup> aircraft over the course of 36 years, resulting in adverse effects to the United States, to the detriment of the sole remaining U.S. producer of large civil aircraft, The Boeing Company (“Boeing”). The Dispute Settlement Body (“DSB”) recommended that the relevant Members withdraw the subsidies or take appropriate steps to remove their adverse effects by December 1, 2012.<sup>2</sup> Instead, the EU and the other relevant Members did the opposite – they continued and even expanded their subsidization. They did essentially nothing to remove the adverse effects of the subsidies, and in fact conferred additional subsidies (with additional adverse effects) after the period covered by the rulings of the DSB. They have accordingly failed to comply with the recommendations and rulings of the DSB and continue to maintain WTO-inconsistent subsidies.

2. At this stage, there is no dispute about the nature and effect of the subsidies, most of which came in the form of billions of dollars of financing granted by France, Germany, Spain, and the United Kingdom for the development of Airbus aircraft. Whether called “launch aid,” or “member State Financing,” or “LA/MSF” (the compromise term adopted by the original Panel), this financing shares the same key features:

- (1) **unsecured:** the lenders have no recourse against Airbus’s assets, such that repayment depends on the success of the model financed.<sup>3</sup>
- (2) **success-dependent:** full repayment occurs only if the model in question is a commercial success;
- (3) **levy-based:** repayment takes the form of per-aircraft levies tied to deliveries of the large civil aircraft financed; and
- (4) **back-loaded:** the producer receives subsidies early during the development of the aircraft, but repayments become due later, after deliveries commence, with a graduated repayment schedule in some instances.

The financing confers a benefit in the sense of Article 1.1(b) of the SCM Agreement in that the relevant EU member States charged less, and typically far less, interest than a commercial lender would have charged for financing on these terms.

3. The effect of these subsidies on Airbus has been critical. The original Panel found, and the Appellate Body concurred, that absent the subsidies, Airbus would be a “much weaker LCA

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<sup>1</sup> For purposes of this submission, “Airbus” has the meaning set out in *EC – Large Civil Aircraft*: Airbus SAS, Airbus GIE, and current and predecessor affiliated companies of both Airbus SAS and Airbus GIE. *EC – Large Civil Aircraft (Panel)*, para. 7.191.

<sup>2</sup> Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 June 2011, WT/DSB/M/247, para. 28 (11 July 2011). *EC – Large Civil Aircraft (Panel)*, para. 8.7; *EC – Large Civil Aircraft (AB)*, para. 1418.

<sup>3</sup> *EC – Large Civil Aircraft (Panel)*, paras. 7.374-7.375; *EC – Large Civil Aircraft (AB)*, para. 604.

manufacturer,” and would have had “at best a more limited offering of LCA models.”<sup>4</sup> Under the most likely counterfactual scenarios, “Airbus would not have existed . . . and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred.”<sup>5</sup> The effect on Boeing was stark – tens of billions of dollars of lost sales and displacement of imports and exports from markets around the world.

4. Based on these findings, the EU and the relevant member States had an obligation to withdraw the subsidies, or take appropriate steps to remove their adverse effects, by December 1, 2011. Clearly, if they neglected to do either of these things, they would fail to comply with the obligation. They would also fail to comply if they granted new subsidies with a “close relationship” to the actionable subsidies at issue in the original dispute,<sup>6</sup> introduced new subsidies that *replaced* the actionable subsidies already found to exist,<sup>7</sup> or introduced measures that *circumvented* the DSB’s recommendations and rulings.<sup>8</sup>

5. However, the EU’s response to these massive subsidies and their adverse effects was to keep on doing what it did in the 36 years covered by the original Panel’s deliberations: give subsidized funds to Airbus aircraft that took sales and market share from its U.S. competitor. On the December 1, 2011, deadline for compliance with the DSB recommendations and rulings, the EU transmitted a document to the United States and to the DSB (the “EU Notification”) asserting that it had taken 36 “steps” to bring its measures into conformity with its WTO obligations. However, these steps did nothing to move toward WTO compliance:

- The EU Notification never mentions the \$4 billion in LA/MSF for the A380, one of the largest LA/MSF subsidies Airbus ever received, and one that the Appellate Body confirmed as “a necessary precondition for Airbus’ launch in 2000 of the A380.”<sup>9</sup>
- The only “repayment” referenced, €1,704 billion in step 25, is no change at all, as it consists almost entirely of funds Airbus paid to the German government in 1997 and 1998.
- Steps 1 through 24 report the “termination” of LA/MSF contracts related to the A300, A310, A320, A330, and A340, without explaining what the term means. Mere “termination” is a meaningless formality without repayment of past subsidies, which the EU has neither claimed nor established. If the “termination” resulted in an effective forgiveness of amounts due, it would actually confer a new subsidy.

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<sup>4</sup> *EC – Large Civil Aircraft (AB)*, paras. 1269 and 1270.

<sup>5</sup> *EC – Large Civil Aircraft (AB)*, para. 1264.

<sup>6</sup> *E.g., US – Softwood Lumber CVDs (21.5) (AB)*, para. 77.

<sup>7</sup> *US – Upland Cotton (AB)*, paras. 237-238.

<sup>8</sup> *US – Softwood Lumber CVDs (21.5) (AB)*, para. 71.

<sup>9</sup> *EC – Large Civil Aircraft (AB)*, para. 1414(q).

- Steps 31 through 33 note the “termination” of subsidized Airbus models,<sup>10</sup> a development rendered meaningless by the subsidization of the models that replaced them – the A330 and A350 XWB. Termination of the A340 program actually boosted Airbus earnings by €460 million<sup>11</sup> – scarcely an action that would eliminate subsidies or their adverse effects on U.S. interests.
- With one exception, the remaining steps reflect EU inaction based on the theory that the passage of time or other intervening events would result in the subsidies or their adverse effects fading to insignificance, without any attempt to explain why this would be so.<sup>12</sup>

6. Airbus has itself been frank about the pointlessness of this exercise. Hans Peter Ring, the Chief Financial Officer of EADS, Airbus’ parent company, has confessed that Airbus retains every franc, mark, peseta, pound, and euro of WTO-inconsistent subsidy that it received:

Q: “If I look at some of the articles about the WTO and complying with the WTO ruling, it would suggest that you feel that you’ve now done something which makes you now compliant, ex-A350, which is another debate. What exactly did you do? Have you paid any money back?”

Hans Peter Ring: “No.”<sup>13</sup>

7. This statement provides a one-word summary of the EU’s plan of inaction. Instead of modifying its behavior, the EU has made light of the DSB recommendations and rulings. Where the Appellate Body found that without the subsidies, Airbus would most likely not exist at all,<sup>14</sup> the EU concluded that “the economic impact of these support measures in the Large Civil Aircraft (LCA) market has been found to be very limited.”<sup>15</sup> For its part, Airbus saw “no significant consequences for Airbus or the European support system from today’s decision.”<sup>16</sup> In fact, Airbus has interpreted the rulings as an affirmation of past funding practices – a “big

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<sup>10</sup> EU Notification (Exhibit USA-001).

<sup>11</sup> EADS Financial Statements 2011, p. 65 (Exhibit USA-014).

<sup>12</sup> The one exception to this is the infrastructure-related subsidy for the Bremen airport runway. The United States is not challenging the EU’s compliance with the DSB recommendations and rulings with regard to this subsidy.

<sup>13</sup> Webcast, Q&A from Global Investor Forum 2011, EADS (Dec. 15, 2011), min. 21 ff. (Exhibit USA-002).

<sup>14</sup> *EC – Large Civil Aircraft (Panel)*, para. 7.1984.

<sup>15</sup> EU Press Release, *WTO Airbus Case – Appellate Body overturns key findings of the Panel in favour of the EU* (May 18, 2011).

<sup>16</sup> Airbus Press Release, *WTO final ruling: Decisive victory for Europe* (May 18, 2011) (Exhibit USA-004).

victory for Europe.”<sup>17</sup> Airbus CEO Tom Enders reacted to the Appellate Body’s findings with the following statement:

It is good to see that the WTO has *fully green lighted* the public-private partnership instruments with France, Germany, Spain and the UK. We now can and will continue this kind of partnership on future development programs.<sup>18</sup>

8. The EU apparently agrees. Aside from generating the list of 36 ineffectual “steps” to comply with the DSB recommendations and rulings, the responding parties’ only substantive response has been to give €3.5 billion in new LA/MSF for the newest Airbus model, the A350 XWB.<sup>19</sup> The EU and the relevant member States have striven to keep information on the terms of the funding from public scrutiny, apparently to avoid revealing information that would suggest inconsistencies with its WTO obligations.<sup>20</sup> However, public documents make clear that Airbus received its new LA/MSF on the same key terms and conditions as its predecessors: unsecured, success-dependent, levy-based, and back-loaded. Government statements further confirm that the relevant member States granted the funding on better-than-commercial terms. Thus, it is clear that LA/MSF for the A350 XWB means that the EU has failed to comply with the recommendations and rulings of the DSB because the funding is closely related to the subsidies already found inconsistent with the SCM Agreement, replaces other actionable subsidies, and results in circumvention of the EU’s compliance obligations.

9. The original Panel noted many examples of how the subsidies operated to create a full Airbus product line that caused the U.S. large civil aircraft industry to lose numerous sales and market share.<sup>21</sup> Recent developments in the twin-aisle segment of the market provide another concrete example of how LA/MSF allows Airbus to brush off its mistakes, and keeps Boeing from enjoying its successes. The EU conceded in the original Panel proceeding that the 300-400

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<sup>17</sup> Airbus Press Release, *WTO Final Ruling: Decisive victory for Europe* (May 18, 2011) (Exhibit USA-004).

<sup>18</sup> EADS Statement, *WTO final ruling: Decisive victory for Europe* (May 18, 2011) (Exhibit US-005) (emphasis added). Similarly, Ranier Ohler, Airbus’ Head of Public Affairs and Communications, said: “‘WTO confirmation of the European loan system is a big victory for Europe. We see no significant consequences for Airbus or the European support system from today’s decision, as the WTO has now fully and finally rejected most of the US claims. Therefore, the WTO findings are likely to require only limited changes in European policies and practices.’” Press Release, *WTO final ruling: Decisive victory for Europe*, Airbus (May 18, 2011) (Exhibit USA-002).

<sup>19</sup> E.g., Kevin Done and Peggy Hollinger, *Airbus set to gain aid for A350*, Financial Times (June 15, 2009) (Exhibit USA-007).

<sup>20</sup> Letter from Amb. Ron Kirk to Commissioner Karel Degucht (Aug. 5, 2011) (Exhibit USA-300).

<sup>21</sup> E.g., *EC – Large Civil Aircraft (Panel)*, para. 7.1993:

We consider that Airbus’ market presence during the period 2001-2006, as reflected in its share of the EC and certain third country markets and the sales it won at Boeing’s expense, is clearly an effect of the subsidies in this dispute. We therefore conclude that the displacement of United States’ LCA from the EC and certain third country markets and lost sales we have found during the period 2001-2006 are an effect of the specific subsidies to Airbus that we have found.”

seat A340 and its subsequent derivatives were aircraft that never would have been launched when they were without LA/MSF.<sup>22</sup> Even so, the A340 and A340-500/600 failed commercially, yielding only 375 sales over a 19-year period, well below the 600 sales that manufacturers treat as the minimum necessary for a successful large civil aircraft.<sup>23</sup> Given these realities, the A340's failure should have been a big blow to Airbus, particularly as it unfolded alongside the A380's weak commercial performance and calamitous production problems.<sup>24</sup> At the same time, Boeing should have been able to enjoy the fruits of the unsubsidized development of the 777 and that aircraft's huge success in the 300-400 seat market segment, with more than 1300 sales in the 1995-2011 period.

10. But Airbus did not suffer from the commercial failure of the A340, and Boeing did not fully enjoy the commercial rewards for developing the 777 without subsidies. LA/MSF for the A340, A380, and other models meant that the subsidizing governments bore a significant part of the costs and risks of failure. Airbus fell far short of the number of A340 deliveries necessary to repay the LA/MSF it received – even at below-market interest rates – but far from hurting Airbus, the A340 cancellation boosted income by €406 million (€312 million net) as it cleared LA/MSF liabilities from its books.<sup>25</sup>

11. The preferential, success-dependent repayment terms of LA/MSF gave Airbus the flexibility to put its A340 mistakes behind it and try again in the 300-400 seat segment with the A350 XWB-900 and -1000. Before launching the A350 XWB in 2006, Airbus was “seriously questioning” whether it had the ability to finance such a program,<sup>26</sup> especially as it was still

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<sup>22</sup> *EC – Large Civil Aircraft (AB)*, para. 1273 (“The European Union . . . accepts that a non-subsidized Airbus would not have been able to launch the A300, A310, and A340 LCA projects by the 2001-2006 reference period.”); *EC – Large Civil Aircraft (Panel)*, para. 7.1939 (“LA/MSF was necessary for Airbus to have launched the A330/A340 in 1987, with LA/MSF covering between 60 and 90 percent of its development costs.”); *id.* para. 7.1940 (“LA/MSF was also essential to the development of the A340-500/600.”).

<sup>23</sup> *EC – Large Civil Aircraft (Panel)*, para. 7.1717 (finding that developing large civil aircraft “is an enormously complex and expensive undertaking” fraught with risk, where typically “at least 600 airplanes of a new model must be sold before the revenues for a programme exceed the costs.”).

<sup>24</sup> *E.g.*, *Time for a new, improved model: Airbus gets to work on its medium sized aircraft, but deeper problems remain*, *Economist* (July 20, 2006) (Exhibit USA-028) (noting that in light of problems with the A340 and the A380, “{t}his is . . . a horrible time for Airbus to be launching such an ambitious new project.”).

<sup>25</sup> EADS Financial Statements 2011, p. 65 (Exhibit USA-14); Hans Peter Ring, Webcast, Q&A from 9m Results 2011, min. 41 ff. (Exhibit USA-015):

Ring: To start with your wording, ‘the launch aid balance’: actually it’s repayable launch investments, as we call them. I mean it’s indeed that we are, I would say, adapting ourselves to reality. We have not sold 340s since almost I think two years now, after we had announced that we would build aircraft to order. So we were extremely successful as you know on the 330 and on the 350, but 380 {sic} was not selling, and that means that *there is a liability in the balance sheet which is released*, if you like, with this assessment, and that’s the reason why it has a positive impact on the P&L, in EBIT, and in net income, as you’ve heard.

<sup>26</sup> Thomas Enders Interview, *Le Monde* (Oct. 13, 2007) (USA-008); Aaron Karp, *Airbus/EADS officials concede Boeing advantage, question A350 viability*, *Air Transport World Daily News* (Oct. 6, 2006) (Exhibit USA-009).

mired in the “monumental task” of bringing the A380 into commercial service.<sup>27</sup> But LA/MSF – both for prior models and for the A350 XWB itself – allowed Airbus to pass through this difficult time without having to sacrifice its key product initiatives. Based on 40-plus years of consistent subsidization, the company maintained its position as the world’s largest civil aircraft manufacturer, delivered the A380, discarded the A340, and launched the all-new A350 XWB as a challenger to both the 787 and 777. On the last point, Airbus Chief Operating Officer, Customers, John Leahy is very clear about the commercial impact the company expects the A350 to have on the 777:

“I’ve got to give (Boeing) credit on the 777; if you need lift in the long-range widebody market now, that’s the plane,” Leahy said, according to Bloomberg News. “The day we deliver the first A350-1000, the 777-300ER will become obsolete.”<sup>28</sup>

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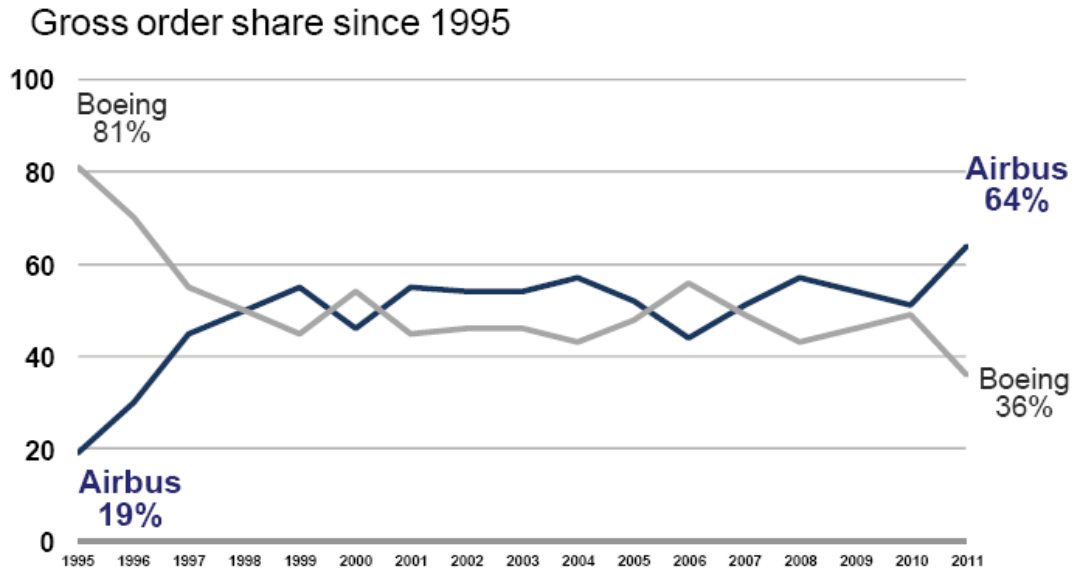
<sup>27</sup> Mark Piling, *Dream date*, *Airline Business* (Apr. 1, 2004) (Exhibit USA-010).

<sup>28</sup> Dominic Gates, *Boeing may overtake Airbus as No. 1 jet-maker in 2012*, *Seattle Times* (Jan. 17, 2012), (Exhibit USA-011).



12. The broader effect of these subsidies also appears in key market indicators, as Airbus itself noted in a series of presentations it made to investors in early 2012. With Boeing's share of gross orders falling from 81 percent in 1995 to 36 percent by year-end 2011, Airbus's market share grew from 19 percent to 64 percent:<sup>29</sup>

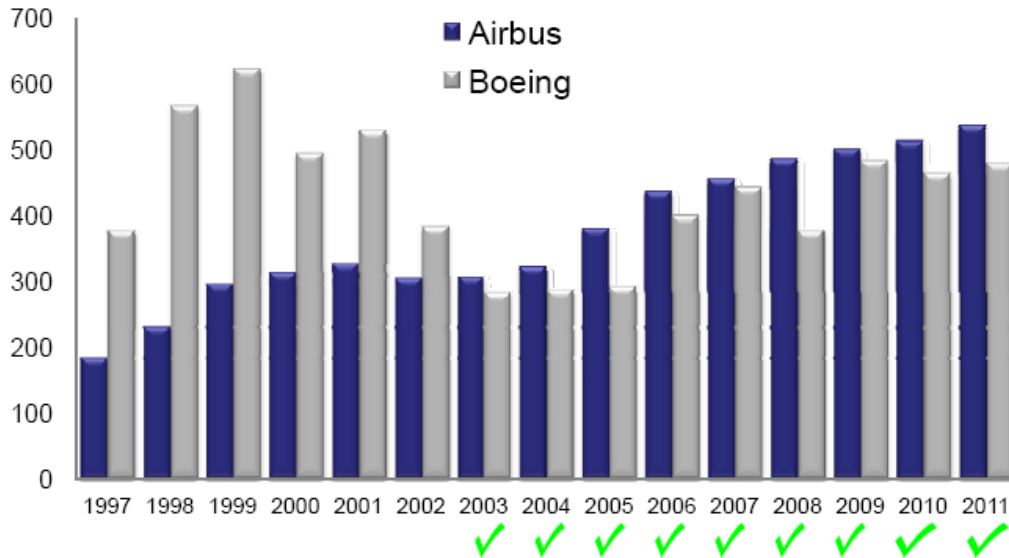
### Airbus and Boeing world market share



<sup>29</sup> EADS Airbus, *New Year Press Conference 2012 – Commercial review*, slide 7 (Jan. 17, 2012) (Exhibit USA-012).

13. Airbus also trumpeted its perennial success as the “largest aircraft manufacturer” in terms of deliveries from 2003 through 2011:<sup>30</sup>

### Delivery comparison over the last 15 years



**Largest aircraft manufacturer 9 out of last 10 years**



14. As the graph shows, it was in the 2001-2006 period examined by the original panel that Airbus finally achieved its goal of splitting the market roughly in half with Boeing. In December 2011, Airbus described this market split as “the most important balance” for it to maintain.<sup>31</sup> However, as the original Panel found, and the Appellate Body concurred, without LA/MSF, Airbus would not have been able to achieve or maintain this strong market position,<sup>32</sup> and quite probably would not have existed at all.<sup>33</sup>

<sup>30</sup> EADS Airbus, *New Year Press Conference 2012 – Commercial review*, slide 18 (Jan. 17, 2012) (Exhibit USA-012).

<sup>31</sup> Marwan Lahoud, *Views on EADS Strategy and Value Creation*, slide 8 (Dec. 15-16, 2011) (Exhibit USA-013).

<sup>32</sup> *EC – Large Civil Aircraft (AB)*, para. 1270 (“As we see it, the Panel’s conclusion that a non-subsidized Airbus would not have ‘achieved the market presence it did over the period 2001 to 2006’, which followed from its views that a non-subsidized Airbus would be a ‘much weaker LCA manufacturer’ with ‘at best a more limited

15. Country markets and individual sales campaigns parallel these broad market trends. Airbus continues to displace Boeing in EU and third country product markets, just as it causes significant lost sales for Boeing in a number of sales campaigns involving hundreds of orders and tens of billions of dollars.

16. From a compliance standpoint, the situation is largely the same as it was in the original proceeding. LA/MSF has not been withdrawn. Airbus still supplies the market with a product line that it would not have without LA/MSF. Consequently, Boeing continues to lose sales and market share worth many billions of dollars. The only material change is a *worsening* of the compliance situation, with the relevant EU member States in the midst of providing €3.5 billion in LA/MSF to Airbus for the A350 XWB. Accordingly, and in light of the evidence and argumentation presented, the United States respectfully requests that the compliance Panel work quickly to address the EU's failure to comply with the DSB's recommendations and rulings in *EC – Large Civil Aircraft*. Almost eight years after the commencement of this dispute, an end to LA/MSF as usual is long overdue.

17. Therefore, the United States respectfully asks the Panel to find that:

- With the exception of the Bremen airport runway subsidy, the EU and relevant member States have not withdrawn the subsidies covered by the DSB recommendations and rulings;
- French, German, Spanish, and UK LA/MSF for the A350 XWB is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement;
- French, German, Spanish, and UK LA/MSF for the A380 and the A350 XWB confers (1) an export subsidy inconsistent with Article 3.1(a) of the SCM Agreement, and (2) an import substitution subsidy inconsistent with Article 3.1(b) of the SCM Agreement;
- the EU and relevant member States have not removed the adverse effects covered by the DSB recommendations and rulings;
- the United States continues to experience serious prejudice in the form of significant lost sales under Article 6.3(c) of the SCM Agreement, including sales where the customer ordered the A350 XWB;

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offering of LCA models', provided enough of a basis to establish a 'genuine and substantial relationship of cause and effect' in this case.").

<sup>33</sup> *EC – Large Civil Aircraft (AB)*, para. 1263 (“{The EU’s appeal} is premised exclusively on scenarios 3 and 4, on which the {EU} claims the Panel focused. We do not agree that this is a proper characterization of the Panel’s findings. In fact, the Panel found that scenarios 3 and 4, in which Airbus would have entered the market without subsidies, were ‘unlikely’.”); *ibid.*, para. 1264 (“Under scenarios 1 and 2, there was no need for the Panel to proceed further in its counterfactual analysis. Without the subsidies, Airbus would not have existed under these scenarios and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred.”).

- the United States continues to experience serious prejudice in the form of displacement and impedance, and/or threat thereof, of its large civil aircraft imports into the EU market under Article 6.3(a) of the SCM Agreement;
- the United States continues to experience serious prejudice in the form of displacement and impedance of its large civil aircraft exports to 11 third-country markets under Article 6.3(b) of the SCM Agreement;
- all subsidies provided to Airbus large civil aircraft, including LA/MSF provided to the A350 XWB, have a genuine and substantial causal relationship with the effects found; and
- the European Union has failed to comply with the recommendations and rulings of the DSB by withdrawing the subsidies or taking appropriate steps to remove the adverse effects.